



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKUENI
CRIMINAL APPEAL NO. 155 OF 2019

SAMUEL KIMOTHO MUTISYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence by Hon. J.N Mwaniki (SPM) in Makueni Senior Principal Magistrate's Court Criminal Case No. 13 of 2019 delivered on 21st November, 2019).

JUDGMENT

1. **Samuel Kimotho Mutisya** the Appellant was charged with the offence of defilement of a child contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 27th day of February 2019 at Kathonzweni market in Kathonzweni sub-county within Makueni county intentionally caused his penis to penetrate the vagina of S.M.K a child aged 14 years.
2. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2007. The complainant was still the one in the main count and it was alleged that the Appellant had intentionally touched her vagina.
3. After a full hearing the Appellant was found guilty, convicted and sentenced to twelve (12) years imprisonment.
4. He was aggrieved and filed an appeal through the firm of J.M. Tamata & co advocates who raised the following grounds:
 - a) **That**, the learned Magistrate fell into error when he found that the component of age had been proved.
 - b) **That**, the learned Magistrate failed to find that Pw6 P.C Chepkemoi was not the author of the report exhibit 5 and could not be questioned on its contents.
 - c) **That**, the learned Magistrate erred when he failed to find that the alleged age assessment report, whose the author was not known, qualification were not indicated and was not detailed and went ahead asked himself wrong questions.
 - d) **That**, the whole trial and proceedings were conducted unfairly.
 - e) **That**, the sentence imposed was excessive and the learned Magistrate failed to exercise his

discretion properly as per the circumstances of the case.

- f) **That**, the learned Magistrate failed to give the Appellant evidence sufficient consideration.
- g) **That**, the learned Magistrate failed to find that vital and crucial witnesses were not called that is the Doctor, author of report, mother and father of the complainant.
- h) **That**, the decision of the learned Magistrate was against the weight of evidence.
- i) **That**, the learned Magistrate erred when he failed to find that the conduct of the complainant affords Appellant the defence under section 5 of Sexual Offences Act.
- j) **That**, the Appellant prays that the conviction and sentence be quashed.

5. A summary of the prosecution case is that Pw1 (S.M.K) then aged 14 years went with her aunt (Pw4) to Kathonzweni hospital on 25th February 2019. She was going for an examination following her involvement in penetrative sex with one Vincent. She was treated and they went home. She had an appointment for 27th February 2019. On this day Pw4 told her the doctor told her she had to go back to the hospital alone.

6. Pw4 called the doctor and informed him that S.M.K had left school. She went to hospital at AIC Kathonzweni using a boda boda rider. The doctor whom she identified as the Appellant took a bit of time to come. When he came he told her there are certain forms/documents she was to fill near a police station. He asked her to follow him which she did. He led her to his house, opened it and asked her inside but she did not enter.

7. While inside he removed his clothes and covered himself in a lessso. He said he wanted to go to the bathroom and she later entered the house. That is when he took her to his bed, and removed his clothes plus pants and had sex with her by inserting his penis into her vagina. The lights in his house were on though it was about 5:00 pm.

8. After the sexual intercourse he told her to go and take a shower which she did. When she came to hospital she was still in her school uniform and that's what she was in when she left the Appellant's house. While still there, police officers came and knocked the door. The Appellant told her to hide in the bedroom as she was in the sitting room. He then opened the door and the officers (*two male and one female*) entered.

9. Both the Appellant and S.M.K were taken to Kathonzweni police station, then later to Kavumbu police station and finally Wote police station. Pw1 was treated and examined at Wote county hospital. The boda boda operator (Pw5) who had been waiting for her was sent to call her aunt (Pw4).

10. **Pw2 Stella W. Waswa** is the clinical officer who examined S.M.K. She said S.M.K had a history of defilement by a clinician. She was in a dirty school uniform. Upon examination her vagina was found to be normal with no discharge. She produced the P3 and PRC forms (EXB 1 and 2), six lab reports and a brief report (EXB3 and 4) and age assessment report (EXB 5). Her conclusion was that S.M.K had been defiled and had had several defilements.

11. **Pw3 No.2013057415 APC Jacob Erick Muthoka** was one of the officers who went to the Appellant's house in company of I.P Kavingu and sergeant Lilian. They had acted on a report of a school girl being in the Appellant's house. The girl they found in the Appellant's house was S.M.K. The Appellant was found in a pair of trousers and a vest, while S.M.K was in a school uniform with a lessso wrapped around her.

12. **Pw4 BNM** is S.M.K's aunt who took her to hospital on 25th February 2019. The rest of her evidence is similar to that of S.M.K. She said she had been in communication with the doctor as she sent S.M.K to

him on 27th February 2019. She said S.M.K is her brother's daughter and she was assisting since S.M.K's mother had left the home. The doctor she was talking about is the Appellant.

13. **Pw5 NWN** is a boda boda operator aged 52 years. He confirmed taking S.M.K, to Kathonzweni AIC church's gate on 27th February 2019 having been sent by Pw4 who had given him a yellow paper with a contact and he called the person who gave him directions. He identified the yellow paper which was produced as (EXB6).

14. When he arrived he called the doctor who came and left with S.M.K through the AP's gate. He waited for so long and called the doctor who told him he had not finalized filling the forms. When he later called its somebody who picked the call and asked him to go to the AP camp where he found the doctor and S.M.K. He identified the Appellant as the doctor he had been sent to. He was sent to call S.M.K's father and Pw4 which he did.

15. **Pw6 No. 106831 PC Sussy Chepkemoi Ndiema** was the investigating officer. She took S.M.K and the Appellant to Makueni referral hospital for examination. She gave a summary of S.M.K's evidence. She produced the yellow piece of paper (EXB6) with the Appellant's contact which she was given by Pw5. She also produced the age assessment report (EXB5) and photos taken at the Appellant's house (EXB 7a – d). The Appellant had no objection to the witness producing them.

16. In his sworn defence the Appellant denied the charges. He confirmed being a clinical officer based at Kathonzweni hospital and being on duty on 25th February 2019, when S.M.K who was in school uniform and Pw4 came to the facility at 3:00 pm. Pw4 wanted the child screened for pregnancy and HIV test. After consultation he ordered and did the tests after taking her history. S.M.K explained to him how she had been sexually active with her boyfriend Vincent hence the need for the tests.

17. He got another assignment and the operations with S.M.K had to be put off to the next day. Pw4 then called him and told him she would make it the following day, but did not. She came alone on 27th February 2019 and explained that her family and that of S.M.K's boyfriend had amicably settled the matter and did not want the matter reported to the police. He told her he would all the same fill the PRC form and make a report, and requested her to avail S.M.K.

18. On his way home, Pw4 called him and said she would bring S.M.K. He reminded her it was past working hours, but she insisted. He then told her he was near the gate to the police station on his way home. The next thing he saw S.M.K standing opposite the AIC church gate in company of a bodaboda rider. S.M.K who was in a school uniform plus a lessa told him she had been sent to him by her aunt. He met an AP officer called Lilian and he entered his house.

19. It was hot and he removed his shirt and shoes and started watching television. After about five (5) minutes, S.M.K opened the door and removed her shoes and closed the door. She still had her lessa. In less than two (2) minutes he heard a knock and went to open the door. He found three (3) police officers as S.M.K rushed in his bedroom.

20. The officers questioned S.M.K who told them he had defiled her. One A.P (Erick) demanded Ksh.100,000/= for them to drop the case, which he declined. Photos of him were taken. They were taken to the police station and on the way he heard AP (Eric) talking to somebody who he later came to know was the bodaboda rider. He argued that EXB1 was filled by Stella Muasya a clinical officer who had been recalled from leave for that purpose. His P3 form was also filled by Stella Muasya. He produced the leave form for Stella (DEXB1). He further claimed there was a police officer on his compound who should have stopped S.M.K from entering his house. He dismissed the age assessment report as not being proper as it had no author, and the proper procedure had not been followed in filling it. He did not call any witnesses.

21. The appeal was canvassed by way of written submissions. Both parties did file their submissions.

22. Mr. Tamata for the Appellant submits that the component of age of SMK was not established and proved beyond reasonable doubt by the prosecution. He has referred to the case of **Alfayo Gombe Okello –vs- Republic (2001) eKLR** where it was held:

“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 of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow for proof of the offence under section 8(1) in this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came proving the age was the statement by her mother MA when she testified on 16th October 2007 that ...” This child in court is mine aged 14 years born in 1992 ... the other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore, take the construction which is favourable to the Appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find”.

He also referred to the cases of **Kibet –vs- Republic Criminal Appeal No. 155 of 2011** and **Benard Kimgetich Rono –vs- Republic (2019) eKLR** on the same issue of age.

23. It’s his submission that SMK did not indicate her date of birth though in examination in chief she said she was 14 years while in cross examination she said she was 15 years. He urged the court to note that none of SMK’s parents testified and her aunt (Pw4) did not produce anything to prove her age. He argues that SMK was over 18 years of age considering her previous conduct.

24. Counsel dismissed the age shown on the P3 form which was an estimate. He further dismissed the “Age assessment report EXB5” as not being detailed and its maker was unknown. That its production was objected to. He refers to the case of Said **Mohammed –vs- Republic (2017) eKLR** where Dulu J. rejected an age assessment report in similar circumstances.

25. Similarly in **Emmanuel Mwadime –vs- Republic (2016) eKLR** a report produced by an investigating officer was rejected since the investigating officer was not competent enough to produce it. It is his submission that failure to prove age to the required standard automatically leads to the collapse of the prosecution case against the Appellant. That S.M.K had reached the age of maturity hence her laughing in court when she testified of having slept with over four (4) adult men and she could therefore make decisions in respect to her life and body.

26. On the weight of the evidence, he contends that the conduct of the police and Pw4 shows this to be a clear case of set up and need to make money. He goes on to submit that the trial court failed to consider the Appellant’s defence, which he set out in point form. He argues that the chronology of events did not resonate with the commission of a crime of defilement in a natural flow of events. To him this was a calculated move to have the Appellant fixed.

27. Counsel has submitted that statements of Pw1, Pw3 and Pw6 vary on how the Appellant met SMK. He mentions the issue of removal of clothes and wonders why the complainant did not scream. He also submits that the medical evidence (EXB1) does not support a case of defilement, and neither were the photos produced by a scene of crimes officer.

28. He goes on to argue that crucial witnesses were not called, he relies on the case of **Bukenya & Others –vs Uganda (1972) E.A 549** where it was held:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate; the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.”

He argues that failure to call S.K.M’s parents and the author of EXB5 was critical. He therefore invites

the court to make an adverse inference against the prosecution on this.

29. Finally, counsel submits that the trial and proceedings were conducted unfairly and in a rushed manner such that the Appellant did not have time to properly prepare. He mentions a time when the Appellant was forced to proceed in the absence of his advocate who was indisposed. That during that time the prosecution sneaked in documents like (EXB5 and EXB7 a- d) unprocedurally.

30. The Respondent opposed the entire appeal through learned counsel Mrs. Ann Penny Gakumu. On the issue of age, she submits that the prosecution proved that SMK was 14 years at the time of incident and she was in standard eight at [particulars withheld] primary school. This was supported by all the medical evidence namely EXB1, 2 and 5. She adds that the birth certificate insisted on by the Appellant is not available in most of the rural set ups, saying technicalities should be avoided as per Article 159 of the Constitution.

31. On the age assessment (EXB5), she submits that the same was filled by a medical officer in the course and discharge of his professional duty. She has referred to section 33(a), section 77(1) and (2) of the Evidence Act and argues that the signature on the document is assumed to be of the person holding the said office and no objection was raised to the production of EXB5. She relies on the case of **Hiram Mwangi Gathonjia -vs- Republic Criminal Appeal No. 44 of 2013 (NKR)** where Emukule J. stated at paragraph 22;

“Even though the P3 form, the PRC form, an age assessment (which the Appellant seeks to be excluded from the evidence) were tendered by Pw3, the police investigating officer, and not the maker thereof (that is to say, the medical officer who examined the child and filled the form) contrary to the Appellant’s contention otherwise the said documents were properly admitted in evidence under section 33 and 77(1) and (2) of the Evidence Act.”

32. Counsel submits that the elementary principle of criminal law is for all witnesses to be availed to establish the truth, but there is no particular number of witnesses who are required for proof of a fact. Further that the prosecution is not obliged to call a superfluity of witnesses. See section 143 of the Evidence Act and **Bukenye & Others –vs- Uganda (supra)**.

33. She submits that penetration was proved by the evidence of S.M.K which was corroborated by the evidence of the clinical officer (Pw2) Stella Muasya who examined her. She contends that under the proviso to section 124 of the Evidence Act the evidence of SMK if believed would still suffice. She refers to the case of **Geoffrey Kioji –vs- Republic Criminal appeal No. 270 of 2010 (Nyeri)** where the court stated as follows:

“Where available medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reason for such belief.”

34. On the issue of identification she submits that the Appellant and SMK were not strangers to each other and **Pw3 No. 2013057415 APC Jacob Erick Muthoka** placed both S.M.K and the Appellant at the scene. Further that **Pw4 Benge Ndunda Matolo and Pw5 Nathan Wambo Ndoo** corroborated SMK’s evidence on what transpired that day. She also submits that there was no inconsistency in the evidence of the prosecution witnesses on the narration of the unfolding of events. In any event she says minor inconsistencies cannot affect the outcome of the case of the prosecution. She refers to the case of **Richard Munene –vs- Republic (2018) eKLR** where the Court of appeal 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.”

35. It's her contention that the Appellant's defence was a mere denial and did not displace the prosecution case. She further contends that the 12 years sentence should be enhanced to 20 years as provided for under section 8(3) of the Sexual Offences Act. All in all she urges the court to dismiss the appeal.

Analysis and determination

36. This is a first appeal and this court is under a duty to re-analyse and reconsider the evidence on record to arrive at its own conclusion. It must bear in mind that unlike the trial court, it did not have the opportunity to see, hear the witnesses and so give an allowance for it. **See Okeno –vs- Republic (1972) E.A32; Kiilu & Another –vs- Republic (2005) 1 KLR 174; Simiyu & Another –vs- Republic (2005) I KLR 192.**

37. I have carefully considered the evidence on record, grounds of appeal, submissions by both parties, and the law. I find the issues falling for determination to be as follows:

- Whether the proceedings were conducted unfairly.
- Whether the prosecution failed to call crucial witnesses.
- Whether SMK's age was proved.
- Whether there was proof of penetration of the genital organ of SMK.
- Whether the Appellant was identified as the perpetrator of the offence complained of.
- Whether the sentence was too harsh and excessive.

Issue (i) whether the proceedings were conducted unfairly.

38. Counsel for the Appellant has submitted that the trial was rushed and the Appellant had no time to prepare. Secondly that it's during that time that EXB5 (*age assessment report*) and EXB7a – d (photos) were produced without a certificate. The record shows that the Appellant was not represented at the start of the case. Mr. Tamata came on record after S.M.K had testified and she was recalled and he cross examined her as well as Pw2 and Pw3 on the same day.

39. On the next day of hearing i.e. 21st May 2019, Mr. Tamata was said to be indisposed but the trial court decided to proceed with the three witnesses (Pw4 – Pw6) who were present. He however gave the following rider at page 13-

“Court: I will secure the evidence of the three witnesses in court. If need to have them re-called arises, the issue shall be addressed by the court. They will be recalled subject to their availability.”

40. The prosecution closed its case and the Appellant was placed on his defence. When counsel appeared on 25th June 2019 he made an application for recall of Pw4 – Pw6. He stated as follows at page 13 still lines 17 – 19:

“Mr. Tamata: I do pray for re-opening of the prosecution case and cross-examine further the prosecution witnesses who testified last time in my absence being Pw4 – pw6. I can proceed if they are in court.”

The same was granted by the court subject to the availability of the witnesses.

41. The witnesses Pw4 and Pw5 were availed after the recall. Pw6 was said to be on maternity leave and could not be availed. This is what transpired when it came to Pw6's turn to testify.

Cross examination upon recall at page 21 lines 27-29

“DPP: The investigating officer is on a maternity leave.

Mr. Tamata: I will not need recall of the investigating officer but I wish to submit on some legal issue. I need about three days to do that.”

42. Despite the Appellant having fully cross examined Pw1, Pw4 – Pw6 the court still granted Mr. Tamata an opportunity to recall them for further cross examination. It is Mr. Tamata who declined the recall of Pw6 when she was said to be on maternity leave. This matter took exactly eight months and three weeks in court before finalization. At no time did the defence indicate unpreparedness to the trial court.

43. Counsel has also talked of documents being sneaked in the case in his absence. The age assessment report (EXB5) was first introduced in court by Pw2 in the presence of Mr. Tamata. It was marked for identification with no objection from him. What the investigating officer Pw6 was to do was to simply produce it as there was no objection to it. The photos (EXB7a – d) were produced after the Appellant said he had no objection to their production.

44. This is what the record of appeal shows at page 17 lines 13-16 **Pw6 No. 106831 Pc Sussy Chepkemoi Ndiema** *I have some photos taken by the scenes of crimes officer at accused's house and which I wish to produce.*

Accused: I have no objection to production of the photos by the witnesses.

4 photos – P. Exhibit 7(a)-(d)

45. It is therefore not clear how the documents were sneaked in as claimed by the Appellant. I find no merit in this ground, as there was no unfairness in the handling of the case. The Appellant and his counsel fully participated.

Issue (ii) whether the prosecution failed to call crucial witnesses.

46. Counsel while relying on the case of **Bukenya & Others –vs- Uganda** has submitted that there were crucial witnesses namely minor's biological parents, author of EXB5, who were not called to prove certain facts. He did not state what was not proved which the parents were to come and prove. For EXB5 counsel said the said document ought to have been produced by its maker.

47. As stated earlier EXB5 was first introduced in court by Pw5 a clinical officer based at Makueni referral hospital, since 2016 and marked PMFI – 5. It originated from Makueni county referral hospital. It has the stamp of the medical superintendent of the said facility. Mr. Tamata never asked Pw1 any question about this document. The Appellant in his defence explained how age assessment is undertaken which was not followed in this case.

48. I have looked at exhibit 5 and it has the stamp and a signature of an officer from Makueni referral hospital. The document was therefore later produced under section 77(1) and (2) of the Evidence Act by the investigating officer. (see also the case of **Hiram Mwangi Gathonjia –vs- Republic** (supra).

49. There was therefore no need to call the doctor who did the assessment. Failure to call SMK's parents did not cause the Appellant any prejudice because they were not involved in this case. All they may have known is what they were told which is hearsay evidence. In any event, section 143 of the Evidence Act

provides that there is no set number of witnesses to be called by the prosecution to prove a particular fact. The prosecution is not duty bound to call a flood of witnesses to prove a single fact.

Issue (iii) Whether S.M.K's age was proved.

50. Mr. Tamata has made lengthy submissions on this. The evidence before the court on this issue is SMK (Pw1), Pw2, and Pw6. SMK in her evidence in chief said she was 17 years old while in cross examination she said she was 14 years. (*I have confirmed this from the original record by the trial Magistrate.*) Pw2 referred to the information on the P3 and PRC forms (EXB1 and 2) which showed an estimated age of 14 years.

51. The importance of proving the age of the complainant in sexual offences was emphasized in **Alphayo Gombe Okello –vs- Republic (2001) eKLR** where the court stated:

“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:

52. In the case of **Francis Omuroni –vs- Uganda**, court of Appeal in Criminal Appeal No. 2 of 2000 observed as follows:

“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....”

53. PEXB 7a – d are photos of S.M.K and the Appellant which were produced with no objection from the Appellant. Two of the photos are of the complainant (S.M.K). The photos clearly show that S.M.K was a child. The submission that S.M.K was over 18 years of age is baseless and is not supported by any evidence. The trial court unlike this court saw the child and was convinced she was 14 years. As stated in the **Francis Omuroni** case (supra) observations and common sense may add to the confirmation of the age of a victim. These observations were made by the learned trial Magistrate in this matter.

54. As earlier found EXB1 and 2 were produced by Pw2 a clinical officer, while EXB5 was produced by the investigating officer (Pw6) after being identified by Pw2 and the officer from Makueni county referral hospital. The mere fact that S.M.K whose age was proved to be 14 years was involved in sexual activities with men does not alter or affect that age.

Issue (iv) Whether there was proof of penetration of the genital organ of SMK.

55. Under section 2 of the Sexual Offences Act penetration is defined as:

“The partial or complete insertion of the genital organs of a person into the genital organs of another person;

The court of Appeal in the case of **Sahali Omar –vs- Republic (2017) eKLR** held that:

“...Penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the Sexual Offences Act.

56. S.M.K and Pw4 told the court how they had been to Kathonzweni hospital on 25/02/2019 for some tests and they had met with the Appellant “the doctor”. The Appellant does not deny that. They were given an appointment for 27th February 2019. The Appellant confirmed that the testing was not yet

complete when he was called for another assignment and so he told S.M.K and Pw4 to return the next day, but they did not come.

57. Pw4 sent **Pw5 Nathan Wambo Ndo** to drop S.M.K at the hospital. A yellow paper (EXB6) with the Appellant's contact was given to Pw5 by Pw4 and that helped him get the Appellant. It was SMK's evidence supported by that of Pw5 that the Appellant found them at the AIC gate Kathonzweni and he left with SMK, leaving Pw5 at the gate. The Appellant in his defence denies leaving with SMK but he said SMK followed him to his house and opened the door and entered and removed her shoes.

58. S.M.K explained how the Appellant entered the house first, undressed, wrapped a lessso and invited her in. He then inserted his penis into her vagina. When through he told her to go and take a shower which she did, dressed up and went to the sitting room. The Appellant denied all that. He said he was innocently sitting in the house with SMK when the police officers arrived. If the Appellant is to be believed then he could have taken action to get S.M.K out of his house.

59. The minor was taken to hospital for treatment and examination the next day (on 28th February 2019). **Pw2 Stella W. Mwasya** testified on the results of the examination. She found S.M.K to have a normal vagina with no discharge, old broken hymen. She had showered as directed by the perpetrator. The history given was of several defilements including that which had taken her to the hospital on 25th February 2019. This evidence by Pw2 seems not very conclusive on the medical findings on the act of penetration.

60. The only evidence this court is left to consider on this issue is that of SMK. Was she a truthful and credible witness for her to be aligned to the proviso to section 124 of the Evidence Act? The proviso to section 124 of the Evidence Act states:

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

61. First of all, there is no dispute that SMK was found by Pw3 and others in the house of the Appellant on 27th February 2019 evening, having acted on some information. Pw5 said it was past 5:00 pm when he was sent to drop SMK at the hospital. Pw4 also confirms having sent SMK and Pw5 to the doctor at about 5:00 pm. When the Appellant received SMK and Pw5 he did not take them to the hospital but instead led SMK to his house though he says SMK followed him there.

62. The Appellant is the officer who received SMK and Pw4 at the hospital on 25th February 2019. They gave him the history of all that had happened to SMK leading to the request for the HIV and pregnancy tests. Assuming that indeed SMK followed him and entered his house without his invitation and even closed the door, what did he do as an adult and medical person? There was no one else in that house.

63. The Appellant's defence does not just add up. This is what the trial court found of the evidence of SMK. He sated this at page 35 lines 16 – 21 of the Record of Appeal.

“Despite her history on matters of sex, the complainant appeared and remained a credible and honest witness. The court never saw any reason to doubt her evidence. The court also never found any evidence of existence of differences or grudges or hostility between her and Pw4 on the one hand and the accused on the other as would make her act in concert with Pw4 to make up a case against the accused.”

64. After considering the evidence on record and the trial court's observations I find that SMK told the court the truth of what the Appellant had done to her. He was found in a vest and had sent the child to his bedroom. That is where she was found in uniform and sitting on his bed. How did she find herself on his bed from his sitting room if his story is to be believed? Why did he allow her into his bedroom? The

photos (EXB7a-d) speak for themselves. The Appellant failed to give a satisfactory explanation of what he was doing with SMK in his house.

Issue (v) Whether the Appellant was identified as the perpetrator of the offence complained of.

65. The evidence of SMK and Pw3 – Pw5 speaks to this. Pw4 sent SMK and Pw5 to the Appellant for filling of certain forms. Pw5 confirmed that it is the Appellant who left with SMK through the A.P camp. He did not see her again until they met at the A.P camp after being directed to go there. Pw3 and two other officers went to the Appellant’s house and found him there with SMK who was in a school uniform and seated on his bed. I find that the Appellant was identified as the perpetrator.

66. Section 8(3) of the Sexual Offences provides:

8(3) Any 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.

The minimum sentence provided as stated is twenty (20) years imprisonment. In sentencing the Appellant the trial court indicated that it had taken into account the sentence provided by the law, and everything else. From the record, I do note that the trial court took into account everything it had noted especially the standing of the accused hence the sentence of twelve (12) years). I do not find any reason whatsoever to make me interfere with the findings by the trial court.

67. The upshot is that the appeal lacks merit and is dismissed.

Orders accordingly

Delivered, signed & dated this 10th day of November 2020, in open court at Makueni.

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H. I. Ong’udi

Judge