REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ITEN
CRIMINAL APPEAL NO. E012 OF 2023

EDWIN KIPLAGAT TOROITICH.....APPELLANT
VERSUS
REPUBLIC……..…….RESPONDENT

(*Appeal from the Judgment dated 10/08/2023 and sentence delivered in Iten SPM Court Criminal (Sexual Offence) Case No. 23 of 2022 by Hon. V. Karanja - PM*)

JUDGMENT

1. The Appellant was charged in the said criminal case with the offence of defilement contrary to what was described as "**Section 8(1)(2)**" of the **Sexual Offences Act, No. 3 of 2006.** The particulars of the offence were that on 17/05/2022, at **[……]** village in Yemit sub-Location, within Elgeyo Marakwet County, he wilfully and unlawfully caused his penis to penetrate the vagina of **CJK**, a child aged 10 years. He was also charged with the alternative charge of committing an indecent act with the same child at the same place, contrary to **Section 11(1)** of the **Sexual Offences Act**.

2. The Appellant pleaded not guilty to the charge and the case then proceeded to full trial in which the Prosecution called 3 witnesses. At the close of the Prosecution case, the Court found the Appellant as having a case to answer and put him on his defence. The Appellant then, in his defence, gave a sworn statement and called no other witness. By the Judgment delivered on 10/08/2023, he was convicted on the main charge and sentenced to serve 60 years imprisonment.

3. Dissatisfied with the decision, the Appellant filed this Appeal in person on 12/07/2023. His Petition of Appeal reproduced verbatim is crafted as follows:

i) That the learned trial Magistrate erred in both law and fact by failing to find that the prosecution witnesses' evidence was contradictory, inconsistent and unreliable evidence to be relied in Court of law to warrant a conviction.

ii) That the learned trial Magistrate erred in both law and fact while basing its judgment on medical evidence that was insufficient and inconclusive and could not meet the threshold as required by the law. For instance, the medical doctor testified that there was deep penetration while there was no injury on the genitalia.

iii) **That the trial Magistrate erred in law and fact by convicting the Appellant on a faulty charge sheet where it was indicated that there two days in which the alleged offence took place 16 & 17.**

iv) **That the trial Magistrate erred in law and fact by convicting the Appellant while relying on witnesses who were not reliable and truthful for example the complainant PW1.**

v) **That the learned trial Magistrate erred in both law and fact by failing to note the Appellant was not given legal representation as provided in the Constitution.**

vi) **That more grounds will be adduced when the proceeding and judgment will be availed to me.**

4. I will now recount the testimony of the witnesses.

5. **PW1** was the minor (complainant) who stated that she was an 8-year-old grade 4 primary school-girl. Due to her age, she was taken through a ***voire dire*** examination upon which the trial Magistrate found her to be intelligent enough to understand the effect of taking an oath and thus, directed that she gives sworn evidence, which she did.

6. She stated that she was born in 2012 and identified her Certificate of Birth. She then identified the Appellant as her father's brother, and testified that on 16/05/2022 at around 7.00 am, she met the Appellant while going to school, who took her to the bush, removed her pant, and did to her "***tabia mbaya***". She stated that the Appellant lowered his trousers and opened the minor's legs and vagina (she pointed around that area), then put his "*dudu*" into her vagina at the place where it has a hole and he put his "*dudu*" into her "*dudu*". She testified that she felt a lot of pain but she did not scream, that the Appellant then removed his "*dudu*" after finishing but left mucus-like discharge in her "***dudu***", and that she cleaned herself with twigs and went to school, where she informed her teacher, who then took her to hospital. She further stated that on 17/05/2022, she again met the Appellant who asked that they go back to the bush to commit the same act but she ran away, in the evening she informed her parents who reported the matter to the Chief and the police, where she was issued with a P3 Form. In cross-examination, she denied that her family had a land dispute with the Appellant, and stated that the Appellant told her father that would rape her, that the Appellant fought with the minor's father, and that the Appellant had set fire to a parcel of

land. In re-examination, she stated that the fight between her father and the Appellant was before the defilement.

7. **PW2** was **Kurui Rono**, a Clinical Officer at Chebiyemit Hospital. He testified that the minor was seen at the facility on 17/05/2022 with a history of defilement, on examination, her labia majora and minora were found to be inflamed with redness, there was a tear on the vaginal walls, the hymen was broken, and that he concluded that the minor had been defiled. He then produced the P3 Form. In cross-examination, he stated that the minor was brought to the hospital by teachers and parents, and there were sperms on her clothes. He agreed that he did not examine the Appellant.

8. **PW3** was **Police Constable Michael Mutuku**, the Investigating Officer in the matter. He testified that he was in his office at Kimnai Police Post on 17/05/2022 when at around 8.00 am, the minor was brought by her father with the complaint of having been defiled by a person known to her. He stated that he escorted the minor to hospital where the doctor confirmed that she had been defiled, that he then issued a P3 Form, and started looking for the suspect. He then produced the minor's Certificate of Birth. He testified that he then arrested the Appellant. In cross-examination, he stated that the minor mentioned and identified the Appellant as the defiler. He also stated that the minor's father never informed him (**PW3**) that he had a dispute with the Appellant. In cross-examination, he stated that the defilement occurred on 16/05/2022 and on 17/05/2022.

9. The Appellant then, in his defence, testified as **DW1** and gave unsworn evidence. He simply denied committing the act.

10. The Appeal was then canvassed by way of written Submissions. The Appellant filed the Submissions dated 5/11/2024, while the Respondent (State), through **Prosecution Counsel Mr. Calvin Kirui**, filed the Submissions dated 27/05/2024.

Appellant's Submissions

11. The Appellant submitted that the charge sheet was defective as the date of the offence is indicated as 17/05/2022 while the minor testified that she was defiled on 16/05/2022. He also urged that there were contradictions and inconsistences in the case, and that key witnesses, such as the minor's father, did not testify, and that the case was poorly investigated leading to a miscarriage of justice. He also faulted the trial Court for not factoring, during sentencing, the period the Appellant had spent in custody as required under **Section 333(2)** of the **Criminal Procedure Code**, and also that the 60 years prison sentence

was harsh and excessive as it will surpass his life expectancy, given that he was 42 years. He contended further that the medical evidence was inconclusive as the P3 Form was not authentic. He also submitted that the case is an abuse of Court process as the same was brought to silence him over personal misunderstanding. He further submitted that his defence was never considered, and accused the trial Court for being impartial in taking down the evidence.

Respondent's Submissions

12. On his part, **Mr. Kirui** cited **Section 8(1)** and **8(2)** of the **Sexual Offences Act** and restated the ingredients of the offence of defilement as set out in various cases, including, **George Opondo Olunga v Republic [2016] eKLR**, namely, identification or recognition of the offender, penetration and the age of the victim. He appreciated that the Prosecution is under a duty to establish or prove all the above elements and which duty does not shift to the accused person and who is also under no duty to adduce or challenge evidence adduced by the Prosecution. He urged that, in this case, the issue of identification of the perpetrator is clear as the minor's evidence is that of recognition, as the minor testified that her father and the Appellant are brothers, and are therefore of the same family. He added that on the day of the incident, the minor was going to school at 7.00 am when she met the Appellant who took her to a nearby bush and defiled her, and that as the incident occurred during the day, there is no doubt that the Appellant was well identified.

13. On "penetration", he cited **Section 2** of the **Sexual Offences Act**, and narrated the minor's testimony that the Appellant took her to a nearby bush, removed her pant and lowered his trousers, then opened her legs and vagina and put his "*dudu*" into her vagina, and she felt a lot of pain and that the Appellant left mucus-like discharge on her "*dudu*". He urged that this evidence shows that the Appellant caused penetration of his penis into the complainant's vagina. On whether that evidence requires corroboration, he cited **Section 124** of the **Evidence Act**, and submitted that the minor's evidence on her being defiled was corroborated by that of the Clinical Officer (**PW2**) who stated that upon examining her, he noted that both her labia majora and minora were inflamed and the hymen was broken. He urged that these findings were noted in the P3 Form and Post-Rape Care Reports produced as exhibits, and which also confirmed penetration. He urged that the absence of the hymen was evidence of penetration and the inflamed labia showed that the penetration was recent which corroborates the minor's testimony. He thus submitted that this evidence proved that there was defilement as contemplated by the Act. In respect to age, he submitted that the Investigating Officer (**PW3**) produced the minor's Certificate of Birth, which indicates that

the minor was born on 17/03/2012, and the incident occurred on 17/05/2022 which means that the minor was 10 years old as at the time thereof. He urged that the Appellant did not challenge this evidence and no contrary evidence was produced.

14. Counsel further submitted that the Appellant elected to adduce and challenge the evidence by giving unsworn evidence which was a mere denial of the incident, and which denial was untrustworthy. Regarding the grounds of appeal preferred, Counsel denied that the Prosecution witnesses' testimonies were contradictory or inconsistent and/or unreliable, and averred on the contrary, that they were all were credible and reliable. He also contended that the medical evidence was conclusive and sufficient. Counsel also observed that although it is true that the minor testified that the incident occurred on 16th and 17th May 2022, the date indicated on the charge sheet is 17/05/2023, and submitted that the charge sheet is therefore not defective, but only failed to include the day before, and that this omission is in no way fatal as did not cause any prejudice to the Appellant. Regarding sentencing, he urged that the trial Court considered the offence, mitigation by the Appellant, and submissions made, and that the Court's discretion was therefore exercised judiciously, and in accordance with the law.

Determination

15. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (see **Okeno vs. Republic [1972] E.A 32)**

16. The issues that arise for determination in this matter are evidently the following:

a) **Whether the defilement charge against the Appellant was proved beyond reasonable doubt.**

b) **Whether the sentence of 60 years imprisonment imposed against the Appellant was justified.**

17. First, the Appellant was charged under what was described as "**Section 8(1)(2)**" of the **Sexual Offences Act**. Needless to state, no such provision exists under the **Sexual Offences Act**. I will presume that what was meant was "***Section 8(1) as read with Section 8(2)"*** of the **Sexual Offences Act**. For some reason, I come across too many charge sheets drafted in this manner and which practice should now stop. However, I do not believe that

the said irregularity is a fatal one as no prejudice has been demonstrated to have been visited upon the Appellant or that the error compromised his ability to defend himself.

18. I also find no prejudice caused to the Appellant by the mere fact that the charge sheet referred to 17/05/2022 as the date of defilement while the minor testified that the act occurred on 16/05/2022. Although ideally the Prosecution ought to have pursued and clarified that discrepancy and if necessary, apply to amend the charge sheet, that mere omission cannot, in my view, be a fatal one as it did not affect the substantive basis or nature of the charge considering that the minor also testified that on 17/05/2022, the Appellant had also again tried to lure her to a similar act but she ran away.

19. Back to the merits of the case, **Section 8(1)** of the **Sexual Offences Act** under which the Appellant is presumed to have been charged, provides as follows:

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

20. For the offence of defilement to be established, 3 ingredients must therefore be proved, namely, age of the victim, penetration and positive identification of the offender (see **George Opondo Olunga v Republic [2016] eKLR)**. This was reiterated by **M. Thande J**, in the case of **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013**.

21. Regarding the minor's age, the minor's Certificate of Birth produced in evidence indicated that she was born on 17/03/2012. There being no contrary evidence, and the offence having been alleged to have occurred on 17/10/2022, it means that the minor was indeed 10 years at the time of the incident, and thus a minor. In any case, the issue of age was not challenged in this Appeal. This therefore dispenses with the first ingredient as adequately proven.

22. In respect to "penetration", **Section 2(1**) of the **Sexual Offences Act** defines the term as:

> **"The partial or complete insertion of the genital organs of a person into the genital organ of another person."**

23. In regard thereto, the Court of Appeal, in the case of **Mark Oiruri Mose v R (2013 eKLR,** guided as follows:

> **"….. In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker**

does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence if spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ."

24. In this case, the minor testified that on 16/05/2022 at around 7.00 am, she met the Appellant while going to school, who took her to the bush, removed her pant, and did to her "***tabia mbaya***". She stated that the Appellant lowered his trousers and opened the minor's legs and vagina (she pointed around that area), then put his "*dudu*" into her vagina "***at the place where it has a hole***" and he put his "*dudu*" into her "*dudu*". She further testified that she felt a lot of pain, that the Appellant then removed his "*dudu*" after finishing but left mucus-like discharge in her "***dudu***". She stated that she then cleaned herself with twigs and went to school, where she informed her teacher, who then took her to hospital.

25. Regarding the minor's use of the term "***dudu"*** to describe the genitals, the Court of Appeal, in the case of **Muganga Chilejo Saha v Republic [2017] eKLR**, acknowledged that such phrases are acceptable descriptions of sexual acts and/or organs. In accepting that in Kenya, the society has adopted such terms as a euphemism to mean phrases generally used by children, and even adults, to describe sexual acts, the Court of Appeal stated as follows:

> "*Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a Court room. If the trend in the decided cases is anything to go by, Courts in this country have generally accepted the use of euphemisms like,* **"alinifanyia tabia mbaya***",* **(IE V R, Kapenguria H.C Cr. Case No. 11 of 2016***),* **"he pricked me with a thorn from the front part of this body."***, (***Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015***),* **"he used his thing for peeing",** *(***David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015***), "he inserted his* **"dudu"** *into my* **"mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu"***, (***Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011***), as apt description of acts of defilement. We, however, need to remind trial Courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See* **A M V R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015**, *among*

several others. Trial Courts should record as nearly as possible what the child says happened to him or her. (emphasis added).”

26. Medical evidence was then provided by **PW2**, the Clinical Officer, who testified that the minor was brought to the hospital on 17/05/2022 with a history of defilement, and on examination, he found that her labia majora and minora were inflamed with redness, there was a tear on the vaginal walls, and the hymen was broken. The inflamed labia indicated that the penetration was recent. **PW3’s** conclusion was then that the minor was defiled. In the circumstances, and there being no evidence to the contrary, I have no reason to fault the trial Magistrate for finding that that penetration was proved.

27. In this case, apart from the minor (victim of the offence), there was no other witness to the alleged act. Even if therefore, the issue of corroboration were to arise as a result of there being only evidence of a single witness, still the proviso to **Section 124** of the **Evidence Act** would come into play. The Section provides as follows:

“**Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.**

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, 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.”

28. In this case, the trial Magistrate heard the minor and believed her.

29. On the issue of identification, the Court of Appeal in the case of **Cleophas Wamunga v Republic [1989] eKLR** cautioned as follows:

“**Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he**

alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

30. In this case, there is no dispute that the Appellant was well known to the minor who identified the Appellant as her father's brother, thus her uncle. The Appellant, too, confirmed being known to the minor. The incident is also said to have taken place around 7.00 am in the morning. It is therefore clear that the Appellant was not a stranger to the minor. This was therefore a case of "***recognition***" rather than identification of a stranger, which evidence is more reliable and believable in "***identification***". In respect thereto, the Court of Appeal, in the case of **Reuben Tabu Anjononi & 2 Others v Republic [1980] eKLR**, guided as follows:

"……. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* **(unreported)."**

31. In light of the foregoing, I again do not find any fault on the part of the trial Magistrate in finding that the Appellant was positively identified.

32. As already observed, the Appellant, in his defence, gave unsworn evidence and simply denied committing the act. Although there was indication of existence of "bad blood" between the two brothers - the Appellant and the minor's father - as a result whereof the Appellant submitted that the case was brought to silence him over personal misunderstanding, there was nothing before the trial Court to make a finding to that effect.

33. The ground that the Appellant was not given legal representation as provided in the **Constitution** also lacks merit as nowhere does the **Constitution** provide that a charge for defilement is one of the instances in which an accused person must be provided with legal representation by the State. This provision only applies to capital cases such as murder.

34. Regarding the sentence of 60 years imprisonment, the applicable principles in re-considering sentence on appeal were restated by the Court of Appeal in **Bernard Kimani Gacheru v Republic [2002] eKLR**, in the following terms:

"It is now settled law, following several authorities by this Court and the high Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly,

the sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial Court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial Court on sentence unless, anyone of the matters already stated is shown to exist".

35. As earlier observed, the minor was 10 years old at the time of the incident. In respect to this age, **Section 8(2)** of the **Sexual Offences Act** provides as follows:

> **"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."**

36. **Section 8(2**) therefore prescribes only one mandatory sentence – life imprisonment. In this case the Appellant was sentenced to 60 years imprisonment. In view thereof, it is clear that the sentence imposed was within the statute. My above observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh, which I now hereby do.

37. The Supreme Court, in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR,** guided that, in sentencing, the following mitigating factors are applicable; (a) age of the offender; (b) being a first offender; (c) whether the offender pleaded guilty; (d) character and record of the offender; (e) commission of the offence in response to gender-based violence; (f) remorsefulness of the offender; (g) the possibility of reform and social re-adaptation of the offender; and (h) any other factor that the Court considers relevant.

38. Similarly, in the case of **Daniel Kipkosgei Letting v Republic [2021] eKLR,** the Court of Appeal pronounced itself as follows;

> **"……. we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to ….."**

39. I also cite **Majanja J**, in the case of **Michael Kathewa Laichena & another v Republic [2018] eKLR,** in which, quoting the **Muruatetu case (supra),** he stated as follows:

> **"The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ……"**

40. Applying the above principles to the facts of this case, I consider that the crime of defilement is treated as a serious offence under Kenyan law and society at large, and is always severely punished. It is also relevant to note that the victim in this case was an "innocent" 10-year-old girl who needed protection from all, especially from close relatives such as the Appellant who is said to be her uncle, thus one of the close family members whom she, ideally, ought to have trusted. Taking all these factors into account, it cannot be denied that the Appellant merited a stiff and deterrent sentence. He is also evidently not remorseful and continues to deny his involvement in the act.

41. Having said so however, I also find the existence of mitigating factors. The Appellant is currently aged 48 years. He is also a 1st offender. Although the offence he was convicted of merits his being put away for a long time, I believe that retribution will be best achieved, not by incarcerating him for an unreasonably long period of time but by giving him a second chance in life, to come out of jail, once he has hopefully learnt his lesson, and rebuild his life. In the circumstances, I trust that a sentence of 35 years imprisonment will be appropriate.

42. I note from the charge sheet that the Appellant was arrested on 18/05/2022, arraigned on 19/05/2022, and convicted and sentenced on 10/08/2023. From the record, I do not find evidence that the Appellant was released from custody on bond or bail. Although the trial Magistrate, in sentencing, stated that she had considered that the Appellant had spent 13 months in remand custody, there is no evidence that she actually applied that finding in her sentence as required under the provisions of **Section 333(2)** of the **Criminal Procedure Code**. On this requirement, the Court of Appeal in the case of **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR** held as follows:

> **"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."**

43. Since **Section 333(2)** of the **Criminal Procedure Code** is couched in mandatory terms, the period spent in custody must be factored in the sentence.

Final Orders

44. In the circumstances, I make the following orders:

i) The appeal against conviction fails and the same is upheld.

ii) On sentence, I hereby set aside the sentence of 60 years imprisonment imposed by the trial Court. and substitute it with a sentence of 35 years imprisonment, to be computed as from the date of the Appellant's arrest, namely, 18/05/2022, as indicated in the charge sheet.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 17TH DAY OF DECEMBER 2025

……..……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Appellant present virtually from Naivasha Maximum Prison

Ms. Mwangi for the State

Court Assistant: Brian Kimathi