REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 64 OF 2015

BETWEEN

SIMON SHILINGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence dated 16.6.2015 by

Hon. J. Ong'ondo, SRM in Kakamega CMC Criminal (SO) case no. 45 of 2014)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

INTRODUCTION

1. The appellant herein, Simon Shilingi was charged with the offences of ***defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act,*** particulars being that on the 23rd day of April 2014 at [Particulars Withheld] Village Kakamega Central District within Kakamega County he unlawfully and intentionally caused his penis to penetrate the vagina of BM, a child aged 8 years.

2. The appellant 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 2006.*** It was alleged that on the on the 23rd day of April 2014 at [Particulars Withheld] Village Kakamega Central District within Kakamega County, the appellant unlawfully and intentionally committed an indecent act with a child by causing his penis to come in contact with the Vagina of BM a child aged 8 years.

3. The Trial Magistrate convicted the appellant of the offence of ***defilement contrary to Section 8 (1) as read with Section 8(2) of the Sexual Offences Act*** and sentenced him to life imprisonment.

The Appeal

4. Being dissatisfied with both the conviction and sentence, the appellant lodged an appeal vide a Petition of appeal. In his petition of appeal, filed in court on 23.6.2015, the appellant raised six grounds of appeal which are as follows;

1. That he did not plead guilty to the appended charges.

2. That the sentence meted was very harsh and excessive in the circumstances.

3. That the learned trial magistrate erred in law and facts in convicting the appellant on the evidence which did not prove the charges.

4. That the trial court did not consider that the appellant was not medically tested to confirm if indeed it was him who committed the alleged offence.

5. That the trial court did not consider the appellant's mitigation.

6. That the learned trial magistrate ignored the appellant's defence.

Duty of this Court

5. The duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions .see ***Okeno Vs Republic [1972] Ea 32.***

6. In ***Kiilu & Another Vs. 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."***

7. The same principle was reiterated in the case of ***David Njuguna Wairimu V – Republic [2010] eKLR*** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

The Prosecution Case

8. The Prosecution called 5 witnesses .Evidence was tendered that on the 23rd April 2014 while the complainant was cutting grass with the appellant their neighbor and a man well known to her , the appellant removed her pant and inserted his penis in her vagina causing her so much pain. The complainant testified that she was unable to walk after the ordeal and that she rested for a while before she regained her strength. She then walked home though still in pain. She stated that the appellant warned her not to tell anyone anything about the incident.

9. The incident was later discovered by PW2 RK who is complainant's aunt, on the 28th April 2014 when she noticed the complainant walking with difficulty. PW2 stated that she asked the complainant what the matter was and that was when the complainant informed her of the ordeal. Upon checking her private parts, PW2 discovered that the complainant's vagina was red.

10. The complainant was taken to hospital on the 29th April 2014 and upon examination, it was established that she had bruises on her private parts and that she had contracted gonorrhea. It was also noted that the minor had difficulties in walking as a result of the pain in the private parts caused by forceful penetration.

11. The incident was later reported to the police station and consequently the appellant arrested. An Age Assessment Report, Post Rape Care report, laboratory test report and P3 form were produced in evidence as PEXIBIT 1, 2, 3 and 5 respectively.

Defence case

12. By a ruling dated 29th April 2014 the appellant was found to have a case to answer and accordingly put on his defence. The appellant gave unsworn evidence and denied the charges. He testified that he was a casual laborer and that he had been framed by the complainant and the Aunt.

Submissions

13. The Appeal proceeded by way of both oral and written submissions. In his submissions, the appellant challenged the manner in which the Trial was conducted stating that his rights as envisaged under ***Article 50 2(g)*** had been violated. He stated that owing to the gravity of the offence, he was entitled to a state funded advocate.

14. He also submitted that the evidence tendered by the minor was not corroborated and that there were several contradictions in the evidence. He prayed that the Appeal be allowed and that he be acquitted or be given a lighter sentence.

15. The State, through Prosecution Counsel Mr Juma, opposed the appeal stating that the same had no merit. He submitted that the appellant had not substantiated his claims with regard to alleged constitutional violations and that the state does not guarantee legal representation in all criminal cases.

16. He further submitted that the prosecution had sufficiently proved their case and that there was no contradiction in the evidence. He prayed that the Appeal be dismissed.

Issues, Analysis and Determination

17. The issue for determination is whether the case against the appellant was proved beyond reasonable doubt. In other words, whether the ingredients of the offence of defilement were proved. The court is also to determine whether the appellant's rights as envisaged under ***Article 50 2 (g) & (j) of the Constitution*** were violated and what recourse is available to the appellant.

18. The appellant herein was charged 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 Act)***with an alternative charge of ***committing an indecent act with a child contrary to Section 11(1) of the same Act***

19. ***Section 8(1) and (2) of the Act*** provides that:-

> ***"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***8(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.***

20. As can be seen from above, ***section 8(1)*** cited above provides the key elements of the offence of defilement. These are "**Penetration**," and "**Child**." The act defines "**penetration**" as being the partial or complete insertion of the genital organs of a person into the genital organs of another person while "**child**" has the meaning assigned thereto in the ***Children's Act, No. 8 of 2001."***

21. These ingredients were highlighted in the case of ***Dominic Mwilaria V Republic [2018] eKLR*** where court held, *inter alia*, that

> ***"[7] It is now beyond peradventure that, in cases of defilement, the prosecution must prove:***
>
> ***1. The age of the child. This is important because defilement relates to children who are persons below the age of 18 years. Secondly, the age of the victim determines the sentence to be imposed.***
>
> ***2. The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and***

3. That the perpetrator is the appellant.

Also see the case of ***Charles Wamukoya Karani Vs. 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."***
>
> (Also see ***Dominic Kibet Mwareng V Republic [2013] eKLR).***

Age of the complainant

22. The prosecution led evidence that the complainant was aged 8 years at the time of the alleged incident. This evidence was corroborated by that of PW5 number 96731 Garrison Otieno who produced an age assessment report that indicated that the minor was aged 8 years at the time of the incident.

23. In the case of ***Kaingu Elias Kasomo -V- Republic, Malindi Cr. App. No. 504 of 2010*** the Court of Appeal stated that

> ***"The age of the minor is an element of a charge of defilement which ought to be proved by medical evidence…….Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of defilement victims is carried out by dentists. The said assessments while useful in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial court heard the minor's evidence and saw her. The court was convinced that she spoke the truth."***

24. In ***Joseph Kieti Seet -VS- Republic [2014] eKLR, H.C. At Machakos, Criminal Appeal No. 91 of 2011***, the Court held, "***that the age of a victim can be determined by medical evidence and other cogent evidence."***

25. Also see ***Musyoki Mwakavi –VS- Republic High Court Criminal Appeal No. 172 of 2012*** and ***Francis Muthee Mwangi V Republic [2016] eKLR*** for similar holdings.

26. It is clear from the authorities cited and the evidence on record that the age assessment report was conclusive proof of the age of the complainant. The Trial Court made reference to the evidence of the minor, and the report before accepting that the minor was 8 years old. It is therefore sufficient to say that the age of the minor was proved to the required standard.

Proof of penetration

27. It was the complainants evidence that the appellant inserted his private parts in hers and that she felt much pain, after which she had difficulties in walking.

28. PW6 Patrick Mambili, Senior Clinical Officer of Kakamega County Hospital, testified that upon examination, it was established that the complainant had bruises on her private parts and that the organ was swollen. He stated that there was an indication of forcible penetration and that the complainant had also contracted gonorrhea for which she was treated. All this information is contained in the Post Rape Care Report and the P3 form which were produced in evidence as exhibits.

29. In the case of ***Mark Oiruri Mose Vs Republic [2013] eKLR*** the court held that

> ***"all that was required is proof of penetration in the victim's vagina by the appellant. Penetration may be partial or complete under the Act."***

30. In ***George Owiti Raya Vs Republic [2013] eKLR*** it was held that:-

> ***"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane."***

31. In the case of ***G O A Vs Republic [2018] eKLR*** the court in holding that penetration was proved stated that.

> ***"The lacerated vaginal walls, the presence of the used condom in the vagina and the missing hymen corroborated the testimony of the complainant that a penis had penetrated her vagina. There was also the evidence that the complainant could not walk properly due to the pains. PW2 corroborated that evidence of the complainant. Further, the clear narration by the complainant described a male- female genital sexual intercourse. There is therefore sufficient evidence on record to prove that the complainant's vagina was penetrated by penis since the then status of the complainant cannot reasonably be explained otherwise in the face of the evidence. I find and hold that penetration was proved."***

32. In the instant case, medical evidence produced by the prosecution was clear on the condition which the complainant's private parts were in at the time of examination. The bruises and the redness and the evidence of PW6 all show that there was penetration. It is thus my considered view that the evidence produced by the prosecution was sufficient to prove penetration and that the trial magistrate's finding on the same was proper.

c) Whether the appellant was positively identified by the minor as her assailant.

33. It was the complainant's evidence that the appellant was well known to her. She stated that the appellant was her neighbor. Her evidence was corroborated by that of PW2. She did not at any time waver in her identification of the appellant. Given that the appellant was a man well known to the child there exists clear evidence of identification by recognition.

34. Evidence of recognition was held by the Court of Appeal in ***Anjononi & Others Vs Republic [1989] KLR 59*** to be ***'more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the person's knowledge of the assailant in some form or other.***' The complainant knew the appellant so well that mistaken identity could not have arisen. In the absence of any evidence to the contrary, I am satisfied that the complainant sufficiently identified the appellant as her assailant.

35. The appellant contends that the evidence of the complainant was not corroborated and that it wasn't sufficient in the circumstances. It should however be noted that the proviso to section 124 of the Evidence Act removes the need for corroboration of a single identifying witness in sexual offences upon certain conditions. The proviso reads:-

> ***"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."***

36. In ***Martin Okello Alogo V Republic [2018] eKLR*** the court stated that:

> ***"The Proviso to Section 124 of the Evidence Act is clear that in criminal cases involving a Sexual Offence, if the only evidence is that of a child of tender years who alleges to have been defiled, then the Court shall receive the evidence of the said child and proceed to convict the Accused person if, for reasons to be recorded, in the proceedings, the Court is satisfied that the child is telling the truth. In this case, the trial Magistrate satisfied herself that the minor victim of defilement charge against the appellant was telling the truth and she proceeded and convicted the appellant on the basis of that evidence which she described as credible. Accordingly, I have no reason to differ with that finding and holding by the learned trial Magistrate which I find to be sound. I hereby uphold it. I find and hold that no other evidence that the appellant describes as "crucial" witnesses could have displaced the credible evidence given by the victim of the offence and corroborated by medical evidence."***

37. Also see ***G O A V Republic [2018] eKLR*** (supra) *w*here the court reiterated the import of the proviso to section 124 of the Evidence Act. A similar position obtained in ***Peter Kimani Mbote V Republic [2018] eKLR*** the court held that

> ***"The proviso to Section 124 of the Evidence Act (Supra) allows the court to convict on the sole evidence of a victim of a sexual***

offence if it is satisfied that the victim is being truthful.

38. From all the above case law, this Court makes a finding that a court is entitled to rely solely on the evidence of the complainant so long as it is satisfied that the complainant is telling the truth. Such evidence does not require corroboration. In the instant case, the trial court noted in its judgment noted that it believed that the minor was telling the truth and made a conclusive determination of the case based on the evidence presented before him. From the proceedings I am satisfied that the prosecution built and proved its case to the required standards of beyond reasonable doubt, the fact of the complainant being the only eye witness notwithstanding.

39. The appellant has alleged that there were contradictions in the prosecution's case. He challenged PW2's evidence on the fact that she stated that she noticed the complainant was walking with difficulties on the 28th April 2014 and took her to hospital on 27th April 2014. The typed proceedings do indicate the date as 27th but the handwritten proceedings show that 27th April 2014 in PW2's evidence was a handwriting misread of 29th April 2014.

40. The Court of Appeal in ***Philip Nzaka Watu Vs. Republic [2016] eKLR*** when faced with alleged inconsistencies stated that

> ***"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

41. Odunga J in ***Michael Mumo Nzioka V Republic [2019] eKLR*** stated, *inter alia*, that

> ***"The general rule as regards the effect the discrepancies in the evidence of witnesses have in discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling, substantial or deliberate…… It therefore follows that each case must be considered on its own peculiar circumstances. There are cases where the inconsistency is so minor that clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony."***

42. In this present case, the alleged contradictions pointed out by the appellant are so minor as to be of no consequence. Further the alleged contradictions were cured by the evidence adduced by PW6 who stated that the complainant was taken to hospital on the 29th and that is the date indicated in all the medical reports. In conclusion on the issue of contradictions, I find that those contradictions did not affect the outcome of the case.

d) Whether the appellant's rights as envisaged under Article 50 2 (g) and (J) of the Constitution were violated and the recourse thereto.

43. The appellant alleged that owing to the gravity of the offence and the sentence that it attracted, the court ought to have availed to him an advocate at the state's expense as prescribed under ***Article 50 2(g) and (j) of the Constitution.*** With regard to violation of ***Article 50 2 (j),*** the appellant contended that his rights as prescribed under ***Article 50 (2)(j) of the Constitution*** were violated as he was not furnished with the statements and other necessary information that the Prosecution relied on during trial thus denying him a fair trial.

44. There have been many decisions in the recent past on the question of alleged breach of the provisions of ***Article 50 of the Constitution, 2010.*** In most of the cases, the courts have ruled that failure on the part of the prosecution to furnish an accused person with requisite statements before the trial commences naturally violates the accused person's right to a fair trial. A case in point is ***Simon Ndichu Kahoro versus Republic Nairobi Criminal appeal no. 69 of 2015 [2016] eKLR*** in which the Court of Appeal was confronted with the issue as to whether failure by the prosecution to give the accused person the statements was fatal to the prosecution case. The position in that case is that in spite of the trial court's order that the accused person be supplied with statements, the trial went on without the accused person being supplied with the statements. While holding that the accused person's right to a fair trial had been violated on account of not being supplied with statements, the Court made the following observation:-

> ***"We should not be understood to be setting up a general principle or precedent that every breach of Article 50 of the Constitution, 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case."***

45. What the Court of Appeal was saying in the ***Simon Ndichu Kahoro Case*** (above) is that the failure to supply witness statements to an accused would not, *per se* be fatal to the prosecution case. As Joel Ngugi J held in ***MEM versus Republic Nakuru HCCRA no. 314 of 2015 [2018] eKLR***, the court considering the issue must look at the prejudice occasioned to the accused person, as was the case in ***Simon Githaka Malombe Nyeri Criminal Appeal No. 314 of 2010[2015]eKLR*** where the accused had been ordered to pay for a copy of the statements when it was clear he had no way of raising money for the same.

46. In the instant case, a scrutiny of the record from the date of plea to the day when the complainant testified shows is no indication whatsoever as to whether or not the appellant was furnished with the statements whether on request or otherwise. It was held in the ***Simon Githaka Malombe case [above]*** and in ***Julius Rotich versus Republic [2019]eKLR*** that the prosecution that assembles and retains custody of evidence against an accused person is under a duty to provide an accused person with, and to do so, in advance of the trial all the relevant material which include copies of witness statements to be relied upon at the trial, as well as documentary exhibits to be produced during the hearing.

47. The appellant in the instant case appeared completely oblivious of the fact that he was entitled to witness statements. The matter was made more complicated by the trial court's silence on the matter and because of this, I find that the appellant's right to a fair trial was violated. The appellant was thus, not able in my considered view to adequately prepare for his defence. This is particularly critical because of the serious nature of the offence and the long sentence associated with the offence.

48. The appellant also complained that his right to legal representation as prescribed under ***Article 50(2)(g) of the Constitution 2010*** was violated. Though the appellant did not say so, I think that this complaint is anchored under ***section 43(1) of the Legal Aid Act*** which requires a trial court to promptly inform the accused of his or her right to have an advocate assigned to him or her.

49. The court in ***Meshak Juma Wafula versus Republic [2019]eKLR***, held *inter alia*, that

> ***"Where an accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence..... or where substantial injustice would otherwise result....."***

50. The court went on to note that:-

> ***"From a reading of the above authorities, it is clear that the right to legal representation is not absolute and there are situations it can be limited. It must be established that the accused will suffer substantial injustice if one is not accorded legal representation and that is why the courts have said that the gravity of the offence, the nature of the reality or severity of the sentence must be taken into account; whether accused is a minor or illiterate and not able to understand the court proceedings is also a factor to be considered."***

51. In ***Republic –Vs- Karisa Chengo & 2 Others (2017) eKLR*** the Supreme Court held that:-

> ***"It is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense of the State …..... Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:-***
>
> ***(i) the seriousness of the offence;***
>
> ***(ii) the severity of the sentence;***
>
> ***(iii) the ability of the accused person to pay for his own legal representation;***
>
> ***(iv) whether the accused is a minor;***
>
> ***(v) the literacy of the accused;***
>
> ***(vi) the complexity of the charge against the accused;***

52. In the instant case, the appellant faced a serious charge for which he was sentenced to life in prison. He was entitled to be informed of his right to an advocate. The record however shows that the appellant did not suffer from any disabilities, nor was this a case where the public interest demanded that some form of legal aid be availed to the appellant. If anything, the public interest was in favour of the 8 year old victim who was defiled by a whole grown up man in the person of the appellant. These are special circumstances in this case and especially so, when the trial court was satisfied that the 8 year old victim was telling the truth. She also clearly and positively identified the appellant and had no reason to concoct a story against the appellant. In any event, provision of legal services to an accused person is not an absolute right. It is an open secret that today, the state is still struggling with other urgent financial demands that it appears unable to meet.

53. The next question on this appeal is whether because of the prejudice caused to the appellant through failure to supply him with statements, he should be set free or should the court order a retrial, bearing in mind the maxim that justice cuts both ways.

54. In ***Obedi Kilonzo Kevevo –VS- Republic (2015) eKLR*** the Court of Appeal held that:-

> ***"Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant. In the case of Muiruri –Vs- Republic (2003) KLR 552, the court considered a similar situation and held as follows, inter alia:-***

"Generally whether a re-trial should be ordered or not must depend on the circumstances of the case.

It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."

55. In ***John Njenga Kamau V Republic Criminal Appeal No. 203 of 2016 [2018] eKLR t***he Court of Appeal further held that:-

"The unmistakable thread in all the authorities is that 'each case must depend on its particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the appellant"

56. The court went on to explain the "**interest of justice**" in the following terms:-

"Explaining what the 'interests of justice' entail, and in its own summary, the court, in the English case of Reid vs R - (1978) 27 WIR 254, held:-

"***The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury... It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case. Among the factors to be considered in determining whether or not to order a new trial are:***

(a) the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial; (f) the strength of the case presented by the prosecution, but this list is not exhaustive."

57. In ***Jackson Githinji Karani V Republic [2019] eKLR*** the court observed that

"The criminal justice system requires that the court balances the rights of the accused and those of the victim and the society at large.

26. Where the trial was flawed, the court orders a retrial. This calls for consideration as to whether the accused has had a proper trial. A retrial will be ordered where a trial was illegal or defective. This depends on the circumstances of each case. A retrial will be ordered where the interests of justice so require and will not occasion an injustice to the appellant.

27. In the Case of Muiruri –vs- Republic (2003) KLR 552, the court considered a similar situation and held as follows, inter alia:

1. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.

2. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.

58. The same principle was applied in the case of ***William Ambetsa V Republic [2019] eKLR.***

59. The appellant herein was charged with the offence of defilement of a minor aged 8 years, and upon conviction he was given a sentence of life imprisonment. He was convicted on 16th June 2015 and has served 5 years. Save for the trial court's failure to order supply of statements, the evidence on record is so strong that its likely to result in a conviction if the appellant goes for retrial. The 8 year old victim suffered extreme trauma, both physical and emotional. The appellant should not go Scott-free because of these technicalities.

Conclusion

60. From the above analysis, I now make the following orders:-

1. The appellant's appeal on both conviction and sentence be and is hereby allowed on grounds of technicalities.

2. The case is sent back to the Chief Magistrate's court Kakamega for retrial.

3. The trial shall be conducted by a magistrate other than J. Ong'ondo who conducted the initial trial.

4. Until the appellant is produced before the Chief Magistrate Court for plea and directions on retrial, he shall remain in custody.

61. Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned at Kakamega in open court on this 18th day of October, 2019

WILLIAM M. MUSYOKA

JUDGE