



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 43 OF 2019

JOA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against both conviction and sentence in Criminal Case No. 9 of 2019 in the Principal Magistrate's Court at Bondo by Hon. S.W Mathenge RM delivered on 31st may 2019)

JUDGMENT VIA SKYPE

1. The appellant herein **JOA** 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 are that on the 9th day of February, 2019 at about 1500hrs at [Particulars Withheld] village in Siaya County unlawfully and intentionally penetrated the vagina of SAO with his penis, a child aged 8 years.
2. The appellant also faced an alternative charge of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act, particulars being that on 9th February, 2019 at about 1500 hrs. at [Particulars Withheld] village in Siaya County unlawfully and intentionally touched the vagina of SAO with his penis, a child aged 8 years.
3. The appellant was arraigned before Hon. S.W Mathenge RM and he pleaded not guilty to both the main count and the alternative count. He was subsequently tried and *vide* the judgment delivered on 31st May 2019 by Hon. S.W Mathenge RM he was convicted of the main charge and sentenced to life imprisonment.
4. Aggrieved by this conviction and sentence, the Appellant lodged this appeal vide the petition dated 31.05.2019 wherein he set out the following grounds:
 1. *That PW1 was coached and trained on how to testify*
 2. *That the appellant had earlier been warned by the grandmother of the complainant that one day she would fix him and he would be arrested.*
 3. *That the appellant fell a victim of the bad relationship of the two neighbours who did not see eye to eye with each other*
 4. *That the appellant was the employee to one who had bought land and was not wanted by the family of the complainant.*
 5. *That such cases had been used to settle scores just like the trial court's case*
 6. *That PW1 was examined after six days and anything could have happened in between*
5. The appellant prayed that the appeal succeed in its entirety and the conviction be quashed and the sentence set aside and he be set at liberty.
6. Later, the appellant filed amended grounds of appeal together with his submissions wherein he raised the following new grounds of appeal:
 1. *That the trial court failed to comply with Article 50(2)(c) of the Constitution.*
 2. *That the trial court failed to appreciate that the prosecution did not comply with Section 33, 26 and 36 SOA No. 3/2006.*

3. That the trial court failed to consider that my defence statement was not challenged by the prosecution case.

4. That the trial court placed reliance on unsound medical evidence to base a conviction.

7. The appellant prayed that the appeal be allowed in its entirety.

8. The appeal was fixed for hearing for 22.01.2020 after being adjourned on 09.12.2019. On the hearing date, the appellant submitted orally, adopting his written submissions. He claimed that the offence allegedly took place at 33pm and later the complainant said that it was at 1pm. That the father said he knew the incident before he was told.

9. In opposing the appeal, Mr. Okachi, Senior Principal Prosecution Counsel, submitted that the incident took place in broad daylight and that the discrepancy in time was immaterial as the victim was a child who knew the appellant as Baba Andera and that they were neighbors. That the clinical officer confirmed the occurrence of the offence. He urged the court to uphold the appellant's conviction and sentence.

10. In a rejoinder, the appellant submitted that he had lived with the child (complainant) together for a long time as neighbours so she knew him. He submitted that he did not commit the offence.

11. In his written submissions, the appellant submitted on the grounds in his amended grounds of appeal that the prosecution did not disclose all the relevant documents that they intended to rely upon as required by the law to enable him adequately prepare his defence case yet the offence he had been charged with was a serious one attracting life sentence in prison and therefore adequate time for defence was necessary and as such his right to a fair hearing were infringed and was jeopardized.

12. He submitted that the trial court failed to consider section 26 and 33 and 36 of the Sexual Offences Act of 2006 and that he was an HIV victim for the last 10 years and that section 36 Sexual Offences Act should have been invoked to establish his complicity in the alleged offence through a forensic analysis. He submitted that it was not provided whether the victim was infected as a result of the alleged act to give effect to Section 26 of the Act and as such, he submitted that the offence was not proved beyond reasonable doubt.

13. The appellant further submitted that his defense was not given due consideration by the trial court whereas the same was not challenged by the prosecution case. He relied on the case of **SEKITOLEKO -v- UGANDA (1967) EA 531 PG 533** and **R-V-JOHNSON (1961) 3A II ER 969**.

14. He further submitted that PW4 (doctor) gave contradictory evidence as far as the examination was concerned and that it was not ordinary for a child of 8 years to withstand the alleged kind of pain for the long period of 6 days before seeking medical attention.

15. This being a first appeal, the duty of this court is as was stated by the Court of Appeal in **Okeno v. Republic [1972] E.A. 32** and re-stated in **Kiilu and another vs. R (2005) 1 KLR 174** that :

“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.

16. Therefore, the duty of this court is to subject the evidence which was tendered before the trial court to fresh and exhaustive examination and to come up with its own decision after weighing the conflicting evidence as to whether the prosecution was able to prove the offence of defilement and or in alternative the offence of committing an indecent act with a child and to decide on the other grounds of appeal as stated in the amended grounds of appeal as submitted on.

17. Revisiting the evidence before the trial court, PW1 the complainant (S.A.O) testified on oath after a voire *dire* examination and stated that she was in standard two at [Particulars Withheld] Primary School. She recalled that on 9.02.2019 at 3.00 p.m., the accused person (appellant) slept with her and they were on his bed and that he inserted his penis into her vagina after he removed her pant and him removing his trouser and that they were in his house. That it was not the first time he was doing it to her. Afterwards, she went home and told Yvonne about her ordeal, that Yvonne lived with the accused person. She said that Yvonne went to school and reported what had happened. She said that the accused person threatened to kill her if she told any person. She then stated that her father found out what had happened and asked her about it. She said that her father took her to Got Agulu Hospital. She said that she knew the accused person as Baba Andera who was their neighbour. She then identified the accused person in court.

18. In cross examination, she responded that the incident happened at around 1.00 p.m. and it was after lunch. Further, that she could not shout as the appellant threatened her not to make any noise and there was no one else. That he told Yvonne to go outside and play and she told Yvonne what happened and her father found out.

19. PW2 (DOJ) testified that he was the father of PW1 who was 8 years. He testified that on 14.02.2019 at around 1.30 pm he was at his home and that the children had come home for lunch and that they were talking to his wife and he overheard his daughter (complainant) tell her mother that she had been defiled by Baba Andera and that Yvonne was there with his wife. That with that information, later at night (8pm), he interrogated PW1 on what happened and PW1 confirmed that she had been always been called by the appellant into his house and on the last case, he asked her to pick something for him from his house. That he followed her into his house and defiled her and that he covered her mouth. That afterward, he threatened to kill her if she told anybody. He testified that the next day (Friday), they did not allow the complainant to go to school but he took her to Got Agulu Hospital where the P3 form was filled and that they also reported to Usenge Police

Station the following day (Saturday). That he recorded the statement. He identified the treatment book and P3 dated 16.2.2019 as PMFI 1 and PMFI 2 respectively.

20. In cross examination, he testified that PW1 (his daughter) told him that the appellant defiled her and that he defiled her on 9.2.2019 at 3.00 p.m. That he was not present while the appellant was defiling PW1 and the that complainant told him what the appellant did to her but that he was not aware of the same until 14.2.2019 when she informed him that the appellant had defiled her.

21. PW3 PC Carolyn Langat testified that she was the investigating officer in the matter and that on the 16.02.2019 at 10.00 a.m., she was at the station when the complainant aged 8 years arrived in the company of her father PW2 and reported that she had been defiled by a person known to her (JO alias Baba Andera) (the appellant herein). That she recorded the incident in the Occurrence Book and started investigations and that on 19.02.2019 she took PW1 to Got Agulu Hospital where a P3 form was filled since PW1 had been treated at Usigu Health Centre. PW3 testified that she established that the appellant herein called PW1 to his house, undressed her and defiled her. That she visited the scene and recorded statements. That on 20.2.2019 at 2300hrs she arrested the appellant with the help of PC Obade and Kazungu. She said that the minor's age was confirmed through an age assessment test conducted at Siaya County Referral Hospital. She stated that she tried to get Yvonne to record a statement but that her parents were uncooperative since she lived with the accused person. She identified the accused person in court. She produced the Age Assessment report dated 20.2.19 for the complainant as P Exhibit 3.

22. In cross-examination, PW3 stated that the complainant made the report to her and was accompanied by her father and the report was made on 16.02.2019 and the allegations being that the appellant defiled her on 9.02.2019 and that she was made aware that the appellant had done it before and that she did not have any reason not to believe the complainant as she positively identified him. That she visited the scene at [Particulars Withheld] village and she identified his house through her own investigations and it was where the appellant was arrested. That the appellant was a close neighbor of the complainant as the distance between the two homes was about 500 meters and that she conducted thorough investigations without being compromised.

23. PW4 Lawrence Maruti stated that he was a clinical officer at Got Agulu Hospital. He testified that he examined the complainant and stated that the complainant (SAO) was aged 8 years and who was presented with allegations of defilement on several occasions latest being 9.02.2019 at [Particulars Withheld] Village and that on examination, the complainant had already changed clothes at the time of examination and that there was no physical injuries on body, head, neck, thorax and abdomen. On vaginal examination, the hymen was broken, there was no vaginal bleeding, and there were not tears or bruises around the vagina. That laboratory tests showed that her urinalysis showed pus cells showing a sexually transmitted infection and that her VDRL test to test for syphilis and HIV test were negative and there were no male spermatozoa cells. The patient was given antibiotics to treat the STI and painkillers. That he concluded that defilement had occurred. That the complainant had a treatment book from Got Agulu where she was treated on 15.2.2019. The P3 dated 16.2.2019 and treatment book dated 15.2.2019 were produced as P Exhibits 2 and 1 respectively.

24. During cross examination, PW4 testified that he filled the P3 form and that the complainant had been treated on 15.2.2019 and that he only examined the complainant and he did not know whether the appellant was examined at the Hospital. Further, that at her age, it was expected that she would still have a hymen but it was missing and that pus cells was usually shows presence of an STI. He maintained that there were pus cells in her urinalysis test.

25. The prosecution then closed its case and vide a ruling delivered on 23.04.2019, the trial court found that the appellant had a case to answer and was thus put to his defense.

26. The appellant gave unsworn evidence and stated that he was a fisherman and that he was not aware of what he was being accused of regarding 9.02.2019 and that on 20.02.2019 at 2310 hrs. he was asleep and that his wife woke him up that there were people knocking outside. That he woke up and heard a strange voice outside his door and that he opened the door and the persons were police officers and they asked for his name and when he answered, they handcuffed him and took him to Usenge Police Station and the next day he was arraigned before court. He said that he was HIV positive and that he had survived for the last ten years. He said that if indeed he had defiled the girl, then she should have had the virus as well but that her P3 stated she was HIV negative. He produced a National AIDS/STD Control programme Patient Card and thereafter closed his case.

DETERMINATION

27. Having considered the evidence tendered before the trial court by both the appellant and the prosecution (in compliance with the duty of this court as was laid down in **Okeno v. Republic (supra)** and re-stated in **Kiilu and another vs. R (supra)**), the amended grounds of appeal, the oral and written submissions by the appellant in person and the oral submissions by the Prosecution Counsel on behalf of the state in opposing the appeal, in my humble view, **the issues for determination are:**

- 1. Whether the elements of the offences the appellant was charged with were proved to the required standard?***
- 2. Whether there was infringement of the appellant's right to a fair hearing as guaranteed under Article 50(2) (c) of the Constitution?***
- 3. Whether the appellant's defence was considered?***
- 4. Whether the sentence imposed was proper?***
- 5. Whether the appeal ought to succeed/ what orders can the court give in the circumstances?***

28. On whether the elements of the offences the appellant was charged with were proved to the required standard? As stated earlier, the appellant in the amended grounds of appeal, stated the grounds of appeal to include- that the trial court failed to appreciate that the

prosecution did not comply with Sections 33, 26 and 36 Sexual Offences Act No. 3/2006 and that the trial court failed to consider that his defence statement was not challenged by the prosecution case and further that the trial court placed reliance on unsound medical evidence to base a conviction.

29. In his oral submissions, the appellant submitted that there was contradiction as to the time the offence was committed and denied having committed the said offence. He submitted that there was no forensic analysis which was done more so now that he was HIV positive, the complainant would have been positive to. Further, that the doctor gave contradictory evidence as far as examination was concerned and that it was not ordinary for a child of 8 years to withstand the alleged kind of pain for the long period of 6 days before seeking medical attention.

30. Analysis of the above grounds and submissions clearly indicate that the appellant was challenging/ attacking the evidence adduced in the trial court as not being sufficient to prove the offence. I shall therefore consider the said evidence so as to see whether there were contradiction in the evidence tendered in court as alleged by the appellant and if there was such contradictions, whether the same could affect the outcome of the trial of the appellant.

31. 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 (as was held in the locus classicus case of **Woolmington –Vs- 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 vs. Ministry of Pensions, [1947] 2 All ER 372**).

32. The appellant was charged in the trial court with the offence of defilement contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act No. 3 of 2006 and in the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(c) of the Sexual Offences Act No. 3 of 2006. What this means is that the prosecution had a burden of proving that the appellant herein had indeed committed the offence in the main charge (defilement) or in alternative, the offence in the alternative charge (indecent act with a child).

a. Whether the prosecution proved the offence of defilement

33. Section 8(1) of the Sexual Offences Act of 2006 defines defilement in the following terms:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

34. For the accused 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 stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

35. 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.**

36. The question to be answered **is whether the above elements were proved to the required standard?** On whether penetration was proved, the victim who testified as PW1 recalled that on 9.02.2019 at 3.00 p.m., the appellant slept with her and they were on his bed and that he inserted his penis into her vagina after he removed her pant and him removed his trouser and that they were in his house. That she told Yvonne who was staying with the appellant of the incident and further when her father found out what had happened and asked her about it, her father took her to Got Agulu Hospital. In cross examination, her evidence on the act by the appellant was never shaken. The issue of penetration was corroborated by the doctor (clinical officer) who testified as PW4 and stated that when he examined the complainant, he observed that her hymen was broken, there was no vaginal bleeding, there were no tears or bruises around the vagina and further that the laboratory tests showed that her urinalysis showed pus cells showing a sexually transmitted infection and that her VDRL test to test for syphilis and HIV test were negative. There were also no male spermatozoa cells seen. She was given antibiotics to treat the STI and painkillers. He concluded that defilement had occurred. He produced the P3 form as an exhibit.

37. In his defense, the appellant denied having committed the said offence.

38. Considering the two set of evidences, for the prosecution and the defence of denial, I am persuaded that penetration of the genitals of the complainant was established beyond reasonable doubt. The evidence of the complainant was well corroborated with that of the doctor. 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.**

39. The appellant was under no duty to prove his innocence but his defence did not shake the evidence by PW1 and the Clinical officer who medically examined the complainant and found that penetration of her genitals had been achieved.

40. I therefore find and hold that the trial court did not err in finding that there was penetration.

41. On whether there was prove of age of the complainant and therefore whether she was a child, the complainant (PW1) testified that she was 8 years old and a class two pupil. This evidence was corroborated by that of PW2 (her father) who testified that the complainant was 8 years. Further according to the P3 form which was produced as PExbt 2, the age of the victim was 8 years. The age assessment report which was produced as P Exbt 3 to reinforce the point on the apparent age of the complainant to be 8 years. The importance of proving age was emphasized by the Malindi Court of Appeal in **Criminal Appeal No. 504 of 2010 - Kaingu Elias Kasomo vs. Republic** where it was stated:

“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.” In proving age of a victim of gender based violence, it is trite law that the same can be proved by many ways including the direct testimony of the victim, or even by observation and common sense.

42. In **Daniel Maina Wambugu v Republic [2018] eKLR**, the High Court Nyakundi J sitting in Kajiado held:

“...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.”

43. Further in **Joseph Kieti Seet -Vs- Republic [2014] e KLR**, the High Court at Machakos (Mutende J) held:

“apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense”

44. In my humble view, this evidence of PW1 (the complainant) PW2 (the complainant's father) and that on the Age Assessment Report and that of the doctor as was indicated in the P3 Form clearly shows that at the time of the alleged offence, the complainant was 8 years. There was no contrary evidence. I therefore find and hold that the trial learned magistrate was right and did not err in finding that the complainant was indeed a minor.

45. On ***whether the appellant was the one who penetrated the complainant***, the complainant was categorical that on the material day at 3.00pm, the appellant slept with her and defiled her (inserted his dudu in her vagina) and that she knew the appellant as Baba Andera and that they were neighbors. The complainant positively identified the appellant in the dock. In cross examination, she testified that it was at 1.00pm and that it was after lunch. PW3 testified that when she carried out investigations, she ascertained that the two houses (the complainant's and the appellants) were 500 metres apart.

46. It is clear that the complainant mentioned two different timelines at 1pm and 3pm . it is also clear that the offence took place during day time (between 1pm and 3pm). Further there is undisputed evidence that the appellant was a neighbor to the complainant. In my view, despite the discrepancy in the time the offence was committed, there was undisputed evidence that the complainant and the appellant were well known to each other. Furthermore, at the oral hearing of this appeal, in his rejoinder, he submitted that he had lived with the child (complainant) together for long time as neighbours so she knew him. There is nothing on record to suggest that the child could have been lying to court and being a child who knew that the offence took place after lunch time, it was not expected that she be precise on the exact time that the offence took place. In my view, the discrepancy in the time is minor. The contradictions by the complainant as to the time of the offence and that of PW2 cannot be a reason enough to quash the conviction of the trial court as the said contradictions were not material.

47. I therefore find and hold that the prosecution proved beyond any reasonable doubt, all the elements of the offence of defilement. The prosecution was able to prove that the appellant caused the penetration, that the complainant/ victim was a minor and further that the appellant indeed was the one who caused the penetration.

48. The appellant in his amended grounds of appeal claimed that the trial court failed to appreciate that the prosecution did not comply with Sections 33, 26 and 36 Sexual Offences Act No. 3/2006. A reading of his submissions on this issue reveals that the appellant was challenging the lower court's decision on the basis that it did not rely on circumstantial evidence (evidence of surrounding circumstances) as provided under section 33 of the Sexual Offences Act. Further that since he was an HIV victim, there was no forensic analysis that was done as required by section 36 of the Act. The said submissions reveals further that the appellant challenged the decision on the basis that it was not proved that the victim (complainant) was infected with the disease so as to give effect to section 26 of the Act.

49. Section 26 (1) of the Sexual Offences Act provides for the offence of deliberate transmitting of HIV or any other life threatening sexually transmitted disease to another person. Sub-section 2 of the said section gives the court discretion to direct appropriate samples to be taken from any person charged with an offence under the Act. Subsequent subsections provides for how the said sample should be dealt with or where the same ought to be taken from.

50. The provisions giving discretion to the court to direct samples to be taken from persons charged with the offences under the Act are repeated under section 36. However as I have observed, section 26(1) provides for another offence which was different from the one the appellant was charged with in the trial court. As such the appeal cannot succeed on the basis of this reason. Further as observed, section 26(2) and 36 of the Act gives the court discretion to direct taking of samples for forensic analysis. The Act uses the word ***“may”*** The Court of Appeal in **Fappyton Mutuku Nguu v Republic [2014] eKLR**, while deciding on the issue on lack of forensic evidence in sexual offences held:

“The appellant's second major ground was that there was no tangible medical evidence adduced to link him with the defilement of PW2. He also argued that a DNA examination was not conducted to link him to the defilement. In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who had defiled her. In Aml v Republic [2012] eKLR (Mombasa), the Court upheld the view that: “The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

This was further affirmed in the case of Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa) where the court stated:

“... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”

The evidence of the minor witnesses squarely placed the appellant as the one who defiled PW2. It cannot therefore be said that there was no evidence that would link him to the crime. This ground of appeal is therefore baseless and is accordingly rejected.”

51. For the above reasons, I find and hold that forensic evidence was not mandatory to prove the case before the trial court. The court had discretion to request for the same. The court was right in convicting based on the evidence which was on record. Defilement can be proved by other evidence and not only medical evidence. There was sufficient direct evidence to link the appellant to the commission of the offence in question and thus there was no need of the court to consider circumstantial evidence as provided and allowed under section 33 of Sexual Offences Act.

52. The appellant also raised a ground to the effect that the trial court failed to consider that his defence statement was not challenged by the prosecution case. The appellant in his defence before the trial court testified that he did not know of the offence he was charged with and that he was arrested later when he was sleeping. I have perused the learned trial magistrate’s judgment and I am of the opinion that the court did in fact consider the said evidence, and, critically, for that matter. In her judgment, the learned magistrate stated as follows (in relation to the defence evidence):

***“The accused person basically stated that he was not aware of any offence that he had committed on 9th February, 2019. He recalled his arrest on 20th February, 2019. He added that he was HIV positive. That if it was indeed true that he had defiled that minor she would also have been HIV +ve. He produced his hospital attendance card. I have critically analyzed this defence as brought forth. First and foremost, the accused person chose to give unsworn testimony. Not that it was worthless for this reason but I found the same to have limited probative value because its veracity was not tested through cross-examination. Further, the accused fell short of presenting to the court more evidence in terms of mode of transmission, how soon or how soon after can the HIV virus be detected?*”**

53. It is therefore my view that the defense evidence was critically examined and found to have no probative value. I have relooked at the said evidence and I opine that the same does not carry any probative value and ought to be disregarded. I find and hold that the learned trial magistrate did not err in disregarding the appellant’s defence.

54. The appellant further submitted (in his written submissions) that the trial court based reliance on unsound medical evidence to base a conviction. Perusing the evidence tendered in the trial court, I have not seen any contradiction in the medical evidence adduced. The appellant does not even specify what contradictions he is referring to in the medical evidence which in my humble view, was simple evidence that the child’s genitalia was penetrated and she also had a Sexually transmitted disease so she was placed on medication mostly antibiotics.

55. The appellant submitted that the evidence by the doctor was contradictory and that it was not ordinary for a child of 8 years to withstand the alleged kind of pain for the long period of 6 days before seeking medical attention. I find this argument unfounded. PW1 testified that it was not the first time the appellant had defiled her and as such, it was possible that she withstood the alleged pain.

56. Furthermore, under section 124 of the Evidence Act Cap 80 of the Laws of Kenya, the court can rely on the evidence of a minor in cases of sexual offences without requiring corroboration hence 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. This provision was appreciated by the Court of Appeal in **Erick Onyango Ondeng’ v Republic [2014] eKLR** where it was held:

“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.”

57. The trial court conducted voire dire and the learned trial magistrate recorded that

“I have observed the demeanour of the minor and her way of answering questions put to her and I am convinced that she understands why she is here today, the importance of telling the truth and consequences of not. She shall be sworn.”

58. In her judgment, the learned trial magistrate observed that:

“It is my finding therefore having examined the demeanour of the minor at the time of testifying and her firm and resolute manner of testifying and not faltering in her cross-examination that she was able to prove penetration.”

59. What emerges from this analysis is that the trial court did not base its decision solely on the evidence of the doctor but on the testimony by the complainant. As such the evidence of the doctor, however contradictory it would have been, which it was not was not relevant when the court was rendering its judgment. The court relied on the evidence of the complainant. As such, it is my opinion that the contradictory nature of the doctor’s evidence (or otherwise) was not an issue and neither was such contradiction established or pointed out by the appellant, apart from merely saying that there was contradiction.

60. Accordingly, I find and hold that prosecution proved the main charge of defilement against the appellant and therefore there was no requirement that she delves into the alternative charge. The law is that once the prosecution had proved the main charge, the trial court had no jurisdiction to consider the alternative charge and convict the appellant under the said alternative charge. This position is supported by the decision of the Court of Appeal’s decision at Nyer in **David Ndumba v Republic [2013] eKLR**, where it was held 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. –vs- 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...’

61. The prosecution proved beyond any reasonable doubt that there was penetration by the appellant’s genitals (penis) into the vagina of the complainant and that the complainant was a minor. That evidence was solid and proper and the same was not contradictory. Further, the said evidence did not need the trial court to consider circumstantial evidence under section 33 of the Sexual Offences Act. There was also no necessity for forensic evidence pursuant to section 36 of the said Act and as such the court cannot be faulted for not directing that the appellant be subjected to forensic tests.

62. For all the above reasons, I find and hold that the prosecution proved to the required standard that the appellant herein committed the offence of the defilement against the complainant. The conviction of the appellant for the main charge of defilement of the complainant was therefore sound. The appeal against conviction fails and is hereby dismissed.

63. On **whether the trial court was right in convicting the appellant and sentencing him to the sentence impose**, the appellant prayed for the conviction to be quashed and the sentence set aside. On sentence, it is now established law that the court in **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 it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.**

64. 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. (See *Simon Kipkurui Kimori v Republic [2019] eKLR- G.V Odunga J* at paragraph 5).

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 be sentenced to imprisonment for life.

67. In sentencing the appellant, the trial court observed that ***“I have considered the offence and the mitigation. I hereby in pursuance to the Sexual Offences Act Section 8(2) sentence the accused person to life imprisonment. Accused person has 14 days Right of Appeal.***

68. The sentence imposed by the trial court was lawful **although it is the minimum mandatory sentence under the penal section 8(2) of the Sexual Offences Act. However**, pursuant to the Supreme Court’s decision in the now well appreciated case of *Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR, Petition No. 15 of 2015*, in relation to section 204 of the Penal Code and the denial of the discretion on the sentencing judge in regard to murder charges, and which decision has been imported into Sexual Offences Act by the Court of Appeal via *Jared Koita Injiri vs. Republic [2019] eKLR*, where the Court of Appeal held that:

“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. Applying the above decisions to this case, the trial court had discretion to mete out sentence other than the mandatory minimum as its hands were not tied to the mandatory provisions of section 8(2) of the Sexual Offences Act as to the sentence which ought to be imposed.

70. **On whether there was infringement of the appellant’s right to a fair hearing as guaranteed under Article 50(2) (c) of the Constitution? the appellant raised a ground to the effect that his right to fair hearing as guaranteed under Article 50 of the Constitution was infringed. In his written submissions, he submitted** that the prosecution did not disclose all the relevant documents that they intended to rely upon as required by the law to enable him adequately prepare his defence case yet the offence he had been charged with was a serious one attracting life sentence in prison and therefore adequate time for defence was necessary and as such his right to a fair hearing was violated and jeopardized.

71. Article 22 (1) of the Constitution of Kenya 2010 stipulates that every person has the right to institute court proceedings claiming that a

right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

72. Articles 23(1) and 165 (3) (b) of the Constitution grant the High Court the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. This jurisdiction is the enforcement jurisdiction. It is my opinion that the court as currently constituted does not have jurisdiction to decide on this issue.

73. There having been no petition filed before the court, and evidence tendered as to the said infringement, it is my opinion that the court would be overstepping its mandate. The appellant ought to file a constitutional petition and plead properly the issue of the infringement and support the same with tangible evidence and serve the same upon the state through the (Attorney General). Until this court is properly moved in that regard, it lacks jurisdiction to determine the issue as to infringement of the right to a fair trial.

74. This court in exercising criminal jurisdiction cannot determine the issue as to infringement of the appellant's alleged right to a fair trial. As such the said ground of appeal fails and it is hereby dismissed.

75. In conclusion, I find and hold that the appellant's appeal against conviction is devoid of merit. The same is dismissed. As against sentence, albeit lawful sentence was imposed, on the strength of the **Jared Injiri Koita** (supra) decision, I exercise discretion and re sentence the appellant to serve fifty (50) years in prison. I therefore set aside the life imprisonment imposed on the appellant by the trial court and substitute it with Fifty (50) years imprisonment. To that extend, the appeal against sentence only, partially succeeds. The appeal against conviction is dismissed.

76. 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