REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 22 OF 2019

EOO................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal from the judgment, conviction and sentence in Siaya PM's Court Cr case No 30 of 2017 judgment delivered on Hon T.M.Olando, SRM on 21/3/2019)

JUDGMENT

1. The Appellant **EOO** was charged before the Principal Magistrate's Court at Bondo with the offence of defilement contrary to Section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 the particulars of which are that on 3rd May 2017 in Gem the accused intentionally caused his penis to penetrate the vagina of JAA, a child aged 9 years.

2. The appellant also faced the alternative charge of Committing an Indecent Act with the same child contrary to Section 11 (1) of the Sexual offences Act No. 3 of 2006**.**

3. The appellant pleaded not guilty to both the main and alternative charge and the case proceeded for full trial.

4. The trial magistrate, Hon. T.M.Olando Senior Resident Magistrate after hearing the four prosecution witnesses and unsworn testimony of the appellant found that the prosecution had proved their case against the appellant beyond reasonable doubt and proceeded to convict the appellant for the offence of Defilement Contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006 and sentenced him to serve 20 years imprisonment.

5. Aggrieved by the said conviction and sentence, the appellant filed his initial petition of appeal based on three grounds as follows:

a. That he pleaded not guilty to the charge.

b. That the learned trial magistrate erred in law and fact by strictly relying on the facts of the recorded statement.

c. That the learned trial magistrate erred in law and facts by imposing a harsh sentence for the alleged crime.

d. That he wished to be present at the hearing of his appeal.

6. The appellant subsequently filed an amended petition of appeal that was grounded on the following grounds:

a. That the trial Court failed to observed that the charge sheet was defective under Section 214 of the Criminal Procedure Code.

b. That his fundamental rights were violated.

c. That circumstantial facts under Section 33 of the Sexual Offences Act were not favourable.

d. That the report and the arresting date does not adhere the ordeal complained of.

e. That the trial Court failed to consider his alibi.

Appellant's Submissions

7. The appellant filed written submissions asserting that the charge sheet was defective. He relied on **Yongo v Republic, Criminal Case No. 1 of 1993**. Further submissions was that the evidence on record from both the complainant and her witnesses do not meet the test of relationship set out in Section 22 of Sexual Offences Act as well as the requirements of intentional and unlawful acts as set out in Section 43 of Sexual Offences Act.

8. The appellant further submitted that one could not be convicted of a separate charge other than that brought against him. Reliance was placed on **Cosma v Republic (1955) 22 EACA.**

9. The appellant further submitted that his constitutional rights under Article 49(1)(f) were violated as he was placed in custody for more than the duration required by law without any explanation being given for the delay. He relied on **Albanus Mwasia Mutua v Republic (2006) eKLR** and **Gerald Macharia Githuku v Republic (2007) eKLR.**

10. According to the appellant, the circumstantial facts considered in the instant case as provided for under section 33 of the Sexual Offences Act were not supported by medical analysis. It was his submission that in the instant case, the minor was 9 years but the period and conditions faced could not favor the process and procedure undergone as the delay of 5 days since the offence was committed was unreasonable and was never explained.

11. Further, he asserted that the medical examination revealed bacterial infection but a urinalysis test was never carried out to find out the person responsible for the same as provided in Section 26 of the Sexual Offences.

12. The appellant further submitted that the P-3 form was not properly filled in that despite it being noted that the victim was limping, **Section "B"** of the form remained unfilled and as such it was not possible to classify injuries sustained or to make the observations noted credible.

13. It was further submitted that the prosecution and court totally failed to confirm the truthfulness of the witnesses as enshrined in Section 164 of the Evidence Act and in the case of **James Mwangi v Republic (1983) KLR 327 – 331**.

14. In addition, the appellant submitted that his alibi defense was not given due consideration. It was his submission that the defense put forward was much weighty and credible but the trial court dismissed it as lacking in merit as the appellant failed to call his father who could have corroborated his story.

15. The appellant thus submitted that an accused person cannot be punished or convicted on the weakness of his defense but only to the weight of the prosecution evidence. He relied on the case of **Sekitoleko v Uganda (1967) E.A. 531 at Page 533**. The appellant further submitted that the law was clear in Section 150 of the Criminal Procedure Code that it is the court's duty to summon a witness where evidence is required but not to shift the burden on the accused.

16. In the written submissions filed on 14th May 2020, the Respondent through the Office of Director of Public Prosecutions, Siaya County opposed the appeal and sought leave of the court to enhance the sentence imposed should the court uphold the conviction by the trial court. It was submitted that this was a heinous crime that calls for severe sentence than the one meted out by the trial court. On the merits of the appeal, it was submitted that the prosecution proved its case against the appellant beyond reasonable doubt and that the offence took place in broad daylight at the appellant's house.

17. Further, that the victim knew the appellant as her brother who lived with her in the same compound and in the next house and that this was the second time he was defiling her. Further, that the appellant was caught ready handed by PW2, and PW3 a medical officer confirmed that the victim was defiled. The Respondent urged the court to quash the sentence meted out on the appellant and enhance it as per te Notice to enhance sentence filed and served upon the Appellant giving him the option of withdrawing his appeal.

Analysis and Determination

18. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) 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 junction 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 1978) E.A. 424."**

19. Revisiting the evidence before the trial court, PW1 JAA, the complainant testified that on 3/5/2017 she went back home from school and the appellant called her and told her to wash for him the cloths. JAA further stated that the appellant then locked the door and told her that he wanted her to give him something to eat and when she asked the appellant what that was, he pointed to her private parts and he then locked the door and had sex with her and he told her not to tell anybody. JAA further testified that the appellant gave her 10 Kenya Shillings and told her not to tell anybody or he would kill her.

20. JAA testified further that when the appellant heard her mother's voice, he opened the door and she went and told her mother what the appellant had done to her and she was taken to hospital and they went and reported at Yala Police Station. In cross examination by the appellant, JAA stated that when her mother went back home the appellant was in the act and the accused left her when he heard her mother's voice.

21. PW2, JA, the complainant's mother testified that on 3/5/2017 she left home and went to Kodiaga but when she returned home, she did not find the complainant but that after some time the appellant opened his door and the complainant got out of his house and told PW2 that the appellant had raped her. PW2 stated that she took the complainant to hospital and later she went and reported to the police. PW2 further stated that the complainant was born on 2nd October 2006. In cross examination by the appellant, PW2 stated that the appellant had called her to try and settle this case at home and further that she had no other dispute with the appellant.

22. PW3 Everlyne Odhuno, the Clinical Officer at Yala sub County Hospital testified that she examined JAA, who was 9 years' old who had been brought to the hospital with a history of having been defiled. PW3 further testified that the girl was walking while limping and on examination of the vagina, she noticed that the girl had bruises on both labia *minora* and *majora* and that she had hymeneal tag which meant that the hymen was broken and was healing. She stated that there were epithelial cells, which was evidence that there was vaginal penetration. PW3 concluded that there was evidence that the child had been defiled. In cross examination by the appellant, PW3 stated that there was evidence that the child had been defiled since there were vaginal bruises and hymeneal tag which meant the hymen had been broken and was healing.

23. PW4 No 106895 PC Fredrick Omondi testified that on 8th May 2017 a female JA went to the station with her daughter JAA and made a report that the daughter had been defiled. PC Omondi took the girl to hospital and issued her with the P3 form and he conducted investigations and later on 6th October 2017, the appellant was arrested at Mutumbu AP Post and PW4 went and picked the appellant and charged him with the offence. PW4 produced the birth certificate for the complaint as exhibit three. In cross examination by the appellant, PW4 testified that the offence was committed on 3rd May 2017 and the appellant was arrested on 6th October 2017.

24. At the close of the prosecution's case, the appellant testified that on 3rd May 2017 he left and went to his place of work. That later, the complainant's mother went and asked him that she wanted to be his wife but he told her that she was like his mother and he could not marry her. The appellant further testified that he later went and told his father what had taken place and the father told him to go on with his work.

25. The appellant testified that later in July, the complainant's mother began to talk to him again but on 30th September 2017, the complainant's mother went and told him to stop reporting to his father the things which they talk together and further threatened him that he will not live with his wife. The appellant stated that he was later arrested and charged with the offence.

26. In his judgment delivered on the 21st March 2019, the trial Magistrate found the appellant guilty and convicted him after framing the following issues for determination:

a. Was the complainant defiled?

b. Was the complainant defiled by the accused?

c. What was the age of the complainant at the time of defilement?

d. Is the accused guilty of the offence he is charged with?

27. On the first issue, the trial magistrate relied on the evidence of the complainant, JAA as corroborated with that of Everlyne Odhuno, the Clinical Officer and found that the complainant had been defiled.

28. On who defiled JAA, the trial magistrate weighed the defence put forth by the appellant against the testimony of JAA as corroborated by both her mother, JA and the Clinical Officer Everlyne Odhuno, and wholly believed the evidence of the complaint and found no reason to doubt the same stating that the complainant was consistent in her evidence and that she positively identified or recognized the accused as the one who had defiled her.

29. On the issue of age of the complainant, the trial magistrate relied on the birth certificate of the complainant that was produced by PC Omondi that showed that the complainant was born on 2nd October 2006 and was thus about 9 years old at the time of the offence.

Determination

30. Having carefully considered the appellant's grounds of appeal, the evidence adduced before the trial court and the written submissions, the main issues for determination in this appeal are:

1) Whether the charge sheet brought against the appellant was defective

31. It is the appellant's argument that the charge sheet brought against him was defective. The appellant states that one cannot be convicted of a separate charge other than that brought against him. He relies on the case of **Cosmas Case 1955 22 EACA.** He also claims that the evidence on record did not meet the test of relationship in the degrees under section22 of the Sexual Offences Act. However, section 22 of the Act relates to test of relationship where one is charged with incest. In such a case then the prosecution must prove that the test of relationship under the section is met. In this case, the appellant was not charged with incest but with defilement of a child aged 9 years. This is an independent charge and it matters not that the child victim complainant is or is not a relative of the accused person.

32. The appellant also claimed that the surrounding circumstances under section 33 of the Sexual Offences Act was not favourable or considered. The section provides:

> "*33*.**Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove -**
>
> **a) whether a sexual offence is likely to have been committed-**
>
> **i) towards or in connection with the person concerned; (ii) under coercive circumstances referred to in section 43; and**
>
> **b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.**

33. Under section 43 of the Sexual Offences Act referred to in section 33 above,

> **"(1) An act is intentional and unlawful if it is committed -**
>
> **a) in any coercive circumstance;**
>
> **b) under false pretences or by fraudulent means; or**
>
> **c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.**
>
> **2)The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is -**
>
> **a) use of force against the complainant or another person or against the property of the complainant or that of any other person;**
>
> **b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or**
>
> **c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her r*esistance to such an act, or his or her unwillingness to participate in such an act.***
>
> **3) False pretences or fraudulent means, referred to in subsection (1)(b), include circumstances where a person -**
>
> **a) in respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;**
>
> **b) in respect of whom an act is being committed, is led to believe that such an act is something other than that act; or**
>
> **c) intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life-threatening sexually transmissible disease.**
>
> **4) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act -**
>
> **a) asleep;**
>
> **b) unconscious;**
>
> **c) in an altered state of consciousness;**
>
> **d) under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected; (**
>
> **e) mentally impaired; or**
>
> **f) a child**
>
> (5) **This section shall not apply in respect of persons who are lawfully married to each other.**

34. This court has carefully perused the above provisions cited by the appellant. I have not seen the relevance of the said provisions to this appeal and that which would go to the benefit of the appellant. However, I shall delve into the issue of whether the evidence relied on was circumstantial evidence, later in this judgment.

35. On the alleged defective charge sheet, I have perused the charge sheet brought against the appellant and I find nowhere in the judgment of the trial court that the trial magistrate convicted the appellant for the offence other than that which he faced in the charge sheet. The appellant was charged with the main and alternative charge. The main charge is as follows:

> **"CHARGE: DEFILEMENT CONTRARY TO SECTION 8 (1)(2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006."**

36. The alternative charge brought against the appellant states:

> **"ALTERNATIVE CHARGE: COMMITTING INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11((1) OF THE SEXUAL OFFENCE ACT NO. 3 OF 2006."**

37. In the conclusion of his judgement, the trial magistrate noted as follows:

> **"From the above I find that the prosecution have proved their case beyond reasonable doubt and I find the accused guilty of the offence of Defilement Contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006"**

38. Nonetheless, it is trite that an accused person is entitled to not only be charged with an offence recognized under the law but also to be furnished with all the necessary details of the offence so as to enable him appreciate the nature of the charge(s) against him and to prepare an appropriate defence. The converse would prejudice an accused person's right to a fair trial contrary to ***Article 50(2) (b)*** of the ***Constitution***. This is the rationale behind ***Section 134*** of the ***Criminal Procedure Code*** which stipulates:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

39. Section 8 (1) of the Sexual Offences Act creates the offence of defilement whilst section 8 (2) being the penal subsection and stipulates 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*.

40. Finally, section 11 (1) of the Sexual Offences Act provides that *any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.*

41. What the charge sheet must have meant in my considered opinion is "Defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act. The Court of Appeal in **Peter Ngure Mwangi v Republic [2014] eKLR,** stated that:

> **"A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, and Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO v R, [198] eKLR that:**
>
> **"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:**
>
> > **(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,**
> >
> > **(ii) when for such reason it does not accord with the evidence given at the trial."**

42. The Court of Appeal in the **Peter Ngure case** was further guided by the case of **Peter Sabem Leitu v R, Cr. App No. 482 of 2007 (UR)** where the Court held:

> **"The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."**

43. In the present case, the particulars in the charge sheet made clear reference to the offence of defilement against a minor. The trial magistrate having conducted the trial and had the opportunity of hearing the evidence and observing the witnesses and scrutinising their testimonies proceeded to find the appellant guilty of the offence provided in section 8 (1) as read together with section 8(2) of the Sexual Offences Act.

44. Section 382 of the Criminal Procedure Code further provides, in material part that:

> **"No finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or**

other proceedings before or during the trial or in any injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

45. The proviso to Section 382 provides that in determining whether the error, omission or irregularity has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

46. As earlier stated in this judgment, the legal principle governing charge sheets is that an accused person should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

47. The answer from the decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective. In this case, the Appellant was charged under section 8(1)(2) of the Sexual Offences Act. The Act provides for section 8(1) and (8(2) as stated above. The question is: did this combining of subsection 1 and 2 of section 8 of the Sexual Offences Act prejudice the Appellant and occasion a miscarriage of justice? I do not think so. There is no doubt in my mind that the appellant clearly understood the charges facing him well enough to understand the ingredients of the crime charged so that he could fashion his defence. In this case, he understood it well enough to offer an explanation when the facts were read out to him.

48. As established by case law, the test for a defective charge sheet is a substantive one, not a formalistic one and when it is applied here, it establishes that the charge sheet gave fair notice to the appellant to the charges he was facing hence the appellant's trial was fair in a substantive sense. I find that no miscarriage of justice was occasioned in the charges brought against the appellant. Accordingly, the ground of appeal challenging the charge sheet accordingly fails and is hereby dismissed.

2) On whether the fundamental rights of the appellant were violated?

49. According to the appellant, there was a miscarriage of justice since his constitutional rights under Article 49(1)(f) were violated as he was placed in custody for more than the duration required by law without any explanation being given for the delay. The appellant relied on the cases of **Albanus Mwasia Mutua v Republic (2006) eKLR** and **Gerald Macharia Githuku v Republic (2007) eKLR.**

50. Article 49(1)(f)(i) of the **Constitution** guarantees every arrested person the right to be arraigned within 24 hours. However, there is an exception in (f)(ii) which provides that; ***"if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day."***

51. PC Omondi testified that the appellant was arrested on the 6th October 2017 whereas the charge sheet brought against the accused showed that he was brought to court on the 9th October 2017.

52. I have consulted the annual calendar for the year 2017 and found that 6th October 2017 was a Friday therefore the appellant could not be taken to court on the following day which was a Saturday as the courts do not operate over the weekend. The appellant was produced in court on the 9th October which was a Monday. Accordingly, I find no violation of the appellant's constitutional right as alleged and I dismiss the ground of appeal.

53. The appellant also raised the ground that there was a variance in the reporting date of the offence and the date of his arrest. PW4 PC Fredrick Omondi testified that on 8th May 2017 JA the mother to the complainant made a report that her daughter had been defiled which led to investigations that concluded with the arrest of the appellant on the 6th October 2017. In my considered view, this did not infringe on the appellant's right as the witness, PW2 clearly stated that the appellant ran away after committing the offence and was only arrested in October 2017. Accordingly, I find the ground lacking in basis and dismiss the same.

3)On whether the trial court relied on unsubstantiated circumstantial evidence in convicting the appellant.

54. The appellant submitted that the circumstantial facts considered in the instant case, as provided for under section 33 of the Sexual Offences Act, were not supported by medical analysis. The appellant further submitted that the medical examination revealed bacterial infection but a urinalysis test was never carried out to find out the person responsible for the same as provided in Section 26 of the Sexual Offences Act.

55. Section 124 of the Evidence Act Laws of Kenya provides that:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where 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, where 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 reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

56 From a reading of section 124 of the Evidence Act, it is clear that a trial Court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and the trial court records the reasons for that belief. (***See George Kioyi V R Cr. App. No. 270/2012 (Nyeri) and Jacob Odhiambo Omumbo V. R. Cr. App No. 80 of 200 (Kisumu).***

57. In the instant case, the trial court convicted the appellant after believing the testimony of PW1, JAA and discounted the defence put forth by the appellant. In addition, despite the provisions of section 124 of the Evidence Act, the complainant's testimony remained unchallenged and was corroborated by both her mother, JA and Everlyne Odhuno, the Clinical Officer who examined JAA after the incident. The trial court stated as follows in his judgment regarding the testimony of the victim:

> **"I totally believed the evidence of the complainant and I find no reason to doubt the same, the complainant was consistent in her evidence and she positively identified or recognized the accused as the one who had defiled her. I find that the accused is the one who defiled the complainant in this case."**

53. Accordingly, I find the allegation that the prosecution evidence by the complainant was not corroborated not merited and I dismiss the ground of appeal.

4) On whether the trial court failed to consider the appellant's alibi

58. The appellant in his defence stated that he was framed for the offence of defilement by the complainant's mother JA, who had seduced him for marriage but that the appellant refused to accede to the demand. The appellant stated that he had informed his father of the constant pestering by JA to marry her. The trial magistrate however observed that the appellant failed to call his father as a witness to corroborate his evidence. The appellant complains that the trial magistrate shifted the burden of proof to him and used the weaknesses in his defence to convict him.

59. The burden of proof lies with the prosecution throughout the trial and does not shift to the accused person even where he raises the defence of alibi. I am alive to the principle that by setting up an alibi defense, the accused does not assume the burden of proving the alibi see (***Ssentale v. Uganda [1968] EA 36).*** The prosecution always bears the burden of disproving the alibi and proving the appellant's guilt ***(Wang'ombe v. Republic [1976-80) 1 KLR 1683).*** **However, t**he Court of Appeal has stated over and over that it is desirable that an alibi defence be raised at the earliest opportunity to give the prosecution time to investigate its truth or otherwise. The said Court of Appeal has also held that nevertheless, even when the alibi defence is raised late in the day, it must still be addressed. See (**Ganzi & 2 Others vs. R [2005] 1 KLR 52**.)

60. In the present case, and as already observed above, the appellant's belated alibi defence weighed against the evidence adduced by the prosecution witnesses which was accepted by the trial court and which I wholly concur with, the conclusion I make is that the alibi defence is and was effectively displaced.

61. Having re-examined the evidence by the prosecution witnesses leading to the arrest of the appellant v*is a vis* the defence, I am persuaded that the prosecution proved their case against the appellant beyond reasonable doubt that he was, and not any other person, who defiled the minor and that the defence of alibi was farfetched. The evidence by the complainant and her mother which was watertight displaced the allegation by the appellant that he was framed by the complainant's mother as a result of failing to give in to her demands to marry her. The complainant's mother found the victim locked up in the appellant's house and it is the appellant who opened the door to his house at 6pm and the complainant came out and told the mother what the appellant had done to her. The appellant is well known to the child as a blood relative and they lived in the same compound. The fact of defilement was proved by medical examination and the age of the victim was proven by production of her birth certificate no. [….] as exhibit 3.

62. Accordingly, I am unable to find any ill logic, contradiction or inconsistency in the evidence by the Prosecution against the appellant on the charge of defilement so as to justify the quashing of the conviction and sentence meted out on the appellant.

63. The appellant also claimed that there was no evidence that the infection the child had was not proved to be from him and further that the P3 form does not state the degree of injury suffered by the victim as **Section B** of the P3 form was not filled. Starting with the latter complainant that the degree of injury was not assessed, I find the ground superfluous as the sexual offences are not a mere assault cases but fall in a special categories of offences and what the medical personnel is required to do is to establish whether the victim was defiled or not and not merely assess the degree of injury as would be the case in common assaults or grievous harm cases. In this case the P3 form shows that the medical officer examined the victim and concluded that the victim had been defiled more than 72 hours. Accordingly, that ground of appeal is dismissed.

64. On whether section of the Sexual Offences Act was violated in that the P3 form showed epithelial cells but the appellant was not examined to determine whether he was the defiler, Section 26 (1) (a) of the Sexual Offences Act states:

> **"(1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know—**
>
> **(a) will infect another person with HIV or any other life threatening sexually transmitted disease.**
>
> ***(b)***
>
> ***(c)***
>
> ***shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life."***

65. To answer the issue of there having been no infection of the minor child, I note that there is no charge or allegation that the appellant wilfully infected the minor with HIV as stipulated in the above section cited. Even assuming that the appellant who is unrepresented was referring to the requirement for DNA to establish the link between him and the victim in the defilement charge, on whether DNA test should have been carried out on the appellant to establish whether he was the person that defiled the complainant, **Section 36 (1) of the Sexual Offences Act** stipulates:-

> **"36. (1). Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the Court may direct that an appropriate sample or samples be taken from the Accused person, at such place and subject to such condition as the court may direct for the purpose of forensic and other testing, including a DNA test, in order to gather evidence and to ascertain whether or not the Accused person committed an offence."**

66. The above provision was considered by the Court of Appeal in the cases, among them- Robert **Mutungi Mumbi V. R Cr. App. No. 52/2014 (Malindi)** and **Williamson Sowa Mwanga V. R Cr. App. No. 109/2014** (Malindi). In the former case, the Court of Appeal stated:

> **"Section 36 (1) of the Act empowers the Court to direct a Person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."**

67 And in the latter case the Court of Appeal stated as follows on the issue of paternity and defilement:

> **" ….. It is patently clear to us that whilst paternity of PM's child may prove that the father of the father of the child had defiled PM. that is not the only evidence by which defilement of PM. can be proved. The fact, as happens in many cases that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the Appellant would at mot determine whether he was father of PM's child, which is a different question from whether the Appellant had defiled PM. As the court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be raptured. (See Twehangare Alfred V. Uganda CR. APP No. 139 of 2001." It is partly for this reason that Section 36(1) of the sexual offence Act is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence to order that samples be taken from him for forensic, scientific or DNA testing."**

68. With the above authority from the Court of Appeal and by which this court is bound and having regard to the circumstances of this case, the question is whether the trial Court should have ordered for a DNA test on the appellant to determine whether he committed the offence in question.

69. To answer the above question, it is worth noting that the evidence of PW1 the complainant which was given on oath to the effect that she knew the appellant as her brother and that they lived in the same compound but different houses and that that was the second time he was defiling her was found by the trial court to be believable and I have no reason to differ with that finding of fact. That evidence was corroborated by PW2 the victim's mother who found the appellant and her daughter the complainant locked up in the appellant's house and it remained unshaken evidence. That being the case, I find that the appellant's claim that the medical evidence did not determine that he was the defiler not useful to his appeal. The argument is hereby dismissed.

5) Whether the sentence imposed upon the appellant was harsh.

70. The appellant has impugned the judgment of the trial court in imposing a sentence of life imprisonment. He argues that the sentence is manifestly harsh. The role of this court in an appeal is not to interfere with the discretion of the trial court on the sole ground that the sentence meted out is severe, unless it was manifestly excessive. The Court of Appeal of East Africa stated in **Wanjema v Republic [1971]EA 494** that:

> **'An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case."**

71. The question is whether I should in the circumstances of this case, interfere with the imprisonment term imposed on the appellant. The Respondent filed a Notice of enhancement of sentence contending that the offence is heinous considering the age of the victim and that the appellant should have been handed a more severe sentence. Section 364 (2) of the Criminal Procedure Code provides as follows:

> **"No order under this Section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence."**

72. The proviso in Section 364 (2) reads as follows:

> **"Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned."**

73. In **M K v Republic [2015] eKLR** the Court of Appeal dealing with the ground of appeal against the order of the High Court enhancing sentence in a sexual offence case had this to say:

> **"Our reading of the Sexual Offences Act shows that whenever a minimum sentence is imposed, the phrase not less than is used. In the instant case, the appellant was charged with an offence under Section 20 (1) of the Sexual Offences Act. This Section provides for a minimum term of 10 years imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?**
>
> **The first observation to note is that the phrase "not less than" has not been used in the proviso to Section 20 (1) of the Sexual Offences Act. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.**
>
> **What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of Opoya -v- Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in James -v- Young 27 Ch. D. at p.655 where North J. said:**
>
> > **"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".**
> >
> > **We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are "shall be sentenced to death".**
>
> ***On our part, we contrast the wordings in Section 8 (2) of the Sexual Offences Act with the proviso in Section 20 (1)*** **of the said Act. The contrast will shed light as to whether the sentence in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) 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 proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.**
>
> **Guided by the decision in Opoya -v- Uganda (1967) EA 752 and the persuasive dicta of North J. in James -v- Young 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the Sexual Offences Act is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.**
>
> **Based on the foregoing interpretation, we are of the considered view that in the instant case, the learned judge erred in law in holding that the twenty (20) years term of imprisonment meted to the appellant by the trial court was an illegal sentence. We find that the twenty (20) years term of imprisonment was not an illegal sentence and was lawful in the context of the decision in Opoya -v-Uganda (1967) EA 752. It follows that the learned judge erred in correcting and or enhancing the sentence from 20 years to life imprisonment. We reiterate the principles in the case of Ogolla s/o Owuor, (1954) EACA 270 wherein the predecessor of this court stated:**
>
> > **"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."**
>
> **We are of the considered view that the High Court misinterpreted the proviso to Section 20 (1) of the Sexual Offences Act and acted on wrong principles and overlooked the decision in Opoya -v- Uganda (1967) EA 752.**
>
> **In conclusion, we are inclined to follow the decisions in Opoya -v- Uganda (1967) EA 752. The upshot of the foregoing is that we find that this appeal has merit. We allow the appeal on sentence to the extent that the corrected or enhanced term of life imprisonment is set aside and it its place, the original sentence of twenty (20) years meted out to the appellant is reinstated with effect from the date the trial court passed it."**

74. The appellant herein was charged under section 8(1) as read with section 8(2) of the Sexual Offences Act which stipulates 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.*** However, the trial court imposed a prison term of twenty years.

75. The sentence of life imprisonment is mandatory upon conviction if a child is aged eleven years or less, and in this case, the child was found to be a nine year old girl. Accordingly the learned Magistrate was entitled and obliged to mete out the life imprisonment provided for in law. However, in the recent times, following the Supreme Court decision in **Francis Muruatetu & others** v **Republic SC Petition No. 15 &16 of 2014**, the Court of Appeal declared in **Jared Injiri Koita v Republic [2019] eKLR** that minimum mandatory sentences even in sexual offences are affected by the decision in the Francis Muruatetu case and are therefore unconstitutional in so far as they deny the accused person an opportunity to mitigate and also interfere with the judicial discretion of the trial court to impose an appropriate sentence having regard to the circumstances of each case and the mitigations by the accused person.

76. In this case, the appellant mitigated before sentencing and the trial court took into account those mitigations. The sentencing was done after the Francis Muruatetu and Jared Injiri (supra) cases from superior courts. That being the case, albeit the Respondent filed a Notice of enhancement of sentence, the appeal was heard by way of written submissions during the Covid 19 situation and the appellant was not able to make submissions on sentence enhancement. For that reason, I find that it would be unjust to enhance the sentence imposed which I find to be lenient but lawful, having regard to the principles espoused in the Francis Muruatetu case.

77. I therefore find the application to enhance sentence not merited. I dismiss it and uphold the twenty years imprisonment imposed on the appellant which I find lawful and lenient. The appeal against sentence is accordingly dismissed.

78. In the end, having considered the appellant’s grounds of appeal, and also having carefully reviewed the evidence on record, there is nothing that suggests that the learned magistrate was in error in convicting the appellant. Accordingly, this appeal against conviction and sentence is hereby dismissed. The conviction of the appellant and sentence imposed are hereby upheld.

79. Orders accordingly.

Dated, signed and delivered at Siaya this 20th Day of July 2020 via Microsoft teams Appellant present in prison.

R.E. ABURILI

JUDGE

Note: Obiter: This court observes that in the process of pronouncing this judgment online, the appellant urged the court to allow him to withdraw his appeal against conviction and sentence. As the court was already pronouncing the judgment, I proceeded to pronounce the judgment as written and made note of the appellant’s request in the court file.

R.E. ABURILI

JUDGE