REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 62 OF 2019

KOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment, conviction and sentence delivered on 8th July 2019 and sentence passed on 31st July 2019 by Hon Muthoni Mwangi, Resident Magistrate, Siaya in Siaya PM's Court SOA Case No. 29 of 2019.)

JUDGMENT

1. This appeal is against the conviction and sentence of life imprisonment sentence imposed on the appellant **KOO** in Sexual Offence Case No. 29 of 2019 at the Principal Magistrate's Court at Siaya in the judgement delivered on the 31st day of July 2019 by Hon. Muthoni Mwangi, Resident Magistrate.

2. The Appellant **KOO** was charged with the offence of defilement contrary to section 8 (1) as read together with section 8 (4) of the Sexual Offences Act No. 3 of 2006 the particulars being that on the 28th day of April 2019 at Nyadorera 'A' sub-location in Siaya district within Siaya County, he intentionally caused his penis to penetrate the vagina of NAO [full name withheld] a child aged 7 years.

3. The appellant also faced the alternative charge of Committing an Indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 9 of 2006 the particulars being that on the 28th day of April, 2019 at Nyadorera 'A' Sub-Location in Siaya District within Siaya County, he intentionally touched the vagina of NAO a child aged 7 years with his penis.

4. On the 30th April 2019, the appellant pleaded not guilty to both the main and alternative charges and the matter proceeded for hearing.

5. The trial magistrate, Hon. Muthoni Mwangi after hearing the four prosecution witnesses as well as the unsworn testimony of the appellant and his witness found the accused person guilty of the offence of defilement and convicted the appellant under section 215 of the Criminal Procedure Code. Upon considering the mitigation of the appellant and the circumstances of the case, the trial magistrate proceeded to sentence the appellant to life serve imprisonment.

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

a) That he pleaded not guilty.

b) That he was not subjected to, medical examination to ascertain his complicity in the offence.

c) That the age of the victim was not established.

d) That the trial court failed to consider that there was an existing grudge between the appellant and the victim's mother due to infidelity.

e) That his defense statement was not given due consideration by the trial court whereas the same was not challenged by the prosecution case.

Submissions

7. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 25th February, 2020 to canvass his appeal. He submitted that the trial magistrate erred in law by convicting him based on the unsworn statement of PW2, the victim NAO which lacked probative value to incriminate in a criminal liability. The appellant relied on Section 151 of the Criminal Procedure Code which he

stated provides that:

> ***"Every witness in a criminal case or matter shall be examined upon oath, and the court before which any witness shall appeal shall have full power and authority to administer the oath."***

He also relied on the case of **Amber May v R (1979) KLR 38**, where the Court of Appeal held that:

> ***"an unsworn statement is not evidence as the term is generally understood because it has no probative value. Its potential value is only persuasive other that evidential."***

8. The appellant further submitted that the trial magistrate erred in law by not invoking Section 186 as read with 179 of the Criminal Procedure Code and proceeded to convict him under Section 8(1) as read with 8(7) [sic] of the Sexual Offences Act No. 3 of 2006 as the ingredients in the case against him suggested a Sexual Offence with a family member, child or person with mental disabilities and that upon conviction he would be liable to a conviction for a term which is not less than 10 years.

9. The appellant further submitted that the sentence imposed upon him was manifestly harsh and not in compliance with Article 50(2)(p) of the Constitution, which he stated provides that an accused person should benefit from the least severe punishment; Section 333(2) Criminal Procedure Code which provides that the period of detention before trial should be considered in the sentence; and the sentencing guidelines outlined in the supreme Court ruling on 14.12.2017. [the **Francis Muruatetu case].**

10. The appellant also relied on the cases of **R v Malakwen Arap Kogo (1933) 15 KLR 115** and **DnabI v R (1987) KLR 304**, where he stated that the High Court stated that the value of the matter, antecedents, age and conduct of the accused should be considered in sentencing an accused person.

11. The appellant submitted that first offenders should not be given maximum sentences and the sentence should be commensurate with the moral blameworthiness of the offender and that the trial Court must look at the facts and circumstances of the case in their entirety before settling for any given sentence. Reliance was placed on the case of **Kennedy Indiema Omuse v R Criminal Appeal No. 344 of 2006**.

12. He further submitted that the trial Court failed to observe that the charge sheet on record was defective due as it indicated the wrong section and further that the trial court proceeded to overstep its mandate by amending the charge during judgment, a duty which lies with the prosecution and not the court. Reliance on this proposition was placed on the case of **Bukenya v R (UG) (1952) EA**.

13. The appellant finally submitted that there was nothing that linked him medically to the alleged offence. He submitted that the trial court erred in its decision when it relied on inconclusive evidence of the medical report as he was HIV positive but the victim tested HIV negative despite the fact it was the prosecution case that she had engaged in unprotected sexual activity severally. The appellant further submitted that no DNA test was conducted to verify the medical findings.

14. The prosecution led by Mr. David Okachi Senior Principal Prosecution Counsel filed written submissions on 20th May 2020 during the covid 19 situation and opposed the appeal and contending that the appeal has no merit. He relied on the evidence adduced on record and submitted that the evidence adduced by the prosecution witnesses proved the elements of defilement beyond reasonable doubt. He submitted that PW3 caught the appellant red handed or in the act hence g he deserves no mercy but face deterrent sentence like the one rendered by the trial court. He urged this court not to tamper with the conviction and sentence imposed by the trial court.

Analysis

15. In determining this appeal, this court being a first appellate court is alive to and is cognizant of 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."***

16. Revisiting the evidence adduced by prosecution and defence, the prosecution evidence as laid out in the trial Court was that **PW1, Isaac Imbwaga,** a Clinical Officer from Siaya County Referral Hospital, stated that the victim was taken to the facility on 29th April 2019 in the company of her mother with a history of having been defiled by person well known to her on the 28th day of April 2019. Mr. Imbwaga stated that the complainant alleged that the perpetrator undressed and defiled her a few minutes after her mother had gone to the shop. Mr. Imbwaga further stated that upon examining the genitalia of the girl he discovered lacerations on the right labia **minora** with inflammation around the vaginal opening. He further stated that the hymen of the girl was broken and that she had a foul smelling discharge at the vaginal opening. On urinalysis he stated that there were pus cell, yeast cells and epithelial cells but no spermatozoa and thus from his physical examination of the minor and tests done, he concluded that there were features suggesting vaginal penetration.

17. In cross examination by the appellant, PW1 stated that the victim was referred to his hospital from Rwambwa sub county hospital who were not in a position to carry out all the tests. He further stated that he did not examine the accused person as he was not brought to the hospital for examination. He denied being paid to prepare the medical report for the complainant.

18. The victim, **NAO** [full name withheld] gave unsworn testimony after voire dire examination as PW2 and stated that on 28th April 2019 her "baba" who is the appellant herein sent her mother to the market and she [complainant] remained at home with her father-the appellant. She stated that her father told her to close the door and to lower the curtain. He then told her to remove her trouser and her panty and he proceeded to sleep on her. She stated that he then removed his penis ***"alitoa dudu yake then akanifanyia tabia mbaya"*** which loosely translates to" ***he removed his penis and did bad manners to me."*** NAO the victim, further stated that the appellant put his penis in her vagina and that while doing so, the appellant asked her whether it was painful and when she said it was, he instructed her to be still. She further stated that her mother came and found her naked on the bed and her father lying on his stomach and that her mother began to beat her father with her hands.

19. The minor was recalled under section 150 of the Criminal Procedure Code and she stated that it was not the first time that her father had defiled her as he had done so several times before although she could not recall how many times.

20. **PW3, WA,** the victim's mother testified that the victim was her child and was aged 7 years. She recalled that on the 28th April 2019 at around 5pm, her husband, the appellant called her and sent her to the shops to buy credit and bread. She further testified that she left her daughter with the appellant and that when she came back she found the door closed. It was her testimony that when she opened the curtain she found her daughter lying upwards with her trouser, biker and panty pulled down and the appellant lying on the bed with his stomach down and face downwards. She got scared and started beating the appellant in anger after which she took her daughter to the hospital, where she was tested and examined and upon examination her daughter revealed that the appellant usually did bad manners to her.

21. In cross-examination, PW3 stated that the complainant was first treated at Rwambwa Hospital and referred to Siaya county Referral Hospital. She further stated that the appellant did not tell her that he was feeling unwell that day.

22. **PW4 No. 106402 PC Christabell Simbiri** gave evidence that on the 28th of April 2019 at around 2100 hours she received a report that there was a suspect at Nyadorera who was being assaulted by members of the public on allegations that he had defiled his daughter. She stated that upon arriving at the scene they found the suspect, appellant herein surrounded by members of the public. She also stated that the complainant was first taken to Rwambwa Hospital then later to Siaya County Referral Hospital where the P3 form was filled.

23. At the close of the prosecution's case, the appellant gave unsworn testimony. He stated that on the Sunday morning of 28.4.19 he had an argument with his 2nd wife, Mrs. A, PW3, after which he went to his rural home. He stated that when he came back in the morning he and the complainant's mother had a quarrel as to who had slept in the house the previous night leading to him leave for the fish market.

24. The appellant further testified that when he came back in the evening he sent his wife to the shop to get him some credit during which time his daughter N [the victim] came and wanted to sleep next to him as she was used to sleeping there. The appellant further stated that the complainant wanted to go for short call and that when PW3 returned she found the child standing next to a seat whilst he was sleeping and upon telling the complainant's mother to lock the door, she started shouting.

25. The appellant further stated that he followed the complainant, her mother and a certain man to the hospital where the doctor inquired if what he heard was true. He further testified that when the complainant's mother was leaving the house she took his Ksh. 9,700 and thereafter the doctors decided to call the police. He stated that his wife told him that the police told her to divorce him and that they addressed him by a name which was not his. He stated that he was never given an opportunity to talk.

26. **The appellant called DW2, RA** who testified that the appellant was her husband with whom they had children and that he had never done such a thing and that he had always had commotion with the complainant's mother, her co-wife.DW2 further testified that PW3 told her that the appellant had intercourse with her [PW3's]child.

27. In cross-examination, DW2 testified that the appellant was at the home of WA, the complainant's mother on the material date of the alleged offence and that she did not see him that day although he used to go to her house once in a while. She further testified that the doctor told her not to have sex since her husband was injured and that he had an injury on the thigh.

28. In her judgment delivered on the 8th July 2019 the trial magistrate Hon. Muthoni Mwangi restated the evidence on record by the prosecution witnesses and the defence tendered by the appellant and his witness and in considering whether the prosecution had proved its case against the appellant beyond reasonable doubt stated that regarding the age of the complainant, the same had been proved by the birth notification which bears the serial number 265091 indicating the date of birth of the minor as 26th July 2010 and produced as prosecution exhibit No. 3.

29. On whether the ingredient of penetration was proved to the required standard that is beyond reasonable doubt, the trial magistrate considered the evidence of PW1 Mr. Imbwaga, the Clinical Officer, who gave evidence that upon physical examination of the minor he concluded that there were features suggesting penetration, as well as the testimony of the complainant who described the appellant's act.

30. The trial magistrate also found that the appellant was positively identified by the complainant and that the same was corroborated by PW2, the complainant's mother who testified that she left the appellant with her daughter when the appellant sent her to the shop and that DW2 stated that the appellant spent the material night at Mrs. A's PW2's home.

Determination

31. I have carefully considered the appellant's grounds of appeal, the evidence adduced before the trial court and the submissions for and against the appeal. I find the following main issues for determination:

1) Whether the charge sheet on record against the defendant was defective.

32. The appellant claimed that the charge sheet on record was defective due to the fact that it indicated the wrong section and that the trial Court overstepped its mandate and amended the charge during judgment.

33. I have perused the trial court record. The charge sheet brought against the appellant reads as follows:

> **"CHARGE: DEFILEMENT CONTRARY TO SECTION 8(1) (4) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**
>
> **COUNT TWO**
>
> **ALTERNATIVE CHARGE: COMMITTING INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCE ACT NO. 9 OF 2006"**

34. In her judgement delivered on the 31st July 2019, the learned magistrate described the charges brought against the appellant as follows:

> ***"The accused person herein is charged with the offence of attempted defilement contrary to section 8 (1) as read together with section 8 (4) of the Sexual Offences Act No. 3 of 2006."***

35. In concluding her judgement, the learned trial magistrate stated as follows:

> ***"In totality of the foregoing, I find the accused person guilty of the offence of defilement as contemplated under section 8 (1) as read together with section 8(2) of the Sexual Offences Act and convict him under section 215 of the Criminal Procedure Code."***

36. 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."***

37. Section 8 (1) of the Sexual Offences Act creates the offence of defilement whilst section 8 (4) is the penalty section and it provides that *a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years*.

38. Section 8 (2) is also a penalty section which 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*.

39. Finally section 11 (1) 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.*

40. In my humble view, the charge sheet must have meant in my considered opinion is ***"Defilement contrary to section 8 (1) as read with 8 (4) of the Sexual Offences Act.***

41. 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, 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 same 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 thus:

> ***"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 whose age at the time of charging the accused was not verified hence the quoting of section 8 subsection (4) of the Act. The trial magistrate having conducted the trial and had the opportunity of hearing the evidence and after scrutinising the said evidence, 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, owing to the evidence adduced that showed that the child victim was aged 7 years hence the penalty section was section 8(2) and not 8(4) of the Sexual Offences Act.

44. Section 382 of the Criminal Procedure Code 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 herein stated, the principle of law governing charge sheets is that an accused 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 be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

47. 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.

48. In the instant case, the Appellant was charged under section 8(1)(4) of the Sexual Offences Act. No such section exists in the Act by such express description. The question is: did this prejudice the Appellant and occasion a miscarriage of justice? I do not think so. There is no doubt in my mind that the Accused Person 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 and he pleaded not guilty. More so, the appellant ***was supplied with the charge sheet and all prosecution witnesses statements before the hearing hence he understood the charge facing him and the evidence to be tendered beforehand***. All this information is available in the trial court record.

49. Case law has established that the test for a defective charge sheet is a substantive one, not a formalistic one and when it is used here it establishes that the charges gave fair notice to the Accused Person to the charges he was facing, and the trial was fair in a substantive sense. No miscarriage of justice was occasioned in the charges brought against the appellant.

50. I observe that the trial magistrate referred to an attempted defilement in the introduction of her judgment which offence the appellant was not charged with, and which offence falls under section 9 (1) of the Act. In my humble view, that was a slip of the pen as far as the judgment of the trial court and the charges facing the appellant were concerned as there was no such charge before her. Such erroneous reference to a non-existent charge is amenable for correction by this court and is hereby corrected as it does not occasion any miscarriage of justice to the appellant. Accordingly I find and hold that the charge sheet was not substantially or materially defective and that the defects noted were curable and the same were cured by the trial magistrate in her judgment and by this court.

2) Whether the prosecution proved its case beyond reasonable doubt and whether the appellant's evidence was considered by the trial court.

51. According to the appellant, there was no medical evidence brought forth by the prosecution against him as firstly being HIV positive, but that although the victim was tested , she was found to be HIV negative and secondly that no DNA test was conducted to confirm the accusations against him.

52. **I am alive to the provisions of Section 124 of the Evidence Act** where it is clear that a trial Court can convict the accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and 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).***

53. However in the instant case it is noteworthy that the complainant who testified as PW2 gave an unsworn testimony which according to the appellant was upheld by the trial magistrate and thus led to his conviction contrary to the provisions of Section 151 of the Criminal Procedure Code as well as the case of **Amber May v R (supra).**

54. The law relating to unsworn statements is well expressed by Emukule, J in the case of **Mercy Kajuju & 4 Others v Republic [2009] eKLR** where he stated as follows:

"I also discussed at some length the nature and value of unsworn statement, and on authorities held that unsworn statements have no probative or evidential value unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence...."

55. **In *Amber May v The Republic [1999] K.L.R.* 38,** *the High Court held that unsworn statement has no probative value notwithstanding the provisions Section 211(1) of the Criminal Procedure Code. On Appeal against that decision and reported as* ***May v The RepublIC [1981] KLR. 129****, the Court of Appeal held, inter alia held-*

> ***"1. That unsworn statement is not, strictly speaking evidence and the rules of evidence, cannot be applied to unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value it must be supported by evidence recorded in the case.***
>
> ***2. No adverse inference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by Section 211 (1) of the Criminal Procedure Code (Cap 75, Laws of Kenya)"***

56. It is clear from the trial court record that the trial magistrate undertook a detailed *voire dire* examination of the complainant, and formed the opinion that she did not appreciate the nature or solemnity of an oath and she therefore proceeded to allow her to give testimony as an unsworn witness..

57. The evidence of a child under the age of 14 may be received even if it is not on oath, provided that the court is satisfied, after conducting a *voire dire* examination, that the child possesses sufficient intelligence and understands the duty to tell the truth. In the present case the child was seven years old. Such a child is defined in **Section 2** of the **Children's Act** as a child of tender years, that is, a child under the age of ten years.

58. In **Oloo v R (2009) KLR**, the Court of Appeal held that:

> ***"In our view, corroboration of evidence of a child of tender years is only necessary where such a gives child unsworn evidence. (See Johnson Muiruri v Republic (1983) KLR)…..***
>
> ***….in law evidence of a child given on oath after voire dire examination requires no corroboration in law but the court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration of it".*** (Emphasis supplied)

59. The evidence of the child, PW2, concerning penetration was as follows:

> ***"….Baba told me to close the door. It had one room. He told me to lower the curtain. I went to sleep, I was wearing a trouser. He told me to remove it and also my panty. I did not remove my shirt, I was lying on the bed. He told me to remove my trouser and panty. He slept on top of me. 'Alitoa dudu yake' then 'akanifanyia tabia mbaya' 'aliniwekea ndani duduyake '….."***

60. This evidence was corroborated by the evidence of the child's mother PW3, who said that when she returned from the shop where the appellant had sent her, she found the girl sleeping upwards, her trouser biker and panty pulled down and the father sleeping on the bed with his stomach down and face downwards.

61. Further, the minor was recalled under section 150 of the Criminal Procedure Code and she stated that it was not the first time that her father had defiled her as he had done so several times before though she could not recall how many times.

62. Accordingly, though the minor gave an unsworn statement, the same was corroborated. More so, the trial magistrate meticulously followed the procedure for taking evidence of a child of tender years as required by section 19 of the Oaths and Statutory Declarations Act. In *Patrick Wamuyu Wanjiru vs Republic*[14]which ably discussed the requirements of Section **19 (1)** of *The Oaths and Statutory Declarations Act*[15] and cited the case of *Joseph Opondo vs Republic[16]* where the Court of Appeal outlined the stages to be followed in determining whether or not a child of tender years may give sworn evidence it was stated as follows:

> *"There are two stages which must be followed and must appear on the record of the trial court. First, the examination must endeavour to ascertain whether the witness understands the meaning, nature and purpose of oath. The question or questions by the court must be directed to that. If the court from the answers it receives from the witness is satisfied that the witness understands the meaning, nature and purpose of an oath, the witness must then be allowed to give sworn evidence. Stage two of the matter does not then come into play.*
>
> *Where, however, the witness does not understand the meaning and purpose of an oath, stage two of the examination then follows. The witness is examined by the court to ascertain whether the witness is possessed of sufficient intelligence to justify reception of his or her evidence though not upon oath. This examination must equally appear on record. Simple elementary questions would normally be asked like date, the day, the school the witness is attending and other matters. If the court is satisfied from the answers to such questions that the witness is possessed of sufficient intelligence, the court will allow the witness to give unsworn evidence."*

63. Further evidence by the Clinical Officer Mr. Imbwaga, from Siaya County Referral Hospital was that upon examining the genitalia of the complainant, he discovered lacerations on the right labia **minora** with inflammation around the vaginal opening and further that the hymen of the girl was broken and that she had a foul smelling discharge at the vaginal opening. On urinalysis he stated that there were pus cells, yeast cells and epithelial cells but no spermatozoa leading him to conclude that there were features suggesting vaginal penetration.

64. I also note that it is not in dispute that the minor's age at the time was proved to be seven years old by production of her birth notification document No. 265091 showing that she was born on 26/7/2010 and that further the appellant was positively identified by the minor as well

as the minor's mother.

65. Accordingly, I find and hold that the prosecution proved its case against the appellant beyond reasonable doubt on the main charge as all the elements of defilement were established.

3) Whether the defence evidence was considered by the trial court.

66. In his defence, the appellant gave an unsworn statement. That is his right in law. That evidence could not be tested in cross examination. As earlier stated, the law relating to unsworn statements is well expressed by Emukule, J in the case of **Mercy Kajuju (supra)** where he stated as follows:

> ***"I also discussed at some length the nature and value of unsworn statement, and on authorities held that unsworn statements have no probative or evidential value unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence.***
>
> **……..**
>
> ***"Although it is an accused person's right to remain silent, or not to give a statement, or evidence on oath, but whenever an accused persons elects to make an unsworn statement he gains one major advantage over the prosecution, his statement cannot be tested as to its veracity or truthfulness by way of cross examination whose purpose directed-***
>
> ***(1) to test the credibility of the witness;***
>
> ***(2) to the facts to which he has deposed in-chief including the cross examiners version thereof, and***
>
> ***(3) the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose,***
>
> ***(4) failure to cross examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.***
>
> ***In addition the estimation of the value of evidence in ordinary cases, the testimony of a witness who swears positively to a fact may receive credit in preference to one who testifies to the negative. For instance evidence as to what has not been seen would not carry the same weight as evidence as to what has been seen. Little weight will consequently be given to an unsworn statement. That is the disadvantage in an accused person electing to make an unsworn statement. A few cases will illustrate the point.***
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> **In *AMBER MAY VS THE REPUBLIC [1999] K.L.R.* 38, *the High Court held that unsworn statement has no probative value notwithstanding the provisions Section 211(1) of the Criminal Procedure Code. On Appeal against that decision and reported as MAY VS THE REPUBLIC [1981] KLR. 129, the court of Appeal inter alia held-***
>
> ***1.That unsworn statement is not, strictly speaking evidence and the rules of evidence, cannot be applied to unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value it must be supported by evidence recorded in the case.***
>
> ***2. No adverse inference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by Section 211 (1) of the Criminal Procedure Code (Cap 75, Laws of Kenya)"***

67. DW2, RA on her part testified and stated that the appellant was her husband and that PW3 was her co wife. She stated that the accused person was at the home of WA, PW3 the mother of the complainant on that day and further that he used to come to her house once in a while. She further testified that WA, the complainant's mother, called her on the material night and told her that the appellant had had sex with the complainant.

68. The trial magistrate duly noted the evidence of the defence in her judgement and stated as follows:

> ***"Having considered the totality of the defence not in isolation of course but vis a vis the evidence of the prosecution witnesses I find the same to be a sham, an afterthought and mere denial which could not by any chance shake the evidence of the prosecution evidence which was firm, consistent and reliable."***

69. The trial magistrate was persuaded by the evidence of the prosecution having taken into account the unsworn statement. In light of the foregoing, I am satisfied that the trial magistrate did in fact take into account the appellant's evidence in defence before reaching her determination. Although the appellant in his defence claimed that he had disagreed with the complainant's mother over her infidelity, my humble view is that there was no such evidence and his attempt to introduce an alibi defence could not hold as his second wife testified that on the material day he was at the first wife's house when the incident is alleged to have occurred and that the first wife called her and told her that the appellant had defiled the complainant.

70. Elements and proof from the analysis of the evidence on record, iam satisfied that the prosecution proved all the elements of defilement

against the appellant. There was proof that the complainant was aged 7 years old, that she knew and recognized the appellant as her father who defiled her and had defiled her on other previous occasions that her genitals had been penetrated by the appellant.

71. Although the appellant claimed that he was HIV positive but the victim was found to be HIV negative and that there was no medical evidence to prove that he was in any way linked to the defilement of the complainant as no DNA tests were done, I find that it is not the HIV test that would have proved that he defiled the complainant as the charge was not that of wilfully infecting the complainant with HIV.

72. In addition, DNA test was not mandatory in the instant case because there was overwhelming evidence adduced by PW2 and PW3 that the appellant and no other person defiled the complainant as he was found sleeping on the bed with the complainant child and he stated that the child indeed slept in the bed with him and even claimed that she was used to sleeping with him on the bed. The child was taken to hospital immediately after being found on the bed without her clothing and was examined and found to have been defiled. Therefore DNA testing was not necessary in the circumstances to establish whether he was the person that defiled the complainant. Section 36 (1) of the Sexual Offences Act provides:

> ***"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."***

73. 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."***

74. 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."***

4) Whether the life sentence meted out was excessively harsh or lawful

75. 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 and not in compliance with Article 50(2)(p) of the Constitution, which stipulates that an accused person should benefit from the least severe punishment, Section 333(2) Criminal Procedure Code which provides that the period of detention before trial should be considered in the sentence and the sentencing guidelines outlined in the supreme Court decision on 14.12.2017 in the case of **Francis Karioko Muruatetu & another v Republic [2017] e KLR.**

76. 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"***

77. The sentence provided for under **section 8 (2)** of the **Sexual Offences Act** is as follows:

> ***"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction to imprisonment for life"***

78. The sentence is mandatory if a child is aged eleven years or less, and in this case, the child was found to be a seven year old kindergarten child. And not just a child but the accused person's child. The question is, what motivated the appellant to defile his own child, and not once but severally prior to the incident herein where he was found by the mother to the child immediately after he had defiled her? Only beasts can do that. The victim a seven year old child being severally defiled and the father claiming that he was HIV Positive and that he does not understand why the daughter was not HIV positive is in itself so traumatising. It sounds like the appellant's main intention in defiling the child was to completely destroy her not only by defiling her but by infecting her with the HIV/AIDS which he claims he is positive of. Such a person is not the kind of person who is remorseful and neither does he care about the life of the victim child. He is worse than a murderer. He kills twice and feels nothing about it.

79. Before sentencing the appellant to serve life in prison, the trial magistrate heard and considered his mitigations and even called for a social inquiry report which was filed by the probation officer to guide her in sentencing. The appellant was said to be abusing alcohol and bhang. In my view, the appellant herein does not deserve the least of sentence available. He is a paedophile who is not remorseful. He was given a chance to mitigate hence it cannot be said that his right to mitigation was violated or that the trial court was not alive to the Francis Muruatetu decision which held that mandatory death sentence is unconstitutional to the extent of its mandatoriness as it deprives the trial court of the discretion to mete out appropriate sentence having regard to the mitigation and circumstances of the offence. The trial magistrate, in my humble view, properly exercised her discretion in sentencing the appellant by taking into account the mitigations, and the circumstances of the case. The appellant had two wives, if he had issues with the complainant's mother, why did he not move into his other wife's house and leave the complainants' mother and the complainant alone? The victim child unfortunately was used as a sex toy by the appellant. The learned Magistrate was entitled and obliged to mete out the sentence given, considering the heinousness of the offence against a very young child who looked up to the appellant father for protection. I am not persuaded to interfere with the life imprisonment imposed on the appellant who deserves to be kept away from the society that he is a danger to.

80. 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.

81. In light of all the foregoing, I find that the learned Magistrate reached the correct decision on evidence which proved the appellant's guilt beyond reasonable doubt. Accordingly, this appeal against conviction and sentence is found to be devoid of any merit and the same is hereby dismissed.

82. Right of appeal guaranteed.

Dated, Signed and Delivered at Siaya this 20th Day of July 2020

(Online) appellant in prison via Microsoft teams.

R.E. ABURILI

JUDGE