



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 53 OF 2016 [SOA]

(CORAM: R.E. ABURILI – J.)

DAVID TOETI MIGESHA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both the conviction and the sentence dated 19.5.2017 in Criminal Case No. 1072 of 2016 in Bondo Law Court before Hon. E.N. WASIKE – S.RM.)

JUDGMENT

1. The Appellant **DAVID TOETI MIGESHA** was charged with the offence of **Defilement contrary to Section 8 (1) as read with Section 8(2) of the Sexual Offence Act No. 3 of 2006**. He also faced an alternative charge of **Indecent Act Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**.

2. Particulars of the main charge are that on the 27th day of September, 2016, in Rarieda Sub-County within Siaya County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of MA a child aged 4 years. In the alternative charge, it was alleged that the Appellant committed an Indecent Act with MA a girl aged 4 years by rubbing his penis against her vagina.

3. The Appellant pleaded not guilty and the Prosecution called 3 witnesses to prove its case against the Appellant who also gave sworn statement of defence denying the offence. This being a first Appellate Court, I must reassess and re-examine the evidence tendered before the trial Court and arrive at my own independent decision, bearing in mind the fact that I did not hear or see the witnesses as they testified. ***(See Okeno v Republic)***.

4. Revisiting the trial Court record, **PW1 JAO** from Asembo, a female adult of sound mind and mother to the Complainant testified that the Complainant child was aged 3½ years as per her baptismal card produced as an exhibit. She recalled that on 27.9.2016 at about 4 pm she was bathing when the Complainant Child went to where she was and removed her inner pant and when the witness (PW1) asked her what had happened to her the Child told PW1 that when She went to urinate, she saw blood coming out of her vagina.

5. PW1 asked the Child further and the Child revealed that it was the Appellant who had inserted his thump into her vagina then he took his penis and inserted it in her vagina and that the Appellant had caused her and placed her on his laps when he defiled her at 1 pm on the same day in their homestead when the mother. PW1 was away. When PW1 checked on the Minor, she saw blood on the vagina. She then went to Rambugu Dispensary and had the minor treated and a treatment book was given to her, which was later produced as an exhibit. From Rambugu, they were referred to Bondo District Hospital where the Minor was given further treatment and treatment notes given.

6. She was then referred to Ndori Police Station where she reported and was issued with a P3 form dated 28.9.2016. The Appellant was traced, arrested and charged in Court. PW1 identified the Appellant as a person she knew prior to the incident.

7. On being cross-examined by the Appellant, PW1 stated that the Appellant usually followed a certain route which is near her homestead. Further, that she was away from home during the incident and that the Minor usually talks but she was afraid of talking before the Court.

8. **PW2 No.48932 PC Samson Katana**, testified and stated that he was he Investigating Officer in the matter. He recalled that on 27.9.2016 he was at Ndori Police Station where he is attached when he received a defilement report from a minor MA accompanied by her mother. He interrogated the Minor who had already received treatment at Rambugu Dispensary. He recorded their statements after which he issued them with a P3 form. He also received her Baptismal card which he produced as Exhibit No. 1. On 28.9.2016 he rearrested the suspect from the Assistant Chief of Siger Sub-Location, interrogated the suspect and charged him with the offence.

9. **PW3 Jared Obiero Opondo**, a Clinical Officer, at Rera Sub-County Hospital testified that he examined the Minor MA on 27.9.2016 and

found that she had bruises on the labia minora. The injuries were a day old and the object used was blunt. She was put on pain killers and antibiotics. She was given prophylaxis. The nature of injury was grievous harm. He concluded that the Minor was defiled.

10. He stated that the Minor had been treated at Rambugu Dispensary and Bondo Dispensary. He produced P3 form as an exhibit and the treatment notes/books from Rambugu Dispensary. He reiterated his testimony in chief on being cross-examined by the Appellant.

11. On being placed on his defence by the Court, the Appellant testified on oath and called no witness. He stated that he was from Vihiga, a farmer and businessman. He recalled that on 27.9.2016 at about 10.00 pm he was in his house when he heard people knock his door. He told his wife to open the door which she did and she was asked if he was present which she answered in the affirmative and he was summoned. He went to the living room and saw the area Assistant Chief and 3 elders. The Assistant Chief told him that he had gone to arrest the Appellant and when the Appellant inquired why, he was told that he would know later. He was then arrested and escorted to Ndori Police Base where he was placed in the cells.

12. The following day at around 6 pm, the Appellant saw the Complainant at the Station. He was then transferred to Aram Police Station. On 29.9.2016 he was arraigned in Court and the charges read out to him. He stated that he had personal issues with the Sub-Chief that is why he was framed with the case. He denied committing the offence.

13. In his judgment dated 12.5.2017 Hon. E.N. Wasike found the Appellant guilty of the offence of defilement as charged on account that the Prosecution had proved beyond reasonable doubt all the elements by defilement in the main charge. He convicted the appellant Person and after mitigation, he sentenced the Appellant to serve life imprisonment.

14. Dissatisfied with the above conviction and sentence by the trial Court, the Appellant filed this appeal on 31st May 2017, the setting out the following grounds of Appeal:

- 1) That the learned trial Court's Magistrate erroneously convicted the Appellant on the purported allegation without noticing that the adduced evidence was insufficient in law.**
- 2) That the Medical evidence adduced was insufficient to warrant a sound conviction.**
- 3) That the trial Court erred by failing to note that vital witnesses were not called to give satisfactory evidence.**
- 4) That I cannot recall all that transversed (sic) during the trial hence pray for the trial records to adduce sufficient grounds at the hearing thereof.**
- 5) That I pray for orders of Habeas corpus.**

15. At the hearing of the appeal, the Appellant also filed additional grounds of appeal. In the said grounds, he contends that:

- 1) The learned trial Magistrate erred in law and fact by failing to appreciate that the Prosecution's case was insufficient. Inconsistencies which lacked probative value (sic).**
- 2) The trial Magistrate erred in law and fact by failing to note that the medical evidence produced in Court did not support the charge against the Appellant;**
- 3) The trial Court erred both in Law and fact by convicting the Appellant notwithstanding that very crucial witnesses were not called to support the alleged defilement charges;**
- 4) The learned trial Magistrate erred in Law and fact by failing to appreciate that the entire records were with full contradictions which proofs a frame up case.**

16. The Appellant argued his appeal orally on 18.2.2019 and adopted his written submissions titled "**courteous address.**" According to the Appellant, the Prosecution failed to apply to Court to allow the Complainant's Mother testify on her behalf and that the trial Court should have been left to assess the Complainant's capability. That an intermediary who is not an interested party should have been allowed to testify instead of the Mother to the Complainant. Further, that the Appellant's right to access information under **Article 35(1) (b) of the Constitution** was not given witnesses statements before commencement of the trial as a consequence of which the Appellant's statements before commencement of the trial as a consequence of which the Appellant's right to a fair trial guaranteed under **Article 50 (1) of the Constitution** was violated.

17. Secondly, it was submitted that the Medical evidence adduced by the Prosecution did not support the charge preferred against the Appellant. It was submitted that the P3 form issued to the Complainant by PW2 on 27.9.2016 was filled on 28.9.2016 which is a contradiction. He complains that once a P3 is issued it should be filled the same day not the following day.

18. That although the charge sheet claims that the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of the Complainant aged 4 years, the P3 form produced does not show any penetration. That had there been penetration, the hymen would have broken yet in this case there was no indication of whether or not the hymen was present hence penetration did not take place.

19. That albeit the evidence was that the Complainant was defiled on 27.9.2016, she only sought treatment on 28.9.2016. In his view, a Minor who was defiled could not have endured pain for more than 24 hours.

20. The Appellant submitted that albeit the Complainant's mother testified that the child was first taken to Rambugu Dispensary then later to Bondo Sub-County Hospital for treatment. The exhibit No. 2 which is treatment book is from Bondo Sub-County Hospital not Rambugu Dispensary and that the one from Bondo Sub-County Hospital does not even bear the date when the Hospital received the patient or that the patient was treated.

21. That albeit the witness who produced a P3 form stated that the P3 form was filled at Rera Sub-County Hospital, there were no records showing that the child visited that facility and that PW1 stated that after leaving Rambugu Dispensary, they were referred to Bondo Sub-County District Hospital where the Minor was treated and issued with some documents.

22. Further, that the P3 form did not come from either Rambugu Dispensary or Bondo Sub-County District Hospital hence the production of the P3 form should be declined since PW3 lied to the Court. Further, that the Prosecution should have brought somebody from Rambugu or Bondo Sub-County Hospital to testify instead of awaiting a Clinical Officer from Rera Sub-County Hospital yet the child was never treated at the latter hospital.

23. It was also submitted that the Prosecution case was not proved beyond reasonable doubt because the Prosecution failed to call some crucial witnesses who were mentioned at the trial including the area Assistant Chief who is said to have arrested the Appellant as stated by PW2 that he rearrested the Appellant suspect from the Assistant-Chief of Siger Sub-Location. That it was necessary to call the Assistant Chief to explain why he arrested the Appellant; and to explain where he got the orders of arresting the Appellant yet there was no evidence from PW1 or the Complainant that they had informed the Assistant-Chief of the incident.

24. That the Assistant Chief may have been in bad terms with the Appellant hence he framed the accusations and that the Appellant was never given reasons why he was being arrested hence a denial of his right to be informed of the reasons for his arrest. It was further submitted that the Prosecution should have called was one of the three elders who participated in the Appellant's arrest to explain the circumstances and evidence of the arrest.

25. Lastly, it was submitted that albeit PW1 testified that she received a report from the Complainant that the defilement took place on 27.9.2016, yet there was no medical evidence to show that the child was treated on the same day that she was defiled. That the treatment notes only show that she was treated on 28.9.2019 Further, that the Prosecution failed to produce the Complainant's inner pant which is believed to have some blood stains as testified by PW1.

26. In his oral highlights adopting the written submissions, the Appellant submitted that he was not born where the incident took place but that he had just gone to live there. That he had issues with the Assistant Chief who was envious of his development in the area and threatened to fix the Appellant. He denied that he defiled the child who was a neighbour's child. He stated that he was 58 years old, married with 8 children.

27. In opposing the appeal, the Prosecution led by Mr. David Okachi submitted that PW1's evidence was corroborated by PW3's evidence and that the issue of the Assistant Chief does not fit in. That the offence was serious, against a 4 year old child and that the conviction was sound and sentence lawful Counsel urged the Court to dismiss the appeal and uphold the judgment of the trial Court.

DETERMINATION

28. I have carefully considered the appeal herein, grounds, and submissions for and against the appeal and reassessed the evidence on record as adduced by the Prosecution witnesses and the defence. In my humble view, the following issues arise for determination:

1) Whether the trial Court erred in allowing the Complainant's mother to testify instead of an intermediary as the Complainant's mother had an interest in the matter.

2) Whether the trial Court erred in proceeding to hear and determine the matter without considering the fact that the Appellant did not have witness statements and therefore whether the Appellant's rights to access information from the state as guaranteed under Articles 35(1) (b) and 50 (1) of the Constitution, were violated.

3) Whether medical evidence adduced against the Appellant was conclusive to prove defilement and whether there was penetration.

4) Whether failure to receive medical attention on the same day of alleged defilement is fatal to the Prosecution's case.

5) Whether failure to call the Assistant Chief who arrested the Appellant to explain why he arrested the Appellant is fatal to the Prosecution's case.

6) Whether there was bad blood between the Appellant and the Assistant Chief which may have led to the Appellant being framed for the offence he allegedly did not commit.

7) Whether failure to produce the Complainant Minor's inner pant was fatal to the Prosecution's case.

8) Whether sentence meted out on the appellant was lawful and if so, whether it was manifestly excessive.

29. On whether the trial Court erred in allowing the Complainant's mother to testify instead of an intermediary, the Appellant submitted that the Prosecution failed to apply that the Court do allow the Complainant's mother to testify on behalf of the Complainant who was a Minor, instead of leaving the issue to the trial Magistrate to test the Complainant capability. Further, that albeit **Section 31(5) of the Sexual**

Offence Act was applied, an intermediary would have been a different person who is not an interested party in this case.

30. **Section 31 of the Sexual Offences Act** provides for vulnerable witnesses and clearly stipulate who a vulnerable witness is namely, the alleged victim in the proceedings pending before the Court, a child, or a person with mental disabilities. In addition, the Section gives discretion to the Court on its own initiative or on request of the Prosecution or any witness other than an Appellants who is to give evidence in the proceedings to declare such witness a vulnerable witness if in the Court's opinion he or she is likely to be vulnerable on account of age, intellectual, psychological or physical impairment, trauma, possibility of intimidation, race, religion, language, the relationship of the witness to any party to the proceedings, the nature of the subject matter of the evidence or any other factor the Court considers relevant. In the present case, the charge sheet reveals that the minor Complainant was aged 4 years.

31. At the hearing on 17.11.2016 the Prosecution led by Miss Makokha Prosecution Counsel applied to court and stated:

“The Minor herein is of tender age of 3½ years and she is incapable of appreciating the proceedings. We pray that the Court allows her mother, JAO to act as an intermediary for the said Minor, MA. as she is a vulnerable witness and this is pursuant to Section 31(5) of the Sexual offences Act No. 3 of 2006.”

32. The Court then made the order as follows:

“Orders accordingly.”

33. It was upon the above Order that PW1 (SAO) was sworn and she testified as an intermediary on behalf of the Minor child stating that the Complainant child was aged 3½ years old, having been born on 27.10.13.

34. In my humble view, therefore the Appellant's Complaint has no merit at all since the Prosecution did apply for the Complainant child's mother to testify as an intermediary and the Court granted leave.

35. The evidence on record as a whole as proven by the child's baptismal card is that she was born on 27.10.2013 and baptized on 30.10.2013 three days later. There was no contrary evidence that a child of less than 4 years was incapable of understanding the proceedings and therefore a vulnerable witness/victim.

36. Albeit the Appellant claims that a different intermediary should have been appointed to testify on her behalf, I find that claim unwarranted and lacking any basis in law as the child's mother was the closest to the child and whom the child would trust to give evidence on her behalf. This is evidenced by the fact that the child told her mother what had happened to her and therefore it was her mother who was competent to give such evidence in Court. I find no prejudice was occasioned to the Appellant by the Child's Mother testifying as an intermediary. The Appellant did not prove any such prejudice.

37. In my view, excluding evidence by the child's mother who first observed the child and asked the child what had happened to her is tantamount to giving the Appellant an outright acquittal without hearing the Complainant who is a vulnerable victim of a crime. Accordingly, the challenge by the Appellant fails.

38. On the issue of whether the trial Court erred in proceeding with the trial of the Appellant without ensuring that he had been supplied with witness statements, the Appellant claimed in his submissions that he was denied his right to access information as stipulated in **Article 35 (1) (b)** of the Constitution and also denied the right to a fair trial as stipulated in **Article 50** of the Constitution.

39. I have perused the trial Court record both handwritten and typed proceedings. On 11.11.2016 when the matter came up for hearing before **Hon. E.N. Wasike** Senior Resident Magistrate, the Prosecution stated that they had 20 witnesses. The Appellant stated that he was not ready to proceed as he did not have witnesses' statements. The Court, on that account adjourned the hearing to 17.11.2016 to enable the appellant obtain witness statements. On 17.11.2016 when the matter came up for hearing, the Prosecution stated that they had 3 witnesses and the Appellant stated ***“I will be ready?”***

40. That being the case, albeit there is no specific order on record showing that the Court directed the Prosecution to supply the Appellant with copies of witness statements, it is clear that the Appellant knew his right to such statements and therefore the Court adjourned the hearing in order for him to be supplied with witness statements and on the hearing date, the Appellant stated that he was ready meaning there was no impediment to his proceeding with the trial. The Appellant did not protest to the Court that he had not received witness statements when on 17.11.2016, he said that he was ready and the trial commenced.

41. Accordingly, I find his complaint on appeal to be an afterthought and not in good faith. I find that the Appellant is not genuine in his allegations that his rights under **Articles 35(1) and 50 of the Constitution** were violated and if he has proof which was not demonstrated before this court, in his appeal, he can file a Constitutional Petition seeking compensation for violation of rights.

42. Furthermore, the trial was not completed in a day on 4.1.2017 the Appellant was released on bond and when the hearing proceeded on 18.1.2017 the Appellant never claimed that he had no witness statements. He also did not raise that issue when he was placed on his defence. Accordingly, I find and hold that the complaint by the Appellant is devoid of merit. The same is hereby dismissed.

43. On the third issue of whether medical evidence adduced by the Prosecution against the Appellant was conclusive to prove defilement, or whether penetration was proved beyond reasonable doubt, the Appellant in his submissions claimed that the P3 form was dated 28.9.2016 but it was issued on 27.9.2016 and filed on 28.9.2016 and filled on 28.9.2016. He claims that the P3 form should have been filled on the same day it was issued, and returned to the Police Station the same day.

44. I have perused the P3 form produced in evidence as P.Ex 4. It was issued on 27.9.2016 to the Complainant M.A. vide OB No. 5/27/9/2016 at 14.00 hours. It was issued by OCS Aram Police Station to the in-charge Rera Hospital. The P3 was filled and dated 28.9.2016 by Jared O. Opondo of Rera District Hospital. The Clinical Officer testified as PW3 that he examined and filled the P3 form for the Complainant with a history of having been defiled by a person well known to her on 27.9.2016 and that she had a known case of sickle cell anaemia.

45. There is absolutely no legal basis for the Appellant to claim that the P3 form was issued on 27.9.2016 instead of being filled on the same day. There is evidence from PW1 and evidenced by the treatment book from Rambugu Dispensary at Page 2 that on 27.9.2016 the Complainant vide out-patient no 806/2016 was treated at the Hospital on allegation of bleeding from vagina due to defilement by a well-known person at 2 p.m.

46. The Nurse attending to the child Ms. Lucy Owino Tel 0717 455 (redacted) recommended that the matter be reported to the Police, P3 form be filled and Sexual Assault form be filled at the District Hospital. She also administered treatment to the minor. It is a well-known fact that P3 forms are only issued at the Police station and noting that the Minor was allegedly defiled on 27.9.2016 at 2 p.m., and the fact that her mother learnt it at 4 p.m, the child had to be escorted to hospital first before she was referred to the Police station where she was issued with a P.3 form by PW2. I find no prejudice occasioned to the Appellant that a P3 form issued on 27.9.2016 was only filled on 28.9.2016. The challenge is therefore dismissed as being devoid of substance.

47. On the further issue of whether the medical evidence adduced against the Appellant was conclusive to prove defilement and therefore whether there was penetration, the Appellant challenges the fact that although the victim was treated at Rambugu Dispensary and Referred to Bondo Sub-county Hospital, there was no treatment document from Bondo Hospital and further, that he does not understand why the P3 form was filled by a Clinical Officer from Rera Hospital instead of Bondo or Rambugu where the Complainant was attended to. Further, that albeit PW1 stated that they were referred by Rambugu Dispensary to Bondo Sub-County Hospital, the treatment note from Bondo does not bear the date when they received the patient nor show what the patient was treated for.

48. I have examined the evidence on record regarding treatment of the Complainant after the alleged defilement. On penetration, PW1 testified that on 27.9.2016 at about 4 pm she was bathing when her minor child went to where she was and she removed her inner pant. When PW1 asked the child what had happened, the child told her that she went to urinate and realized that blood was coming from her vagina and on being asked further, the child told PW1 that David (the Appellant) inserted his thumb into her vagina, took out his penis and inserted it into her vagina. That he carried her onto his lap and defiled her, at around 1 pm at PW1's homestead when PW1 was away. When PW1 checked on the Minor she saw blood on her vagina and that is when she rushed to Rambugu Dispensary for treatment as per P.Ex 2 – PW3 a Clinical Officer at Rera Sub-County Hospital testified and produced the P3 form and stated that on 28.9.2016 he received the Complainant with a history of being defiled. On examination he found bruises on the *labia minora* which were also tender. The age of injury was one day and the object used was blunt. He concluded that the nature of injury was grievous harm and that she had been defiled.

49. From the above evidence albeit the words “**Penetration**” were not used in the testimonies of PW1 and PW5, it is clear that the minor had bruises on the *labia minora* which were tender and there was increased vaginal secretions being the presence of Pus cells indicative of infection with STI.

50. Penetration need not be complete in **Sexual Offences**. **Section 2 of the Sexual Offences Act** defines penetration to mean:

“**the partial or complete insertion of the genital organs of a person into the genital organs of another person.**”

51. From the above definition, **penetration** need only be partial. It need not be complete. From the P3 form and PW1's description of the injuries sustained by the Child complainant, there was partial penetration of her vagina that is why there were bruises of *labia majora* of her vagina and she was infected with STI. Accordingly, I find and hold that there was penetration of the Complainant Child's vagina.

52. On whether filing of P3 form by a Clinical Officer from Rera Sub-County Hospital was fatal as the child was never treated at the said health facility, the P3 form issued to the Complainant on 27.9.2018 is clear that it was addressed to the in-charge of Rera Hospital. In my humble view, there is no material before this Court to show that the filling of P3 form at Rera was irregular or prejudicial to the Appellant as that is the hospital where the child was referred, after submitting treatment notes from Rambugu Dispensary to the Aram Police Station.

53. On whether there was anything from Bondo Sub-County Hospital to show that the victim child was treated there. I have examined Pexhibits 1 and 2. P Exhibit 1 is a treatment note from Bondo Sub-County Hospital dated 28.9.2016 showing the patient to be MA aged 4 years, female Diagnosis was Defilement and UTI. She was given medication. On the other hand, the “**Yellow**” card P. Ex 2 is only a patient's attendance card for future use. It has no other significance and therefore the claim by the Appellant that it has no date of referral is devoid of any substance, as P. Ex 1 is the document that shows what the Complainant was treated of defilement and UTI. Accordingly, the complaint is dismissed.

54. On the issue of whether failure to call the Assistant Chief who arrested the Appellant to explain why he arrested the Appellant is fatal to the Prosecution's case, PW2 was clear in his testimony that he was an Investigating Officer and that he is the one who received the report of defilement of the Complainant child and that on 28.9.2016 he re-arrested the Appellant from the Assistant Chief of Siger Sub-Location. The Appellant never contested the date of his arrest which PW2 stated was on 28.9.2016 a day after the alleged defilement of the minor child. In addition, the Assistant Chief's evidence of why and how he arrested the Appellant would not have added any value to the Prosecution's case. Being an Administrator, Assistant Chiefs can arrest a suspect and hand him/her over to the Law Enforcement Officers. There was no allegation that the Assistant Chief arrested the Appellant because he (the Assistant Chief found the Appellant in the act of committing the alleged offence. In so holding, I am alive to the established principle of Law espoused in the case of **Bukenya and Others Vs. Uganda [1972] EA 549** that the Prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent and that the Court has a duty to call any person whose evidence appears essential to the first decision of the case. However, **Section 153 of the Evidence Act Cap 80 Laws of Kenya** provides that in the absence of any requirement by provision of Law, no production of a number of witnesses shall be required for the proof of any fact. In addition, the proviso to **Section 124 of the Evidence Act**

allows the Court to convict on the sole evidence of a victim of sexual offence if the court is satisfied that the victim is being truthful.

55. Accordingly, the Prosecution need not call all witnesses who may have information on a fact and such failure to call a witness will only be fatal if the evidence presented by the Prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

56. In this case, albeit there was no eyewitness, the trial Court observed the demeanors of the Prosecution witnesses and found them consistent and truthful and had no doubt that it was the Appellant who was connected with the offence. The trial magistrate compared that evidence by the Prosecution with the defence which was basic denial and playing innocence.

57. Having analyzed the evidence on record and the observations made by the trial Court on the demeanor and truthfulness of the Prosecution witnesses, I find no reason to differ with the findings of the trial Magistrate. There are no gaps, in my view, in the Prosecution's case that would require filling by the Assistant Chief who merely assisted in arresting the suspect and presenting him to the law enforcement agencies, and as the Appellant in his defence and while questioning of the Prosecution witnesses knew the reasons why he was before the trial Court and the charges he was facing. In the premises I find and hold that the challenge by the Appellant lacks merit and the same is hereby dismissed. Furthermore, failure to call the said Assistant Chief of Siger Sub-Location as the person who arrested the Appellant did not weaken the Prosecution's case in any way.

58. On the issue of whether there was bad blood between the Appellant and the Assistant Chief of Siger Sub-location and whether such bad blood if any may have led to the Appellant being framed for committing the offence of defilement, I have perused the trial record and the evidence of PW1 and PW2. The Appellant did not put any questions to the two witnesses, suggestive of being framed by the Assistant Chief who allegedly arrested him. The Appellant only raised the issue of bad blood with the Assistant Chief who is not the Complainant or witness in this matter in his defence. He stated that he had a personal issue with the Sub-Chief and that is why he was framed for allegedly committing the offence. The Appellant did not elaborate on what material issue he had with the Assistant Chief that would have made the latter to frame him (Appellant) with such a serious offence. It was the child who revealed to PW1 that the appellant defiled her and the child identified the appellant by name DAVID. There was nothing to suggest that PW1 framed the appellant with the offence. Accordingly, I find the claim that there was bad blood between the Appellant and the Assistant Chief lacking in substance. I further find the claim that the Assistant Chief framed the Appellant with the offence not proven for this Court to make an inference thereon. I dismiss the claim.

59. On the issue of whether failure to produce the Complainant's inner pants was fatal to the Prosecution's case, the Appellant in his submissions elaborated that the inner pant in question was "believed to have some blood stain and that the Prosecution failed to produce the inner pant as an exhibit to prove PW1's allegation that the child's vagina had blood.

60. I have gone through the entire trial record and the evidence of PW1. I do not find any part of that evidence that claims that the inner pant of the Complainant child was blood stained. The issue of an inner pant believed to have blood stains was created by the Appellant in his submissions. It was his conclusion which was not backed by evidence on record.

61. PW1 testified that she was bathing when the minor went to where she was and she removed her inner pant. When PW1 asked the child what had happened she said that she went to urinate and realized that blood was coming from her vagina. The witness stated..... "**I then checked on the minor and I saw blood on her vagina.**" There was no mention of an inner pant with blood stains. The Appellant did not question PW1 on where the inner pant was and/or whether it had any blood. In my view, the issue of a bloodstained inner pant is the Appellant's own figment of imagination, and an afterthought. There was no evidence that the Investigating Officer recovered an inner pant which was bloodstained and failed to subject it to forensic examination to establish whether the minor's blood was present on it.

62. This court appreciates that the burden of proof in criminal cases lies on the Prosecution throughout the trial to prove its case against the Appellant beyond reasonable doubt and to adduce evidence which may nonetheless be adverse to its case. However, in this case, there was no evidence to suggest that the minor had blood stained pants or that failure to produce the allegedly blood stained pant was intended to cover up the Appellant's innocence and or frame the case against him.

63. On the whole, I find that the Prosecution proved beyond reasonable doubt all the ingredients of the offence of defilement of a child under **Section 8(1) of the Sexual Offence Act** and that the Appellant by the trial Court was found. This is so because: (1) The Child though aged about 4 years old was able to identify to PW1 her mother, the person who had defiled her. The Appellant according to PW1 used to pass by PW1's home and that they were neighbours. The Child was proved to be aged about 4 years as per the Baptismal Card produced as an exhibit showing her date of births to be 27.10.2013, while the date of the Offence was 27.9.2013 one month to her 4th birthday.

64. The child described the Appellant by name "David." There was nothing on record to suggest that PW1 could have couched the child or that she could have framed the Appellant with the offence. There was evidence of penetration of the child's vagina by the Appellant who used both his thumb and penis as evidenced by bruises on her **labia majora** as per the P3 form produced in evidence by PW3 form produced in evidence by PW3 the Clinical Officer.

65. The defence by the Appellant did not challenge the Prosecution's evidence which was watertight. Accordingly, I find no reason to differ with the findings and holding by the trial Magistrate. The Appeal against conviction is therefore found to be devoid of merit. It is dismissed.

66. On sentence, **Section 8(2) of the Penal Code** is clear that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The trial Magistrate in his sentencing remarks considered the offence and mitigating circumstances of the Appellant who stated that "**I have three young children who go to school. I am the breadwinner. I request for this Court's leniency.**" The trial Court stated and correctly so that "**This is a serious offence which has a mandatory Sentence as per Section 8(2) of the Sexual Offences Act and I have no alternative but to sentence the Appellant to life imprisonment.**" The sentence was no doubt lawful. However, the question that this Court must answer is whether the life imprisonment envisaged in **Section 8(2) of the Sexual Offences Act is Mandatory Sentence**. Put differently, did the trial Magistrate have any discretion to mete out a term sentence, given the wordings in **Section 8(2) of the Sexual Offences Act**? A similar question arose in the case of **MK V Republic [2015]**

eKLR and in determining the issue of whether there is a minimum Mandatory sentence of a term of life imprisonment in **Section 20(1) of the Sexual Offences Act**, the Court of Appeal contrasted that Section with **Section 8(2) of the Sexual Offences Act**, and stated *inter alia*

“16: Our reading of the Sexual Offences Act Shows that wherever a minimum sentence is imposed, the phrase not less than is used. In the instant case, the Appellant was charged with an offence under Section 20(1) of the Sexual Offences Act. This Section provides for a minimum term of 10 years imprisonment. However, the proviso to Section 20(1) stipulate that if the female person is under the age of eighteen years, The Appellants shall be liable to imprisonment for life. The Learned Judge of the High Court interpreted this proviso to mean that a mandatory minimum sentenced for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for consideration and determination is whether this interpretation is correct, does the proviso provide for a minimum term of life imprisonment?

19. What does “Shall be liable” mean in Law?” The Court of Appeal for Eastern Africa in the case of Opoya V Uganda (1967) E.A. 752 had an opportunity to clarify and explain the words: “Shall be liable on conviction to suffer death.” The Court held that in the construction of Penal Laws, the words “Shall be liable on conviction to suffer death” provide a maximum Sentence only; and the Courts have discretion to impose sentences of death and imprisonment. The Court cited with approval the dicta in James Vs. Young 27 Ch D. at P. 655 where North – J. Said:

“But when the words are not “Shall be forfeited” but shall be liable to be forfeited” it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced.”

We consider such to be the correct approach to the construction of the words: “Shall be liable on conviction to suffer death especially when contrasted with the words of S.184 which are “Shall be sentenced to death”. On our part, we contrasted the wordings in Section 8(2) of the Sexual offences Act with the proviso in Section 20 (1) of the said Act. The contrast will shed light as to whether the sentence in the proviso to Section 20(1) is minimum and Mandatory or otherwise. Section 8(2) provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The proviso in Section 20(1) provides that the Accused shall be liable to imprisonment for life.....”

67. Based on the above decision, it is my humble view what the life imprisonment stipulated in **Section 8(2) of the Sexual Offences Act** is the minimum mandatory and not maximum Sentence. Accordingly, I find and hold that the trial Magistrate meted out lawful minimum sentence provided for in law.

68. However, the Court of Appeal sitting in Kisumu quite recently in the case of **Kared Koita Injiri v Republic CRA 93 of 2014 [2019]e KLR** per Musinga, M’Inoti & Murgor JJ.A held that despite the mandatoriness of section 8(2) of the Sexual Offences Act in providing for the minimum sentence of life imprisonment where the defiled child is aged eleven years and below, applying the principles set out in the **Francis Karioko Muruatetu & others v Republic case[2017]e KLR**, the court was inclined to hold and it held that life imprisonment was not mandatory sentence under section 8(2) of the Sexual Offences Act. The Court of Appeal reduced life imprisonment imposed on the appellant to thirty (30) years imprisonment.

69. Before the above decision was pronounced, courts have been holding that life imprisonment being the only available sentence in such circumstances cannot be altered. The position has since changed. Accordingly, in this case, I am of the view that based on the above two decisions, I have the discretion to tamper with sentence imposed on the appellant. I however note that the child who was defiled was a toddler aged only about 4 years and has sickle cell anaemia. The appellant is expected to be protective of such children and not to prey on them. The law frowns of sexual anarchism against defenseless children.

70. In the end, I dismiss the appellant’s appeal against conviction. I uphold the conviction of the appellant by the trial court. I however interfere with sentence imposed by substituting life imprisonment with a prison term of thirty (30) years to be calculated from the date of sentencing in the trial court. this decision is backed by the recent authority in **Jared Koita Injiri v Republic (supra)** where the Court of Appeal held that life sentence for defilement was not a mandatory sentence, citing the Supreme Court decision in the **Francis Muruatetu & others v R [2017] e KLR**.

71. Orders accordingly.

Dated, Signed and Delivered at Siaya this 12th Day of June, 2019

R. E. ABURILI

JUDGE

In the presence of:

Mr. Okachi Senior Principal Prosecution Counsel

Appellant in person

CA: Brenda and Modestar