REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 50 OF 2019

CORAM: HON. R.E. ABURILI J

JOANES ODUOR OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence in Principal Magistrate's Court in Bondo in Sexual Offense Case No. 51 of 2017 delivered by Hon S.W.Mathenge, Resident Magistrate on 5th July 2019)

JUDGMENT

Introduction

1. The Appellant herein **JOANES ODUOR OTIENO** was charged before the Principal Magistrate's Court in Bondo in Sexual Offense Case No. 51 of 2017 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 being that on the 14th March, 2019 at unknown time in Bondo Sub-county within Siaya County, he unlawfully and intentionally caused his penis to penetrate into the vagina genital organ of VH[full name withheld for legal reasons], a girl aged 3 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. SW Mathenge after hearing five 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 life 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 the trial court failed to consider that the alleged age of the complainant was not proved beyond reasonable doubt.

b) That the trial court erred in law and facts by not considering that the Prosecution's evidence was full of contradictions and inconsistent hence unreliable witnesses whose evidence ought not to have been relied upon.

c) That the trial magistrate erred in law and facts by relying on the evidence of the complainant to convict him without noting that there was no corroborations and her evidence was inconsistent.

d) That, the trial court failed to give his defence statement due consideration despite the fact that the same was not challenged by the prosecution case.

e) That he be served with the trial court records to enable me erect more grounds.

6. The appellant subsequently filed further grounds of appeal in his submissions as follows;

a) That the trial court erred in law by basing a convicting on an age assessment report whose authenticity was not established.

b) That the trial court failed to observe that the prosecution did not avail crucial witnesses in support of their case.

c) That the trial court imposed m a manifestly harsh sentence.

Appellant's Submissions

7. The appeal was canvassed by way of written submissions. The appellant submitted that the age of the victim was not established as no birth certificate or any other document was produced in court to ascertain the alleged age. He further submitted that he was not given an opportunity to ascertain the authenticity of the age assessment report adduced by the investigating officer in court through cross examination and thus the appellant submitted that his conviction was unsafe.

8. The appellant further submitted the prosecution failed to avail the minor to testify in court and as such it was not clear whether the trial court was able to ascertain the minor's level of intelligence and whether she was competent to give any evidence on oath. He thus submitted that the trial court erroneously invoked section 124 Evidence Act.

9. The appellant submitted that the mandatory nature of his life sentence as imposed by the trial court deprived the trial court the discretion to award a sentence which is commensurate with the gravity of the offence committed. He relied on the cases of **Francis Karioko Muruatetu & Another v Republic (2017) eKLR** where it was held that mandatory sentences deprive courts of the legitimate jurisdiction to exercise discretion to individualize an appropriate sentence to the relevant aspects of the character and record of each accused person, and the Court of Appeal case of **Christopher Ochieng V R (2018) eKLR Kisumu CR. App. 93 of 2014** where it was held that minimum mandatory sentences are unconstitutional.

10. The Respondent did not file any submissions.

Analysis and Determination

11. This is a first appellate court. As expected, I must analyse revaluate afresh all the evidence adduced before the lower court and draw my own independent conclusions bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno v Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."***

12. Similarly, in **Kiilu & Another v Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> ***"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.***
>
> ***2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; 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."***

13. The prosecution evidence as laid out in the trial Court was as follows: PW1 MAA testified that on the 15th March, 2019 at around 10.00 – 11.00 a.m. one A went to her home and informed her that a child had been defiled. She asked A to take her to the child's home. She testified that the child, VH[full name withheld for legal reasons], was 2 years old and when she got there, she found one J on the road within that area as it was a site Jaduong was guarding. She informed J that there had been a child who was defiled and asked him to accompany her to where the child and the mother were, at Bondo Sub-county hospital where it was confirmed that the child was defiled and doctor Opondo called police officers. She stated that J was arrested, as he had been left to care for the victim, and taken to Bondo police station. She further testified that the victim told her that Jaduong had touched her private parts.

14. In cross-examination, PW1 stated that the doctor confirmed that the child had been defiled and that Jaduong was there when the doctor confirmed. She further testified that it was at 1.00 p.m. and that the neighbours saw the child enter J's house. PW1 then proceeded to the appellant's house and on checking, she found that the mattress particles found on the minor's head were similar to the one on the appellant's bed. She stated that the child was defiled on 14.3.2019 and that she got the information on 15.3.2019 and acted immediately.

15. She further stated that the doctor examined both the baby and the appellant and that she had witnesses and also a P3 form to confirm that the baby was defiled. She further reiterated that the child was two years old.

16. PW2 LA testified that on the on 14th March, 2019 at around 10.00 am she woke up and went to visit her friend P where she stayed until 1.00pm. she saw V' accompanied by her older Sister Van.[full name withheld]. She further testified that she noticed V. walking as if she was unwell and upon inquiring from V, if V. was sick, V. confirmed she was not sick. She noticed pieces of mattresses on V.'s head and when she tried to lift V., the child resisted and instead put her arms across her private parts. She then implored P and V. to check the girl who was dressed in a short and panties. On checking, the saw white stuff in solid form on the child's vagina and also noted that there were no cuts on her vagina. The next day, P informed her that J had raped the girl. It was her testimony that V. told them that J had cooked ugali and kales for her and that after they confirmed their suspicions they went to report to the village elder, M, PW1 who asked her to take him to V's house

which she did.

17. PW2 testified that V's mother did not stay with her and that V. and J were left in charge of the child. She also testified that J was V's mother's boyfriend.

18. In cross-examination, PW2 testified that she knew the appellant who worked as a helper in one of the houses near V's home.

19. PW3 VAO testified that on the 14.3.2019, at around 1.00 p.m., she went to her neighbour P's house where she also found Lucy. She testified that she saw V. approaching and noticed that she was walking funny and could not lift her legs prompting L to ask her to check V. When she tried to hold V's thighs, the child would tighten and refuse to part her legs leading P to conclude that might have been defiled and that on asking V, on what had happened, V. said that Jaduong had touched her breasts and private parts and vagina. PW3 called V's mother who did not pick the phone. She therefore went to sleep with V who cried the whole night. That when V wanted to pee, she was screaming forcing PW3 to check V's vagina and saw cracks and subsequently informed P. She further testified that they knew it was Jaduong because he was acting funny and that he had said that the child had been stuck on a live fence. She also testified that she boiled some water, added salt and put V. on that water and in the morning she took V. to Bondo District Hospital where she was examined and treated.

20. PW3 testified that the doctor confirmed that V had been defiled. While she was still in hospital with the child, the village elder arrived and they went to Report at Bondo police station where they were issued with a P3 form. She testified that they were accompanied by PC Deborah. PW3 stated that she knew Jaduong before as she had seen him many times near their home and that she thought he was a neighbour.

21. In cross-examination, PW3 testified that it was not true that she picked V. on 12.3.2019. She further stated that V. told her that the appellant herein had touched her vagina and sucked her breasts. She reiterated that her statement was true.

22. PW4 Jared Obiero Opondo the Chief Clinical Officer at Bondo Sub-county hospital testified that he had a P3 form for one VH dated 15th March, 2019 who was defiled on 14.3.2019 by a person left to take care of her by her mother. On genital examination of the victim he noticed the hymen was broken, there was laceration of the perineum region and that there was increased per-vaginal discharge. He further testified that the lab tests revealed no abnormalities in the urine and further that the minor tested HIV negative. He concluded that the minor was defiled. He further testified the minor was 3 years old.

23. In cross-examination, PW4 testified that the medical examination showed defilement and that medical history from the family was that the child was not walking properly.

24. PW5 No. 106296 PC Deborah Mose, the investigations officer testified that on the 15th March, 2019 at 1600hrs whilst at Bondo Police Station, one Doctor Jared Opondo went and informed her that he had received a patient by the name VH aged 3 years, at the hospital who had been defiled and that the suspect, Joanes Oduor Otieno, was at the hospital. Accompanied by PC Julius Ng'eno, they rushed to the hospital and arrested the suspect and took him to Bondo and also brought the complainant to the station. PW5 testified that she recorded all statements of the complainant and witnesses. Issued a P3 form and PRC form which were filled at the hospital. On the 18th March, 2019, she charged the appellant with defilement.

25. PW5 further testified that she took the child for age assessment at Bondo Sub-County Hospital where the results revealed that the child was between 2 and 3 years. PW5 further testified that the child could not communicate and that her investigations confirmed the appellant was the guardian to the minor as the minor's mother was in Nairobi looking for a job. PW5 identified the appellant in court.

26. At the close of the prosecution's case, the appellant gave a sworn statement of defence and stated that on 13.3.2019 at 7.33 am, VA met him on the road while he was heading to the shop and told him that he had defiled a girl after which he asked her to take him to the home of the girl that he had allegedly defiled.

27. The appellant further testified that on arrival, he looked for 5 people to be his witnesses and to accompany him to the home of the girl where the girl was put on a mattress and examined but nothing could be seen wrong with her private parts. He further testified that the girl's mother then informed him to take the girl to hospital but he declined because the girl was not sick forcing the mother to take her. The appellant further testified that at 1.00 p.m. a doctor called him and asked him to present himself at the hospital where his blood sample was taken and thereafter the doctor called Bondo police officers who went and arrested him at the hospital. He further testified that on 18.3.2019 he took plea in court.

28. It was the appellant's testimony that the mother to the minor told that him she would teach him a lesson. He further testified that on 14.3.2019, the girl got injured on a barbed wire fence. He also testified that the girl's mother left 3 girls in his care when she left for Nairobi on the 10.3.2019 to look for a good job and did not return.

29. In cross-examination, the appellant stated that he was a Ugandan and he had been in Kenya for ten years working as a casual worker. He stated that the 3 children were brought to him by WD with whom he was in a relationship. He also stated that he stayed with the 3 children in his house with two other adults, one being DO who was his son.

30. He also stated that the children were left in his care and that he did not give their custody to anybody else on 14.3.2019. He stated that on 14.3.2019 he was at home and had not gone to fetch water or do any other job. He denied that V. was defiled on 14.3.2019 and added that he did not suspect any person who could have defiled her. He stated that the 2 other girls were in school and he was left with the 3-year-old. The appellant maintained that he did not defile the child.

31. The trial magistrate, Hon. S.W.Mathenge after considering both the evidence adduced by the prosecution witnesses and the appellant's defence found that the prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellant and subsequently

sentenced him to life imprisonment.

Determination

32. Having carefully considered the appellant's grounds of appeal, written submissions in support thereof and the evidence adduced before the trial court by both the prosecution and the defence, in my humble view, the main issues for determination in this appeal are:

1) whether the prosecution case was riddled with Inconsistent and contradictory evidence

33. The appellant listed as one of his grounds of appeal that the learned trial magistrate erred in both law and fact in not considering that the Prosecution's evidence was full of contradictions and inconsistencies and was not sufficient to secure a conviction.

34. I do note that the appellant did not specify any 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. I find no contradictions or in evidence adduced by prosecution witnesses, worth the mention. The Court of Appeal addressed itself on the question of contradictions in the case of **Erick Onyango Ondeng' v. Republic [2014] eKLR** where it 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."***

35. More recently the Court of Appeal sitting in Nyeri in the case of **Richard Munene v Republic [2018] eKLR** stated:

> ***"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."***

36. Accordingly, I find the ground of appeal devoid of any substance. I dismiss it.

2) whether Crucial witnesses for the prosecution were not availed and the consequences thereof

37. It was the appellant's case that the prosecution failed to call a crucial witness specifically the victim to testify in court and as such the trial court was unable to ascertain the minor's level of intelligence and whether she was competent to give evidence on oath hence the trial court erroneously invoked section 124 of the Evidence Act.

38. Section 150 of the Criminal Procedure Code provides:

> ***"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:***
>
> ***Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."***

39. Section 150 of the Criminal Procedure Code empowers the court to, at any stage of the trial, summon a new witness or recall a witness already examined for re-examination. Where the court determines that the evidence of the new witness or the witness to be recalled is essential to the just decision of the case, the court is under a duty to summon the witness. In exercising the power, the court should ensure the protections afforded to the parties in the proviso are adhered to.

40. In **Kulukana Otim v R [1963] EA 257**, cited by J. Ngugi, J in **Stephen Mburu Kinyua v Republic [2016] eKLR**, the Court of Appeal of Uganda, in considering Section 146 of the Ugandan Criminal Procedure Code, which is similar to our Section 150 of the Crimnal Procedure Code stated:

> ***"It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself…."***

41. The learned Judge further held, and I concur that it was necessary for the court to form an opinion that it would be essential to the just decision of the case to call or recall a witness. This is what the learned judge said:

> ***"This is important because it would appear that the second part is triggered when the Court itself forms the opinion that the***

evidence to be called is essential to the just decision of the case. Section 150 implies that once a Trial Court comes to that conclusion, the duty to call that witness is triggered. This is not the situation we have here. The Trial Court did not make any assessment or finding that the evidence of the three witnesses it permitted to be called were essential to the just determination of the case. Instead, the Trial Court acquiesced to the Prosecution request to call the three witnesses. We must therefore conclude that the Trial Court acted pursuant to the first discretionary part of section 150 of the Criminal Procedure Code."

42. It is my considered view that whereas a trial court has the discretion to summon a fresh witness or recall a witness who has testified, this discretion should be exercised with caution to ensure that the prosecution does not use the opportunity to clean up its act. Much greater caution is called for when the court decides to act suo moto. It is always better to let the parties present their cases in the manner they think best. The prosecution should be left to identify the witnesses it wants to call. Likewise, the defence should be left to decide on the witnesses to call. This was stated by the court in the case of **Clement Maskati Mvuko v Republic [2018] eKLR**.

43. In the instant case, the victim's age was assessed to be between 2-3 years old and thus a child of tender years. A *voir dire* examination as submitted on by the appellant, would thus be necessary before her evidence could be received. Voir dire examination is a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror. With specific regard to the testimony of children, voir dire examination is essential to enable the court satisfy itself that the child is conscious of the truth. The purpose of voir dire was explained by the Court of Appeal in **Johnson Muiruri vs Republic [1983] KLR 445** as follows:

1. "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

44. Further, this court is alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of Evidence Act (Cap 80) Laws of Kenya provides:

"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

45. In **Bukenya Vs R (UGC 1952)**, the court stated:

"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."

46. In **Donald Majiwa Achilwa and 2 other v R (2009) eKLR**;the Court stated:

" The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

47. In **Keter v Republic [2007] 1 EA 135** the court held inter alia:

"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

48. In the instant case the prosecution was at liberty to call the witnesses they deemed necessary to establish and prove their case. The trial

court was in my opinion not at liberty to determine which witnesses are sufficient to prove the prosecution case.

49. Furthermore, the law is clear that where a witness is incapable of giving evidence, an intermediary can testify on their behalf. In the instant case, the child was too young to give evidence and therefore the intermediaries testified to protect her interests and rights as a child of tender years. I find no substance in the allegation that the child should have testified. Accordingly, this ground of appeal fails and is dismissed.

3) Whether the prosecution proved its case beyond reasonable doubt

50. The burden of proof always lie with the prosecution to prove its case against the accused person beyond reasonable doubt and that burden does not shift to the accused person. Section 8 of the ***Sexual Offences Act*** provides as follows:

> ***"8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) 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.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***(4) 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.***
>
> ***(5) It is a defence to a charge under this section if -***
>
> > ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
> >
> > ***(b) the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***
>
> ***(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.***
>
> ***(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity."***

51. It is trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013,** where it was stated that:

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

52. In **Kaingu Elias Kasomo v Republic** the Court of Appeal in Malindi Criminal Appeal No. 504 of 2010 stated:

> ***"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."***

53. The importance of proving the age of the complainant in sexual offences was emphasized in **Alfayo Gombe Okello v Republic (2010) eKLR** where the Court stated that:

> ***"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1) …proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."***

54. In **Dominic Kibet v Republic Criminal Appeal No. 155 of 2011** it was held that:

> ***"…while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."***

55. In this case, the appellant submitted that the age of the victim was not established as no birth certificate or any other document was produced in court to ascertain the alleged age. He further submitted that he was not given an opportunity to ascertain the authenticity of the age assessment report adduced by the investigating officer.

56. PW5 the investigating officer testified that the complainant was between 2 and 3 years as per the age assessment report conducted at Bondo sub-county hospital which she produced as P. exhibit 3. In **Joseph Kieti Seet v Republic [2014] eKLR**, the High Court at Machakos, Criminal Appeal No. 91 of 2011, Mutende J. held:

> ***"It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni -Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:***
>
> ***…. In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense …."***

57. In my humble view, the trial magistrate's finding that the victim was between 2-3 years old at the time of the offence cannot be faulted.

58. Whether penetration of the child's genitalia was proved beyond reasonable doubt? The P3 form produced showed that the minor's hymen was broken and that she had lacerations of perineum region with increased pervaginal discharge. PW4, the clinical officer who examined the minor testified that he conclude that the minor was defiled. Accordingly, penetration did occur and the same left lacerations on the minor's perineum region.

59. On whether the act of penetration was done by the appellant herein, the testimony of PW2 and PW3 was that the minor and her sisters were left in the care of the appellant who was a boyfriend to the minor's mother. PW2 and PW3 further testified that the minor stated that the accused had touched her breasts and her vagina and further that PW3 added that V. had cracks on her vagina and she put V. on some salty water. For his part, the appellant testified that on the material date the minor was left in his sole custody. He denied defiling the child.

60. The trial court which had the opportunity to view the prosecution witnesses as well as the appellant during trial found the prosecution witnesses to be truthful and consistent in their testimonies and thus had no reason to doubt their evidence whereas it found the defence by the appellant to amount to mere denial, based on the evidence presented before the trial court and which I have had the opportunity to go through. Albeit the appellant denied defiling the minor, he also denied that the minor was defiled by anyone else or that he suspected anyone else to have defiled her. The appellant also stated that he had stayed home on the material day throughout with the minor, which meant that there was no opportunity for any other person to defile the child. Iam persuaded as was the trial court that the appellant and no other person defiled the minor. I find no fault with the trial magistrate's finding of guilt against the appellant. The challenge against conviction is found to be devoid of merit and is hereby dismissed.

6) Whether the sentence imposed upon the appellant was harsh and or unconstitutional.

61. 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. 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.

62. From the record the accused faced a charge of defilement contrary to section 8(1) of the Act. The victim of the defilement was found to be aged 2 to 3 years old. The appropriate sentence on conviction is provided in Section 8(2) of the Act to be 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 life imprisonment.

63. 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** 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."***

64. Similarly, the former Court of Appeal for Eastern 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."***

65. In the present appeal. The horrors and trauma of a victim of defilement especially of a child of such little age are such that they leave a permanent psycho-traumatic experience on the babay. I am alive to the fact that when Parliament legislated for minimum sentences in sexual offences, it was meant to deal with societal problems 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.

66. In the present appeal, after conviction, the record reveals that the appellant mitigated saying he was remorseful for the physical pain and

damage he had caused to the victim. I take note of the Supreme Court of Kenya's decision in **Francis Karioko Muruatetu (supra)** as consolidated with Petition No. 16 of 2015 (the Muruatetu decision) in which the Supreme Court held that the mandatory death penalty as provided under Section 204 of the Penal Code is unconstitutional as it deprives the courts discretion to impose an appropriate sentence depending on the particular circumstances of each case.

67. The Court of Appeal in **Dismas Wafula Kilwake v Republic Criminal Appeal No. 129 of 2014** extended the reasoning of the Supreme Court in the Muruatetu decision to mandatory minimum sentences provided under the Sexual Offences Act and held that Section 8 of the Sexual Offences Act must be interpreted in a way that does not take away the discretion of the Court in sentencing. In the instant case, the minor complainant was between 2 and 3 years old. The trial court noted the appellant's mitigation. In **Christopher Ochieng v R [2018] eKLR the Court of Appeal** stated as follows: -

> ***"In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis… Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another v Republic (supra) we should set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years imprisonment from the date of sentence by the trial court."***

68. Guided by the Supreme Court in the **Muruatetu** decision and persuaded by the case of **Christopher Ochieng v R (Supra)** and by **Dismas Wafula Kilwake** decision in relation to sentencing, it is my opinion that the life imprisonment meted upon the appellant cannot stand. See also **Solomon Limangura v Republic [2019] eKLR**. I would therefore interfere with the same and set aside the life imprisonment and substitute it with a prison term of 80 years to be calculated from the date of arrest of the appellant.

69. For all the above reasons, I find and hold that the appeal herein against conviction is devoid of merit. The same is hereby dismissed. The appeal against sentence is allowed to the extent that the life imprisonment is set aside and substituted with a prison term of sixty [60] years to be calculated from the date of arrest of the appellant on 15th March 2019.

70. Right of Appeal explained to the appellant.

Orders accordingly.

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

R.E. ABURILI

JUDGE