REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 61 OF 2019

CORAM: HON. R.E.ABURILI J

CHARLES OTIENO OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence in Bondo Principal Magistrate's Court Sexual Offences Case No. 2 of 2019 delivered by Hon. E.N.Wasike, SRM, on 31.7.2019)

JUDGMENT

Introduction

1. The Appellant **CHARLES OTIENO OCHIENG** was charged before the Principal Magistrate's Court in Bondo in Sexual Offense Case No. 2 of 2019 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. Particulars of the offence are that on the 5.1.2019 at about 1400 hours at [particulars withheld] Sub-location in Bondo Sub-County within Siaya County he unlawfully and intentionally caused his penis to penetrate into the vagina of C.O.A. [full name withheld for legal reasons], a girl aged 10 years.

2. The appellant also faced the alternative charge of Committing an Indecent Act with the 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 matter proceeded for hearing.

4. The trial magistrate, Hon. E.N. Wasike after hearing four prosecution witnesses and testimony of the appellant found that the prosecution had proved their case beyond reasonable doubt and proceeded to convict and sentence the appellant to serve 30 years in prison.

5. Dissatisfied 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 nothing linked him medically with the alleged offence.

c) THAT the trial court failed to comply with Article 50(2) of the Constitution.

d) THAT the alleged age of the victim was not proved beyond reasonable doubt.

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

6. The appellant through his advocates on record subsequently filed further grounds of appeal together with written submissions as follows:

a) The charge and particulars set out thereof are defective to the extent that they cannot form a basis for a competent trial.

b) The learned trial magistrate erred in both law and fact in failing to appreciate the glaring, contradictions in the evidence by the Prosecution witnesses.

c) The trial court erred in both law and fact in making conclusions, decisions and drawing inferences which are not based on evidence on record; using exterior matters to do so.

d) The trial court erred in both law and fact in failing to resolve the doubts in the prosecution case in favour of the Accused /Appellant as per the law and practice.

e) The trial court shifted both the burden and instance of proof to the accused.

f) The judgment of the subordinate court is against the weight of evidence on record.

g) The sentence imposed on the Appellant is manifestly harsh and excessive in the circumstances.

Appellant's Submissions

7. The appellant through his advocates on record submitted that the trial magistrate erred in convicting the appellant on uncorroborated evidence that lacked probative value. It was submitted that despite a voire doir examination being carried out on the complainant, who testified as PW1, section 124 of the evidence act still provided for corroboration of evidence of minors. The appellant relied on the case of **Johnson Muiruri v. Republic [1983] KLR 447** where the court while addressing the proper procedure to be followed when children are tendered as witnesses stated that where after carrying out a voire doir examination the court is not satisfied that the child is in possession of sufficient intelligence and understands the duty of speaking the truth, the accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

8. It was further submitted on behalf of the appellant that the trial court shifted the burden of proof to the appellant as it failed to consider the alibi defense put forth by the appellant and further by stating that the appellant failed to call a witness to corroborate his evidence. On this proposition, the appellant relied on the case of **Peter Wafula Juma & 2 Others v Republic [2014] eKLR.**

9. The appellant further submitted that the judgement of the subordinate court was against the weight of evidence on record considering the manner in which the appellant's identification was done. It was submitted in this regard that the complainant never described the appellant as her assailant but that identification in this case was only dock identification which it was submitted was unsafe. Reliance on this proposition by the appellant was placed on the case of **Gabriel Kamau Njoroge v Republic (1982-1988) 1 KAR 1134** where the court stated that dock identification was worthless and the witness ought to describe accused and the police then arrange an identification parade. The appellant further relied on the case of **Simiyu & Another v Republic (2005) KLR** where the court stated that in every case in which there is a question as to the identity of the accused, the fact of there being a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given.

10. Finally, it was submitted on behalf of the appellant that the sentence imposed on the appellant was manifestly harsh and excessive in the circumstances and that the trial court failed to consider a pre-sentencing social inquiry report prior to sentencing so as to mete out an appropriate sentence on the accused.

Analysis & Determination

11. 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."

12. The prosecution evidence as laid out in the trial Court was as follows: The complainant, CAO testified as PW1 that she was 9 years old and hailed from [particulars withheld] Primary School in class 4. She further testified that on 5.1.2019 at about 2p.m her mother sent her to another homestead and as she was coming back she met the appellant who grabbed her and dragged her to a maize plantation.

13. The complainant further testified that the appellant then removed both her underwear and his and then took out his penis and inserted it into her vagina. She further testified that she felt pain and told the appellant he was hurting her. She testified that after the incident, she got up and went home and told her mother what had transpired.

14. The complainant testified that her mother then took her to the village elder but he was not at his home so they proceeded to the clan elder (Mji Kumi) who advised them to go to the police. She further testified that they went to Bondo police station and made a report after which they were referred to Bondo hospital where she was examined and treated. The complainant further stated that she knew the appellant who was their neighbour.

15. In cross-examination by the appellant, the complainant stated that she was speaking the truth.

16. PW2 EAO, the complainant's mother testified that the complainant was born on 24.4.2008 and she identified the certificate of birth as

proof. She further testified that on the 5.1.2019 at about 1 pm she sent PW1 to their neighbour's place to buy omena but the complainant took long before coming back.

17. She further testified that when she finally came the complainant was crying and informed her that the appellant had grabbed and defiled her after which they proceeded to the village elder but did not find him. PW2 testified that on the way, she met the appellant and upon inquiring as to whether he had defiled the complainant, the appellant denied.

18. PW2 testified that she then proceeded to the clan elder and reported the matter and subsequently proceeded to Bondo police station where they were referred to hospital. She further testified that they went to Bondo district hospital where PW1 was examined and treated after which they went back to the police station where she was issued with a P3 form that was filled at the hospital. PW2 identified the appellant in court and noted that he was their neighbour.

19. The appellant did not cross-examine PW2.

20. PW3 Jared Obiero Opondo, the chief clinical officer at Bondo Sub-County hospital testified that the complainant was taken to their facility with a history of having been defiled by a person well known to her. He produced a P3 form dated 5.1.2019 in respect of the complainant that detailed her age as 9 years. He further testified that a detailed examination on the complainant revealed swelling and bruises on her lips as well as tenderness on her cheeks. He further testified that the genital examination revealed lacerations on the vulva and labia minora, bruises on vaginal mucosa and a broken hymen. Opondo concluded that there was penetration.

21. In cross-examination by the appellant, PW3 stated the he only examined people who went to the hospital for examination.

22. PW4, No. 57514 Sgt. Joseph Kiboi of Bondo police station and the investigating officer in this case testified that he took over the matter on the 23.2.2019 from PC Rotich who left for Kiganjo Police Training College after investigations had been completed. He testified that the case was that of defilement, the complainant was C.O. and the accused was Charles Otieno Ochieng. He also testified that he was also handed over the minor's Birth Certificate which he produced before court as an exhibit. The appellant did not cross-examine PW4.

23. At the close of the prosecution's case, the appellant gave a sworn statement of defence that on the on 5.1.2019 he was at home all by himself when a certain doctor instructed him to go and slash his compound where he went and worked until 12 pm after which he went back home.

24. The appellant further testified that he then went to the water point to fetch water at his neighbour's place and found one Joshua. He further testified that Joshua then went to where the complainant's mother was and began a conversation. It was the appellant's testimony that one Andrew then came to where he was and together they took their cows to river Yala but before, he could leave, the complainant's mother came and asked him if he was Charles and what he had done to her daughter. The appellant testified that the complainant's mother then went to Mama S's house and told her that he had defiled her daughter after which he left and as he was tying their cows, Joshua went and told him that he was a bad person.

25. The appellant testified that the complainant's mother then told Andrew that he had defiled her daughter but he refuted the same and that later on some boda boda riders went and arrested him and took him to Bondo police station. He further testified that he was later arraigned before court and charged and that there after some people went to his home and threatened to kill him.

26. The trial magistrate, Hon. E.N. Wasike after considering both the evidence laid out by the prosecution as well as that put forth by the appellant found that the prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellant and subsequently sentenced the appellant to 30 years imprisonment.

Determination

27. Having carefully considered the appellant's grounds of appeal, the evidence adduced before the trial court for the prosecution and for the defence as well as the written submissions for and against the appeal herein, the main issues for determination in this appeal are:

1) Whether the trial court failed to comply with Article 50 (2) of the Constitution

28. In his petition of appeal, the appellant stated that the trial magistrate erred in convicting and sentencing him by infringing on his rights under Article 50 (2) of the Constitution.

29. Article 50(2) of the Constitution provides for right to a free trial as follows;

"(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law. information shall be given in language that the person understands."

30. In the instant appeal, the appellant has not stated which specific right of his was infringed.in my humble view, where one seeks to prove a violation of a constitutional right or freedom, he ought to bring out which specific right or freedom was particularly and specifically violated to warrant the court's intervention. This was the holding of the court in the Court of Appeal case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR,** the case of **Godfrey Paul Okutoyi v Habil Olaka & Another [2018] eKLR** and **Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154** all of which held inter alia that:

"… if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important(if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

31. The appellant having failed to specify the right allegedly violated, I find no merit in the ground of appeal which I hereby dismiss.

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

32. The appellant also set out as one of his grounds of appeal that the charge and particulars set out against him were defective to the extent that they could not form a basis for a competent trial.

33. The charge brought against the appellant read as follows;

"DEFILEMENT CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006."

34. The alternative charge brought against the appellant read as follows;

"ALTERNATIVE CHARGE

INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006."

35. 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."***

36. Section 8 (1) of the Sexual Offences Act provides for the offence of defilement whilst 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*. 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.*

37. 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."***

38. 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 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."***

39. In the present case the particulars in the charge sheet made clear reference to the offence allegedly committed by the appellant. The alternative charge further made clear reference to the offence of committing an indecent act with a minor. The trial magistrate having conducted the trial and had the opportunity of hearing the evidence and scrutinising the same proceeded to find the appellant guilty of the main charge and proceeded to sentence the appellant as provided by law.

40. I am unable to detect any defect or prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before the trial court.

41. Further, I find no risk of confusion in the mind of the accused as to the charge framed and evidence presented as the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice.

42. 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.

43. 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.

44. As earlier herein stated, the principle of the 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.

45. Case law has established, 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. The alleged defect was not even disclosed.

46. Accordingly, the ground of appeal was unsupported or unsubstantiated. The same is hereby dismissed.

> **3) whether the evidence for the prosecution was inconsistent and contradictory**

47. The appellant further listed as one of his grounds of appeal that the learned trial magistrate erred in both law and fact in failing to appreciate the glaring, contradictions in the evidence by the Prosecution witnesses.

48. Again, I observe that the appellant did not pinpoint to this court in his submissions any alleged contradictions or inconsistencies in the prosecution evidence that he deemed to have been missed by the trial magistrate. I have perused the evidence on record especially that of the complainant who testified as PW1 and in my view, there are no contradictions or inconsistencies in her testimony. In any case the the Court of Appeal of Kenya in addressed itself on the issues of contradictions in the case of **Erick Onyango Ondeng' v. Republic [2014] eKLR** held;

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

49. More recently the Court of Appeal whilst sitting in Nyeri in the case of **Richard Munene v Republic [2018] eKLR** stated as follows;

> ***"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."***

50. For the above reason, I find the ground of appeal baseless and I proceed to dismiss the same.

> **4) Whether the prosecution proved its case beyond reasonable doubt**

51. The appellant in this appeal was charged with the offence of defilement contrary to Section 8(1) of the Sexual Offences Act which provides:

> ***"A person who commits an act which causes penetration with a child is guilty of the offence termed defilement and depending on the age of the victim i.e, if under eleven years shall upon conviction be sentenced to imprisonment for life."***

52. Going by this definition, for the state to sustain a conviction against an offender the following elements must be proved beyond reasonable doubt.

> ***i. Penetration of the male offender into the genitalia of the female victim in the case of a male defiling a female.***
>
> ***ii. The age of the child must be established in view of Section 8(1), (2),(3) and (4) of the Sexual Offences Act.***
>
> ***iii. Evidence that the accused was positively identified as the perpetrator.***

53. When dealing with sexual offences involving under the age of maturity the court is entitled to apply Section 124 of the Evidence Act on corroboration. However, in absence of corroboration the proviso of Section 124 provides as follows:

> ***"provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons be reached in the proceedings the court is satisfied that the alleged victim is telling the truth"***

54. It is therefore necessary to re-evaluate and subject the evidence to afresh scrutiny to be satisfied that the prosecution proved its case in the court below beyond reasonable doubt.

55. Regarding penetration, Section 2 of the Sexual Offences Act defines penetration to mean partial or complete insertion of the genital organs of a person into the genital organs of another person. According to the interpretation of Section 2 the slightest and brief arousal Penetration is sufficient to complete the crime. The law does not envisage absolute penetration into the genital nor the release of spermatozoa or semen of the male organ for the act of penetration to be said to be complete.

56. In this case the complainant testified that the appellant removed her underwear then took out his penis and inserted it into her vagina. PW3 Jared Obiero Opondo corroborated the complainant's testimony of her defilement when he testified that the genital examination on the complainant revealed lacerations on the vulva and labia minora, bruises on vaginal mucosa and a broken hymen leading to the conclusion that there was penetration. During cross-examination by the appellant there was no *iota* of material to render rebuttal to the testimony by the complainant in this ingredient.

57. The appellant took issue with the medical evidence as being unreliable and inconsistent and further argued and submitted that he was not examined by the medical doctor and as such there was no medical evidence linking him to the alleged offence. I have already alluded to the legal position under Section 124 of the Evidence Act and further posit that the failure or refusal by the investigating officer or the police to examine the appellant was not by itself fatal to the prosecution case.

58. In enacting the provision of Section 124 of the Act parliament in its wisdom was to reform the law for courts not to lean in favour of the

accused and order for an acquittal on the grounds that there is no corroboration. The medical evidence on the complainant or that of the appellant is therefore not significant.

59. From the appraisal of the trial courts record in my view the prosecution placed sufficient corroboration from the undisputed medical evidence by PW3 who said the complainant was defiled. The evidence of a broken hymen though not peculiar to sexual intercourse and the conclusion reached by PW3 is compelling evidence against the appellant in absence of any other material to the contrary. That together with the testimony of the complainant that she was grabbed and defiled by the appellant in a maize plantation renders credibility that the ruptured hymen must have been occasioned during the sexual assault incidence.

60. The appellant alleges that no tests were done on him to connect him to the allegation. The ingredients of the charge of defilement which must be proved by the prosecution are, age of the complainant, the identity of the perpetrator and penetration which must be proved by medical evidence. Medical examination of perpetrator is not a mandatory requirement to prove defilement, especially where there is other independent credible evidence linking the appellant to the offence.

61. Further, it is important to note that the law on Sexual Offences is proved by the evidence tendered by the prosecution and is not dependent on the examination of the perpetrator. Evidence of the victim is key in sexual offences and the only crucial medical examination is that of the victim to corroborate the fact of defilement or rape as the case may be. In the case of **Fappyton Mutuku Ngui v R (2014) eKLR** while considering a similar issue of medical examination of the perpetrator, the court had this to say –

> ***"In our view such evidence was not necessary and in any event the trial court found that there was sufficient medical evidence in support of PW-2-'s testimony which was trustworthy as to the person who had defiled her."***

62. What is important is that the trial Magistrate believes the testimony of the victim on the identity of the perpetrator, to sufficiently support the conviction. In this case, the evidence adduced proved all the elements of defilement of the complainant. From the evidence adduced on record, the complainant was 9 years old and knew the appellant very well as a neighbor. I find no motivation on her part or on the part of her mother to frame the appellant with such a heinous offence. The age of the complainant was also proved beyond reasonable doubt by production of her birth Certificate. This court does not comprehend what evidence the appellant expected to prove the age of the complainant. In my humble view, medical examination of the appellant was therefore not necessary. The appellant's defence in my humble view was correctly rejected by the trial court as the evidence by the prosecution witnesses was overwhelming against the defence proffered. It proved the offence as charged beyond reasonable doubt. I find the ground of appeal without merits. I dismiss it.

63. Turning to the age of the child, the same was proved beyond reasonable doubt by the production of the Certificate of Birth E/No. XXXX (P. exhibit 1) that showed that the complainant was born on the 24th April, 2008 and thus placed the complainant at 10 years old at the date of the alleged offence.

64. Finally, as to the identity of the appellant as the one who caused penetration on the complainant, according to the complainant, it was the appellant who grabbed her and dragged her to a maize plantation where he defiled her. The complainant testified that he knew the appellant as he was her neighbour. PW2, the complainant's mother also testified that the appellant was their neighbour. On his part, the appellant faulted the trial court for convicting him based on the dock identification by the complainant and her mother on the grounds that it was unsafe.

65. The identity of the appellant was not in dispute. He was a well-known person to the witnesses who easily recognized him. It is a well settled principle in criminal law that recognition is better than identification. This is the case here and there is no dispute that the appellant was well known PW1 & PW2. The appellant was arrested immediately. The identity of the appellant as the perpetrator of this offence was not in dispute and was proved beyond any reasonable doubts.

66. It is thus clear that the evidence available against the accused person on the issue of identity was the evidence of PW1 only.

67. 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."***

68. **Thus it is clear from a reading of section 124 of the Evidence Act** 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 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).*** *Accordingly, the appellant's claim that the complainant's evidence was not corroborated also fails. The trial court carried out a voire doir and satisfied itself that the complainant was telling the truth.*

69. The appellant raised an alibi defence that he did not defile the complainant and that at the alleged time the incidence occurred he was in the company of another person. The appellant submitted that the trial court did not consider his alibi defence and thus shifted the burden of proof from the prosecution to himself by requiring him to call a witness to corroborate his case.

70. In the case of **Charles Anjare Mwamusi v R CRA No. 226 of 2002** the Court of Appeal stated:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25."***

71. I thus take cognizance of the principle that by setting up an alibi defence, the accused does not assume the burden of proving the alibi- see **Ssentale v Uganda [1968] EA 36**-. The foregoing was restated by this court in the case of **Bernard Odongo Okutu v Republic [2018] eKLR** where the court referred to the holding in the case of **Wang'ombe vs. Republic [1976-80] 1 KLR 1683**, where it was stated "the prosecution always bears the burden of disproving the alibi and proving the appellant's guilt."

72. However, this defence should also be raised at the earliest opportune time as was held in the case of **Victor Mwendwa Mulinge v R [2014] eKLR** where the Court of Appeal rendered itself thus on the issue of alibi:

> ***"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see*** *Karanja vs. R, [1983] KLR 501* ***… this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."***

73. The said Court of Appeal has also held that nevertheless, even when the defence is raised late in the day, it must still be addressed. See (**Ganzi & 2 Others vs. R [2005] 1 KLR 52**.) However, in the present case, and as already observed above, the appellant's belated alibi defence is weighed against the evidence adduced by the prosecution 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.

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

74. The appellant has impugned the judgment of the trial court in imposing a sentence of 30 years imprisonment. He argues that the sentence is manifestly harsh. Trial Courts have a greater deal of discretion when it comes to punishment and meting out the appropriate sentence and other determinations. The law basically provides various range of sentences from which a Judge or Magistrates can opt to effect and apply in specific cases. The same law provides for a minimum mandatory sentences where the appellant case is stated to have been proved by the prosecution.

75. From the trial record, the appellant faced a charge of defilement contrary to section 8(1) of the Act. The victim of the defilement was found to be aged 10 years old. The appropriate sentence on conviction is provided in Section 8(2) of the Act is mandatory life imprisonment. The learned trial Magistrate therefore considered and paid due regard to the minimum legislated sentence for the offence of defilement and proceeded to sentence the appellant to 30 years imprisonment. He exercised discretion and imposed a very lenient sentence below the mandatory prescribed.

76. The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is well stated in the case of **Ogalo s/o Owuora 1954 24 EACA 70.** It is well set out that:

> ***"This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice"***

77. 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."***

78. In the present appeal the horrors and trauma of a victim of defilement are such that they leave a permanent psycho-traumatic experience. I am alive to the fact that when parliament legislated for minimum mandatory sentences in sexual offences it was meant to deal with societal problem of sex predators of young girls. However even with long minimum custodial sentences the problem seems not to abate nor such incidents reduced to zero rated within our country.

79. In the present case, after conviction, the appellant did not express any remorse for the physical pain and damage he caused to the victim. Considering the circumstances of the case I am of the considered view that the sentence imposed on the appellant was lawful and does not deserve interference this court should not interfere with the appellant's as it is deterrent and further as it is sufficient punishment to enable the appellant learn his lesson, be rehabilitated, and possibly be readapted into the community. The trial court meted out 30 years imprisonment instead of mandatory life imprisonment. I find no reason to interfere.

80. Accordingly, I find and hold that the appellant's appeal against conviction and sentence is devoid of merit. I dismiss the same.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 6th Day of October, 2020

R.E. ABURILI

JUDGE