REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 51 OF 2019

SAMUEL AGUNDA OTIENO..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against conviction and sentence in Siaya PM's Court Criminal Case No. 52 of 2018 by Hon. Muthoni Mwangi RM vide a judgment dated 12.06.2019)

JUDGMENT VIA SKYPE

1. The appellant herein **SAMUEL AGUNDA OTIENO** 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 14th day of March 2017 at Barding sub-location in Siaya District within Siaya County, intentionally caused his penis to penetrate the vagina of L.A.O. [full name withheld for legal reasons] a child aged 11 years.

2. The appellant was also charged with an alternative count of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act, particulars being that on the 14th day of March 2017 at Barding sub-location in Siaya District within Siaya County, intentionally touched the vagina of L.A.O. [full name withheld for legal reasons], a child aged 11 years with his penis.

3. The appellant was arraigned before Hon. T.M Olando on 6.12.2018 and he pleaded not guilty to both the main count and the alternative count. He was subsequently tried and *vide* the judgment delivered 12.06.2019 by Hon. Muthoni Mwangi, he was convicted of the main charge and sentenced to serve life in prison as stipulated in section 8(2) of the Sexual Offences Act.

4. Being aggrieved by this conviction and sentence, the Appellant herein instituted this appeal vide the petition dated 23.07.2019 setting out the following grounds:

> ***1. That the trial magistrate erred in law and facts by convicting the appellant for the offence of defilement regardless of the opinion of medical officer testifying that there was no penetration.***
>
> ***2. That it was unconstitutional for the learned trial magistrate to convict the appellant to life after ignoring his mitigation which was a requirement for fair trial as captioned under Section 329 of Criminal Procedure Code.***
>
> ***3. That the trial magistrate erred in law and fact by corroborating evidence of the victim who testified that the appellant gave her keys and she went to his house without any malice.***
>
> ***4. That the actual age of the victim was not eleven years.***
>
> ***5. That there was no corroboration of evidence adduce before court between medical officer and the accused.***
>
> ***6. That the trial magistrate did put the appellant on spot by stopping him while cross examining PW1 and in that regard he wished to be supplied with all proceedings to adduce more grounds.***

5. The appellant prayed that the appeal be allowed in its entirety and the conviction be quashed and the sentence set aside and he be set at liberty.

6. The duty of this court as the first appellate court was set out 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.

7. It is the duty of this court to submit the evidence which was tendered before the trial court to fresh and exhaustive examination and to arrive at its own independent conclusion after weighing the conflicting evidence if any, as to whether the prosecution was able to proof the offence of defilement and in the alternative the offence of committing an indecent act with a child and to decide on the other grounds of appeal as stated in the petition of appeal, which grounds I have reproduced hereinabove.

8. In the trial court, PW1 the Clinical Officer testified that he had the medical examination report dated 15.03.2017 for LA who was 11 years old at the time of examination and that he signed the said report on 17.03.2017. That the child was first treated on 15.03.2017 at Siaya Referral Hospital when she was brought to the hospital in the company of her father and alleged to have been defiled on 14.03.2017 at around 5:00 p.m. by someone well known to her. That she was in stable condition and there was no injury on the upper and lower limbs or on the head and thorax. That on examining the vagina, the outer genitalia was normal. That there were no bruises or lacerations nor tear and the labia minora and majora were normal. That the hymen was absent and there was no bleeding or discharge seen. That the complainant was sent for urinalysis tests and there was no abnormalities detected and the pregnancy test was negative. Further the VDRL for syphilis and the HIV tests were negative. When vaginal swab was taken, there were pus cells but no spermatozoa. He produced the P3 dated 17.03.2017 as P Exhibit 1, the treatment notes as P exhibit 2, the lab results as P exhibit 3. He further testified that he had a birth certificate number […..] for LA that showed she was 11 years at the time of examination and which indicated the date of birth as 28.05.2005. The same was produced as P Exhibit 4.

9. PW2 the mother of the complainant testified that on 15.03.2017, she sent her child to take food to her brother at school and that the child did not return home. She stated that the following day she got a call informing her that her child had been seen in the house of a man and the child was LA the complainant who was 11 years. That she was told that the child had been found at the house of one Samwel and that she found the child inside the house and it was around 4PM and that the Assistant chief and people from World Vision were there (at the scene). It was her testimony that the Assistant Chief removed the child from the house and they took her to hospital and that her daughter (the child) told her that the appellant had raped her. That the doctors at Siaya Referral Hospital told them that she had been raped.

10. In cross examination by the appellant, PW 2 stated that she knew the accused well as a person who used to buy chapatti from her house. She further stated that her daughter had been rescued from the house of the accused at around 4:00 p.m. That the appellant was not there as he had gone to fetch water.

11. PW3, the Assistant Chief of Barding sub location, testified that on 15.03.2017, he received a call from one Alfred Ochoro informing him that there was a child who had been locked up at Bama market. That he rushed to the scene and upon arrival at the scene he found a crowd of people and he was told that there was a girl who was locked in the house of Samuel Agunga and that when the door was opened they found that the accused was not there. That the girl told him that she had been locked up in the house by one Samwel Otomo and that PW3 did not know him by name but when he saw him, he recognized him as someone he had seen before. That he told the parents to take the child to hospital. He stated that the girl had told him that the appellant had sexual intercourse with her and that he went to look for the appellant who had gone to fetch water and on asking the appellant, he said that the girl slept in the house but he denied having sex with her. That on reaching the hospital he found the girl on medication and he waited until she finished and that at around 6.15pm he took her to Siaya Police station where he wrote statements. He positively identified the Appellant in the dock.

12. In cross examination by the appellant, PW3 stated that he had not found the accused at the house but he was told by the neighbors that that house belonged to the appellant/the accused.

13. PW4, (L.A) the complainant upon the court conducting ***voire dire*** examination and finding her not competent to give sworn testimony as she did not understand or appreciate the solemnity of an oath, gave unsworn testimony to the effect that she was a pupil at [particulars withheld] Primary and that in 2017 she was in Boarding School and used to live in [particulars withheld] village and that she was born in 2005 and that in 2017 she was in class 4. She testified that on 14.03.2017, she was taking lunch to her brother at school at around 1.00pm so she went to her mother's friend whom she referred to as "Mama Dico" and when she was leaving at around 4:00 p.m, one boy by the name Samuel called her and that she knew him (Samuel) before and that there was a big girl who liked going to his house and her name was Auma and she used to tell her (PW4) to go with her to Samuel's house. That she met the appellant on 14.03.2017 and he gave her the keys to take to his house in Barding market and that she knew the house as it was her second time to go there. That she opened the house and entered and sat up to until 9.00pm and that the appellant came and when she requested him to take her home, the appellant started doing "dhambi" -sins to her.

14. PW4 testified that the appellant started removing her trouser, her top and her panty and she was screaming and the appellant increased the volume of the radio. That he took her to his bed and did "dhambi" –sin and that there was light from the bulb and the light was enough to see him and everywhere. That the appellant put her on the bed and slept on her. That she tried to kick him but he covered her mouth to prevent her from screaming. That he used his *"dudu" "mkundu"* in Kisawahili (which translates to penis) and used it to do bad things on her private parts (pointing at her vagina) and that he inserted his *dudu* and did bad manners *"tabia mbaya"* to her. She stated that she entered and slept under the bed and saw the appellant leave with his bicycle and jerry cans and that when she decided to leave, she realized that the door had been locked with a padlock from outside which she could see when she peeped through the window. That some people saw her and brought the Assistant Chief and her mother and the appellant was caught and brought to the hospital and that they were the only two of them who were in the house. She positively identified the appellant in the dock.

15. In cross examination by the appellant, she testified that she was a child in 2017 and that she did not know what the accused would do to her if she told on him.

16. **PW 5 a police officer** testified that she was not the original Investigating officer but she took over from CPL Sarah Kauadha who had since been transferred to Machakos. She gave evidence that on 16.03.2017, she received a complainant who was in the company of her parent and the complainant reported that she was going home when she met the appellant on 14.03.2017 and the appellant gave her the keys to his rental house at Barding. That the appellant went to fetch water and she stayed in the house and the accused later came with mboga and when they ate supper the appellant locked her in the house and on that night, the appellant undressed her and had sexual intercourse with her. That the following day, he locked her in the house and left. That the complainant was rescued by the members of the public and the Assistant Chief of the area. That the child was issued with a P3 form which was completed at Siaya County Referral Hospital and that the accused was traced, arrested and charged.

17. In cross examination, PW5 stated that she took over from the original Investigating Officer who was transferred to Machakos and that she could not tell whether the appellant was arrested at the scene as she was not there.

18. The prosecution then closed its case and vide a ruling delivered on the same day of the hearing, the court ruled that the appellant had a case to answer and was thus put on his defense.

19. The appellant gave sworn evidence and testified that he was not there and that he usually did night shifts digging gold. He stated that he had an argument with the chief after he refused the chief's cows to be driven through his homestead (boma) and that the chief had vowed to revenge. That the Assistant Chief along with other boys arrested him at Ojalo village and took him to the hospital where he found LA and her mother. The appellant closed his case.

Analysis and Issues for determination

20. Having considered the evidence which was tendered in the trial court by both the prosecution and the appellant, the amended grounds of appeal, the oral and written submissions by the appellant and the oral submissions by the state in opposing the appeal, it is my opinion that **the issues which this court ought to determine are;-**

1. ***Whether the elements of the offences the appellant was charged with were proved to the required standards?***

2. ***Whether the sentence imposed was proper?***

3. ***Whether the appeal ought to succeed/ what orders can the court give in the circumstances?***

DETERMINATION

21. On the first issue of whether the elements of the offences the appellant was charged with were proved to the required standards, the appellant in the amended grounds of appeal, which he indicated in his submissions raised the issue that the trial court did err both in law and fact while convicting him in not knowing that there are three critical elements to be considered in any defilement issue: age of the victim, identification and penetration.

22. At the hearing of this appeal, the appellant made oral submissions to the effect that the person who called the complainant's parents to tell them she had slept in his house was never called as a witness and further that the Assistant Chief and one Emmanuel did not testify. He further submitted that the medical evidence was not credible and further that the age of the complainant was not proved. His written submissions also were basically to the effect that the evidence as to penetration was not tendered as the doctor did not find that there was penetration or even presence of spermatozoa and further that his evidence varied with that of the victim and further that the pants, top or the trouser which the complainant was wearing were never exhibited before the court. Further that the age of the complainant was no 11 years.

23. The appeal was opposed and the state through the Senior Principal Prosecution Counsel Mr. Okachi submitted that the prosecution proved its case beyond reasonable doubts and that all the elements of defilement was proved. He further testified that the victim knew the appellant very well and that her age was confirmed by a birth notification. That penetration was confirmed.

24. The basis of the instant appeal is that the prosecution did not tender sufficient evidence to prove the elements of the charges facing the appellant to the required standard.

25. The burden of proof in criminal cases always lie with the prosecution throughout the trial and that burden does not shift to the accused person. The locus classicus case of **Woolmington –Vs- DPP (1935) AC 462**) is clear that the elements of the offence must be proved beyond any reasonable doubt (as was defined by Lord Denning in **Miller vs. Ministry of Pensions, [1947] 2 All ER 372).**

26. The appellant faced the charge 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 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 proof 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

27. 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."***

28. 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 correctly stated that:

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

29. Section 2 of the Sexual Offences Act defines ***"Penetration"*** *as:*

> ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

30. The question I must resolve is whether the above elements were proved to the required standard? On **whether penetration was proved**, section 2 of the Sexual Offences Act 2006 defines ***"penetration"*** as *the partial or complete insertion of the* ***genital organs*** *of a person into the* ***genital*** *organs of another person."*

31. The victim/ complainant testified as PW4 and her testimony was to the effect that on 14.03.2017, she was taking lunch to her brother at school at around 1.00pm after which she went to her mother's friend ("Mama Dico") and when she was leaving at around 4:00 p.m, one boy by the name Samuel (the appellant) called her and he gave her keys to take to his house in Barding market and that she knew the house as it was her second time to go there. That she opened the house and entered and sat up to until 9.00pm and that the appellant came and when she requested him to take her home, the appellant started doing "dhambi" sins to her. She testified that the appellant started removing her trouser, her top and her panty and took her to his bed and did "dhambi." That he used his *"dudu" "mkundu"* in Kiswahili (which translates to penis) and used it do bad things on her private parts (pointing at her vagina) and that he inserted his *dudu* and did bad manners *"tabia mbaya"* to her. She stated that she slept under the bed and saw the appellant left with his bicycle and jerry cans and that when she decided to leave, she realized that the door had been locked from outside with a padlock which she could see when she peeped through the window. After that she was rescued.

32. The Clinical Officer who examined the victim testified as PW1 and gave evidence that when the complainant was examined on her vagina, the outer genitalia was normal. That there were no bruises or lacerations nor tear and the labia minora and majora were normal. That the hymen was absent and there was no bleeding or discharge seen. That the complainant was sent for urinalysis tests and there were no abnormalities detected and the pregnancy test was negative. Further the VDR for syphilis and the HIV tests were negative. When vaginal swab was taken, there were pus cells but no spermatozoa. He produced the P3 form as P Exhibit I.

33. A perusal of the said P3 form conforms to the said testimony to the effect that there was no penetration. The said P3 form did not in any place indicate that there was penetration. All the entries therein are to the negative and do not suggest penetration. Thus the evidence by the doctor did not corroborate the evidence by the victim (PW4). This is so because there was no evidence that absence of hymen was due to recent penetration considering the fact that the child was examined within 24 hours of the alleged defilement.

34. But does this mean that the prosecution did not tender sufficient evidence as to penetration (as was submitted by the appellant) and bearing in mind that the appellant denied committing the offence and testified that he was a mine worker who worked on night shifts? In other words, did the evidence of the complainant need to be corroborated so as to lead to a conviction?

35. I pose this question is because, as seen from the grounds of appeal and the submissions by the appellant, he argued that the evidence of the complainant was never corroborated by that of the doctor on the issue of penetration. The court of appeal in **Kassim Ali vs Republic Criminal Appeal No. 84 of 2005** (Mombasa) which was cited in **Martin Nyongesa Wanyonyi vs Republic Criminal Appeal no. 661 of 2010, (Eldoret), held that** ***"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence."*** **In Mohamed vs. R, (2008) 1 KLR G&F 1175,** it was held that:

> ***"It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."***

36. 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."***

37. This section 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 PW4 alone. What the law requires is that the court does record in the proceedings, the reasons as to why the court is satisfied that the alleged minor (victim) was telling the truth. In **Erick Onyango Ondeng' v Rpublic [2014] eKLR** the Court of Appeal had this to say:

> ***"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... 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).**

38. From the authorities cited above, in my humble view, the evidence by PW4 needed no corroboration by the doctor's evidence and the court could convict the appellant based on the evidence of the said witness alone. What the court ought to have done was just to note the reasons as to why it believed that the victim she was telling the truth.

39. Therefore, the **question which I must pose and answer is whether the evidence of PW4 (complainant) was sufficient to secure a conviction?** As I answer this question, I am guided by the Court of Appeal's decision in **John Mutua Munyoki v Republic [2017] eKLR**, where it was held that in cases where the court has to prefer the evidence of one person against the other, for instance between the accused and the complainant and that is the only evidence, the court must approach such evidence with a degree of circumspection, particularly in sexual offences that are normally committed in secrecy with hardly any eye witness. I am also alive to the fact that in analyzing the evidence on appeal, this court ought to make *allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses as they testified, unlike this court.*

40. The evidence of PW4 was to the effect that the appellant defiled her in his house on the night of 14.03.2017. Before the trial court took her evidence, the learned magistrate conducted a *voire dire examination* and found the witness not competent to give sworn testimony as she did not understand or appreciate the solemnity of an oath. As such, the victim complainant gave unsworn evidence. That evidence was consistent during examination in chief and during cross examination to the effect that the appellant defiled her. In my view, this was a clear instance where such evidence can be relied on without corroboration.

41. I therefore find and hold that the evidence of PW4 (the complainant) was sufficient on the issue of penetration. She was emphatic that the appellant put his penis in her vagina and had sexual intercourse wit he her.

42. The learned trial magistrate in her judgment noted that:

> ***"The evidence of the complainant was corroborated and even in the absence of such corroboration which is now not mandatory under section 124 of the Evidence Act, I believe the complainant was being truthful. The evidence of the complainant and description of the events that transpired on that night was clear and I have no reason to believe that she was being untruthful."***

43. In my humble view, the learned trial magistrate having given her reasons as to why she believed that the witness (minor) was telling the truth, as she had the opportunity of seeing and observing the complainant's demeanor, unlike this court which did not have that opportunity, I am of the view that the trial court was right in believing the complainant and in holding that the appellant was the one who caused the penetration on the complainant. For that reason, I find and hold that the evidence on record proved beyond any reasonable doubt that indeed there was penetration of the complainant's genitalia.

44. On **whether the appellant was the one who penetrated the complaint**, the complainant (PW4) testified to the effect that when she was going home from her mother's friend ('Mama Dico") the appellant called her and that she knew the appellant before and there was a girl who liked going to his house and her name was Auma and was a big girl and she used to tell her (PW4) to go with her to his house. That she met the appellant on 14.03.2017 and he gave her keys to take to his house in Barding Market and that she knew the house as it was her second time to go there. She further testified that when the appellant came home, he defiled her and that at the time of the act, there was light from the bulb and the light was enough to see him and everywhere. This evidence of the complainant positively identifying the appellant by recognition and the victim being found locked up in the house of the appellant the following morning, was not controverted by any other evidence.

45. The appellant had no duty of rebutting the prosecution's evidence but iam persuaded that the complainant's evidence which was not shaken even in cross examination was strong enough to link the appellant to the offence.

46. The appellant in his defence merely denied committing the offence and stated that he was not at home on the said day and further averring that he was a victim of circumstances as a result of alleged grudge between him and the Chief. In my view, this defence evidence did not dislodge the watertight evidence adduced by PW4 that it was the appellant and no other person who defiled her on the material day. The victim and the appellant were known to each other and as such the victim could not have mistaken the appellant as the one who committed the offence. There was no evidence of the complainant having worked in cohorts with the appellant's perceived enemies to frame him for such a heinous crime.

47. I therefore am satisfied that the trial magistrate did not err in finding that the prosecution had proved beyond reasonable doubt that it was the appellant who was positively identified as the person who defiled the complainant.

48. On proof that **the complainant was a minor (age)**, proof of age of **a victim of sexual offence can be in** many ways including **the direct testimony of the victim**, or **even by observation and common sense**. In **Daniel Maina Wambugu v Republic [2018] eKLR**, the High Court, per Nyakundi J held that:

> ***"…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."***

49. Further in **Joseph Kieti Seet -Vs- Republic [2014] eKlr, the High Court at Machakos (Mutende J) held that** ***a****part from medical evidence age may also be proved by birth certificate, the victim's parents or guardian* ***and by observation and common sense …."***

50. 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."***

51. The complainant (PW4) testified that she was born in 2005 and that in 2017 she was in class 4. This testimony was corroborated by that of PW2 (her mother) who testified that the complainant was 11 years old and further by the evidence of the birth certificate which was produced by PW1 as P Exhibit 4 and which showed that the complainant was born on 28.05.2005.

52. Accordingly, I find and hold that the prosecution proved beyond reasonable doubt that the complainant was a child aged 11 years at the time the offence was committed against her. There was no contrary evidence.

53. In the end, I find and hold that the prosecution proved beyond reasonable doubt all the three elements of the offence of defilement against the appellant, that there was penetration, that the complainant/ victim was a minor and that the appellant indeed was the person who caused the penetration.

54. The appellant raised a ground of appeal to the effect that the person who called the complainant's parents to tell them that the complainant had slept in the appellant's house was never called as a witness and further that the Assistant Chief and one Emmanuel did not testify. *In* **Bukenya & Others V Uganda [1972] EA 549** which decision was cited with approval by J.A Makau J in **Republic v George Onyango Anyang & another [2016] eKLR** court held that:

> ***"(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.***

55. Notwithstanding the above decision, and the principles espoused therein, under section 143 of the Evidence Act, ***no particular number of witnesses should, in the absence of any provision of law to the contrary, be required for the proof of any fact.*** *As was observed by the* Court of Appeal in **Richard Munene v Republic [2018] eKLR,** the elementary principle of criminal law is that although the prosecution must avail all witness 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.

56. The prosecution always has the discretion to call witnesses whom it believes that they are sufficient to prove its case. Under section 124 of the Evidence Act Cap 80 Laws of Kenya, in sexual offences, evidence of a minor alone, can lead to conviction without it being corroborated so long as the court notes down the reasons why it believes that the witness (minor) is telling the truth.

57. In the instant case, even without the evidence of the persons whom the appellant claimed that they were never called, the court could still render a conviction. Further, the fact that the trial court did not call or summon the attendance of the person who called the complainant's parents to tell them that the complainant had slept in the appellant's house and/ or the Assistant Chief and/ or one Emmanuel or that the said persons did not testify in court cannot be a reason to fault the decision of the trial court. No prejudice was proved to have been occasioned to the appellant or even to the prosecution's case by the failure to call the witnesses who, in which event, did not record any statements with the police. In my humble view, the evidence by the complainant as corroborated by the Clinical Officer(PW1) who examined her was sufficient to prove the prosecution's case by application of the proviso to section 124 of the Evidence Act.

58. The appellant also submitted that the doctor did not note spermatozoa, penetration or tear and that since the complainant was a minor of 11 years, there ought to have been indications that penetration had been forceful or some bruises noted somewhere within her private part and that the urethra of the male organ ought to show some signs. He submitted that even pubic hairs ought to be found on either the victim's inner pant or the defiler's inner pant.

59. The above submissions call for proof of the offence by way of forensic or expert evidence which is circumstantial evidence. However, there is no established scientific evidence that an 11 years old ought to have been bruised in her private parts or the urethra or the male organ ought to show some signs or further that pubic hair ought to be found on the victim's inner pants or the defiler's inner pants. Penetration having been proved and penetration by the appellant who was positively identified by the complainant, my view is that other forms of evidence were not necessary.

60. The appellant in his submissions further submitted that the complainant used to spend most of her times in men's cottages and that even her parents were aware of her conduct no matter her age and thus she could not be said that she was a minor because she knew what she was doing.in my humble view, this ground and submission is a misconstruction of the law as defilement or lack of it is not always dependent on the previous exposure or the "experience" of the minor in sex activities. See section 33 of the Sexual offences Act. The test is always whether the accused penetrated the genitalia of the minor. The appellant cannot use the past exposure of the complainant to sexual activity as a defense against defilement. The evidence by the prosecution was that the appellant penetrated the complainant minor and that was all that was required. The law protects such minors as there is a presumption that the said minor could not consent to the act of sexual intercourse. The drafters of the law did not contemplate that an accused can escape a conviction on the ground that the complainant had previously had sexual intercourse. Accordingly, that ground of appeal fails and is dismissed.

61. **The appellant also claimed that his constitutional rights were infringed and that he was not accorded a fair hearing. In my humble, that is an issue which can only be fully determined by a court exercising jurisdiction in a constitutional petition.**

62. On whether the sentence imposed was proper, the appellant further submitted that the trial court erred in law and fact in convicting him to a life sentence and ignored his mitigation which was a requirement for fair trial and that he was just arrested as a victim of the circumstances because of the dispute or grudge which had occurred between PW3, PW1 and the appellant. He submitted that the sentence was excessive. The question is whether the sentence imposed was lawful or excessive in the circumstances.

63. On sentencing, 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 it 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. (See Simon Kipkurui Kimori v Republic [2019] eKLR**- per G.V Odunga J at paragraph 5).

64. The learned judge in the above judgment further held (at paragraph 9) that:

> ***"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…."***

65. Section 8(2) of the Sexual Offences Act 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. The Trial court upon convicting the appellant for the offence of defilement listened to his mitigation and subsequently requested for pre-sentencing probation report and when it was filed, the learned trial Magistrate in the ruling delivered on 19.07.2019 noted that the said report was to the effect that the appellant was a ***"sex pest"*** as he had a habit of locking girls in his house against their will and defiling them. Based on that report, the learned magistrate sentenced the appellant to life imprisonment so as to enable him have time to consider his ways and sincerely repent from the same.

66. In my humble view, the trial Magistrate considered the relevant factors in sentencing him and thus the said sentence was not manifestly excessive as the trial court did not overlook any material factor. It also never took into account some wrong materials. In the circumstances, and albeit the sentence imposed was mandatory sentence, the sentence was nonetheless lawful.

67. However, pursuant to the Supreme Court decision in the now well appreciated **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR, Petition No. 15 of 2015 case relating to the mandatoriness of death sentence stipulated in section 204 of the Penal Code and the perceived denial of the discretion on the sentencing court in murder cases which decision has** been imported into Sexual Offences Act (for instance in **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.")***

68. Thus, the court can apply the decision in this case and exercise discretion revise the mandatory sentence imposed on the appellant. The hands of the court are not tied to the mandatory provisions of section 8(2) of the Sexual Offences Act as to the sentence which ought to be imposed.

69. In conclusion, I find and hold that the trial magistrate court did not err in convicting the appellant on the main charge and sentencing him to life imprisonment. However, based on the current jurisprudence, as was developed by the Supreme Court of Kenya in **Francis Karioko Muruatetu & Another vs. Republic (supra) as applied to** Sexual Offences in **Jared Koita Injiri vs. Republic [2019] eKLR), this court has jurisdiction to revise the sentence to a lesser term., I hereby exercise discretion and substitute the life imprisonment imposed on the appellant. I resentence the appellant to serve fifty (50) years in prison to be calculated from the date of his arrest on 5th December 2018 as per the charge sheet.**

70. In the end, the appeal against conviction is found to be devoid of merit the same is dismissed. The appeal against sentence succeeds to the extent stated herein.

Orders accordingly.

Date, Signed and Delivered at Siaya this 5th Day of May, 2020 via skype due to Covid 19 situation.

R.E. ABURILI

JUDGE