Rono v Republic (Criminal Appeal 2 of 2014)
[2023] KECA 1181 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1181 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 2 OF 2014

F SICHALE, FA OCHIENG & WK KORIR, JJA

OCTOBER 6, 2023

BETWEEN

WELDON CHERUIYOT RONO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kericho, (Ngenye-Macharia, J.) dated 12th November, 2013 in H.C.CR.A. No. 45 of 2012)

Elements of defilement

The appeal was against conviction and sentence of the accused person for the offence of defilement. The court highlighted the elements of defilement.

Reported by Kakai Toili

Criminal Law *– sexual offences – defilement - what were the elements of defilement – Sexual Offences Act (cap 63A), sections 8(1) and (2).*

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to legal representation - whether failure to inform a person accused of defilement of his right to legal representation was fatal where the accused was able to properly defend himself.*

Brief facts

The appellant 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. At the conclusion of the trial, the appellant was found guilty of the offence and was convicted and sentenced to life imprisonment by the trial court. Aggrieved by the decision of the trial court, the appellant appealed to the High Court. The High Court upheld the trial court's conviction and sentence.

Further aggrieved, the appellant lodged the instant appeal and submitted on the following grounds: failure to adequately explain the charges; admission of hearsay evidence; failure to consider the plea of not guilty; improper shifting of the burden of proof; failure to establish the complainant's age; disregard of the

complainant's evidence; wrongly taking the evidence of an intermediary; denial of the right to legal counsel; and a manifestly excessive sentence.

Issues

i. What were the elements of defilement?

ii. Whether failure to inform a person accused of defilement of his right to legal representation was fatal where the accused was able to properly defend himself.

Held

1. The instant matter was a second appeal. Section 361(1) of the Criminal Procedure Code enjoined the court to consider only questions of law. In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court. The appellant had failed to demonstrate that the procedure for declaring a witness vulnerable and the procedure for taking the evidence of an intermediary was not followed. The appellant was allowed to cross examine the intermediary. Due process was followed by the court.
2. From the record, the appellant was not informed of his right to legal representation. The appellant understood the nature of the proceedings and was able to properly defend himself. There were no complex issues of law or fact which the appellant encountered in the course of the trial that would have required that he be represented. The appellant also had the right to choose an advocate but he did not. Until recently, State funded legal representation was only given to persons charged with the offence of murder. The lack of legal representation was not shown to have caused an injustice to the appellant.
3. The Sexual Offences Act sets out the elements of the offence of defilement as follows;
    1. the victim must be a minor;
    2. there must be penetration of the genital organ, but such penetration needed not be complete or absolute. Partial penetration would suffice; and
    3. the identity of the perpetrator must be established.

    For the offence of defilement to be established, the prosecution must prove each of the above ingredients.
4. Part 1 of the P3 Form, which was completed by the officer who requested for medical examination of the complainant, indicated that the complainant was 7 years old. The court took judicial notice of the fact that such information was ordinarily provided to the police, by the complainant. In the instant case, it was indicated in the P3 Form that the complainant was escorted to Kapkatet Hospital by her parents and the police. On section C of the P3 Form, the clinical officer indicated that the estimated age of the complainant, at the time when he examined her, was 7 years. Based on that evidence, the prosecution proved that the complainant was 7 years old at the material time. The Sexual Offences Act adopted the definition of a child in the Children Act. The age of the complainant was conclusively proved beyond reasonable doubt.
5. The appellant was well-known to PW1 and PW2. The appellant was their neighbour. PW1 had had occasion to see the appellant in the fields before she sent the complainant to tether the cow, and later she caught him red-handed in the act. That was a case of recognition. PW1 was able to recognize the appellant. There was no possibility of any error in the recognition of the appellant, as the perpetrator of the offence.
6. The record was clear that the trial court analysed the appellant's evidence. The court extensively considered the appellant's defence and found that the defence did not displace the prosecution evidence. There was no reason to depart from the finding of the trial court, which was upheld by the High Court.
7. All the ingredients of the offence of defilement were proved beyond reasonable doubt. The complainant was a child, and she was defiled by the appellant. The appellant's conviction was safe. The mandatory nature of a prescribed sentence completely precluded the court from exercising any discretion, regardless of whether or not the circumstances of a particular case so required. The court

should not be deprived of the discretion which would enable it to determine the appropriate sentence in the particular case.

8. At no given time did the two courts below refer to the appellant's previous conviction in making their determination. The appellant's conviction did not factor in his sentence. The sentence that was handed down by the trial court was justified. The court was not persuaded to intervene. The appellant's mitigation was considered by the trial court. The complainant was a child of tender years; she could not understand what had happened to her or the implications thereof. Children and the society were safer, when the appellant was kept behind bars.

Appeal against conviction and sentence dismissed.

Citations

Cases

1. Alfayo Gombe Okello v Republic (Criminal Appeal 203 of 2009; [2010] KECA 319 (KLR)) — Applied
2. Christopher Ochieng v Republic (Criminal Appeal 202 of 2011; [2018] KECA 59 (KLR)) — Applied
3. CLEOPHAS OCHIENG OTIENO V REPUBLIC (Civil Appeal 166 of 2008; [2009] KEHC 2358 (KLR)) — Mentioned
4. David Njoroge Macharia v Republic (Criminal Appeal 497 of 2007; [2011] KECA 406 (KLR)) — Applied
5. Dennis Osoro Obiri v Republic (Criminal Appeal 279 of 2011; [2014] KECA 598 (KLR)) — Applied
6. Fappyton Mutuku Ngui v Republic (Criminal Appeal 296 of 2010; [2012] KEHC 5491 (KLR)) — Applied
7. Francis Karioko Muruatetu & Wilson Thirimbu Mwangi v Republic (Criminal Miscellaneous Application 394 of 2017; [2020] KEHC 1390 (KLR)) — Applied
8. G.M v M.M (Divorce Cause 86 of 2007; [2011] KEHC 3345 (KLR)) — Applied
9. JMM v Republic ([2022] eKLR)
10. Karani v Republic ([2010] 1 KLR 73) — Applied
11. Mark Oiruri Mose v Republic (Criminal Appeal 295 of 2012; [2013] KECA 67 (KLR)) — Applied
12. Peter Ochoki Mogusu v Republic (Criminal Appeal 11 of 2019; [2019] KEHC 4218 (KLR)) — Applied
13. Republic v Peter Maina Gichuri, Simon Gatama Gichuri & James Gichuki Mwangi (Criminal Case 47 of 2010; [2014] KEHC 5850 (KLR)) — Mentioned
14. Simon Ngole Katunga v Republic (Criminal Appeal 77 of 2015; [2018] KEHC 7303 (KLR)) — Applied

Statutes

1. Constitution of Kenya, 2010 (Const2010) — article 50(2)(g) — Cited
2. Criminal Procedure Code (CAP. 75) — section 361(1) — Cited
3. Evidence Act (CAP. 80) — section 125(1) — Cited
4. Sexual Offences Act (No. 3 of 2006) — section 8(1); section 11(1) — Cited

International Instruments

1. International Covenant on Civil and Political Rights (ICCPR), 1966

Advocates

None mentioned

JUDGMENT

1. This is an appeal from the judgment of the High Court of Kenya at Kericho, (Ngenye- Macharia, J (as she then was)). The appellant 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. At the conclusion of the trial, the appellant was found guilty of the offence. He was convicted and sentenced to life imprisonment.

2. The particulars of the offence were that: on June 5, 2012 in Bureti District within the then Rift Valley Province, the appellant intentionally caused his penis to penetrate the vagina of IC (name withheld), a child aged 7 years.

3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on June 5, 2012 in Bureti District within the then Rift Valley Province, the appellant intentionally touched the vagina of IC (name withheld), a child aged 7 years.

4. The prosecution's case was that; the complainant's mother (PW1), sent the complainant to tether a cow in the fields. At the time, the appellant was in the field but he later on disappeared. PW1 followed the complainant to the fields and on calling out her name, there was no response. It was then that she heard some noises in the bushes. On approaching the bushes, PW1 caught the appellant on top of the complainant. He was holding the complainant's mouth. The complainant's pants were on the ground and she was crying. The appellant was half naked. When the appellant saw PW1, he pulled off the complainant and sat on the ground. PW1 hit the appellant with a kettle, she then screamed for help. Her sister in-law came, and together they apprehended the appellant and informed the area chief.

5. PW2, the father of the complainant, was informed of the incident by PW1. After reporting to the chief, he took the complainant to Kapsogut Health Centre for treatment. He also went back to the scene of the incident in the company of the chief, there they recovered the appellant's X-ray reports, hospital receipts and the complainant's slippers. PW3, the area chief, corroborated the evidence of PW2 and also identified the items which had been found at the scene.

6. PW4 was the investigating officer. She informed the court that the appellant had been brought to the police station by PW3. She produced the complainant's skirt and pant, and the X-ray reports and hospital receipts that were recovered by PW2 and PW3.

7. PW5, was the Clinical Officer who examined the complainant. His findings were that; the complainant's clothes were torn and dirty. Her neck and the left side of the abdomen were tender. The age of the injury was one day, and a blunt object had been used to occasion the said injuries. There was discharge from the complainant's genitalia; there was no spermatozoa, but Sexually Transmitted Disease cells were detected. PW5 formed the opinion that the complainant had been defiled and was infected with a sexually transmitted disease.

8. The complainant did not testify as the court determined that she could not understand the nature of the proceedings.

9. In his sworn statement of defence, the appellant stated that PW1 had directed the complainant to tether a calf. He said that he used an access road which was next to the complainant's house. On reaching the junction, PW1 asked him what he was doing with the complainant and then she started to scream, for no reason. He was apprehended by members of the public who responded to PW1's screams. He

further stated that he had pain on his left hand and therefore he was not in a position to defile the complainant.

10. DW2 was the appellant's father. He informed the court that he did not know the charges against the appellant. He stated that on the material date, the appellant was at Kapkaket Hospital for treatment since he had wounds on his hands.

11. DW3 was the appellant's mother. She informed the court that she had heard about the appellant having defiled a young girl. She was of the view that the charges had been fabricated, even though she was not at home on the material day.

12. The trial court held that the appellant was caught red-handed in the act of defiling the minor by PW1. The court further held that evidence in the P3 form was conclusive; and that PW5 proved beyond reasonable doubt that the minor had been defiled because there was presence of discharge from her genitalia and also, there was presence of sexually transmitted disease cells in the discharge. The court was of the considered view that the identification of the appellant was credible; as the appellant was a neighbour and the offence took place in broad daylight. Identification was by way of recognition. The court convicted the appellant for the offence of defilement and sentenced him life imprisonment.

13. Aggrieved by the decision of the trial court, the appellant appealed to the High court. The learned Judge held that the evidence of PW1 had not been challenged in any way, and that the said evidence was corroborated by the evidence of PW5 who had medically examined the complainant. The learned Judge proceeded to hold that the conviction was based on strong and cogent evidence as opposed to hearsay or uncorroborated evidence. The learned Judge also held that the burden of proof did not shift to the appellant, his defence was considered and the same was displaced by the prosecution's overwhelming evidence. The learned Judge observed that the appellant's defence was a mere denial that did not dislodge the prosecution's evidence against him.

14. As regards the age of the complainant, the learned judge observed that the appellant did not dispute the same during trial and that the charge sheet and the P3 form showed the complainant's age to be 7 years. The learned Judge also observed that during voire dire, the complainant stated that she was in standard one, which placed her age below 8 years and also that it was in light of the complainant's tender age that she was unable to understand the nature of the oath or the proceedings. The learned Judge held that, the evidence clearly demonstrated that the complainant was below the age of 11 years which precipitated the police to draw the charge under section 8(2) of the *Sexual Offences Act*.

15. Citing the provisions of section 36(1) of the *Sexual Offences Act*, the learned Judge observed that medical or forensic examination of the appellant was unnecessary as the appellant was caught red-handed committing the offence.

16. The learned Judge held that the failure by the trial court to inform the appellant of his right to legal representation in light of article 50(2)(h), could not be underscored as life imprisonment is no mean penalty; however, the learned Judge held that that would not warrant an acquittal or otherwise the setting aside of a conviction. She relied on the decision of this court in *David Njoroge Macharia v Republic*[2011] eKLR.

17. In his mitigation before the trial court, the appellant informed the court that he suffered from tuberculosis and that he was the sole bread winner for his family, and therefore he was deserving of the court's mercy. The learned Judge, while citing the case of *David Kundu Simiyu v Republic*, Criminal Appeal No 8 of 2008, held that the sentence meted upon the appellant was lawful; and found no reason to interfere with the trial court's finding on sentencing.

18. Dissatisfied, the appellant lodged various memorandums of appeal and supplementary grounds of appeal. He submitted on the following grounds: failure to adequately explain the charges; admission of hearsay evidence; failure to consider the plea of not guilty; improper shifting of the burden of proof; failure to establish the complainant's age; disregard of the complainant's evidence; wrongly taking the evidence of an intermediary; denial of the right to legal counsel; and a manifestly excessive sentence.

19. At the hearing of the appeal; Mr Motanya, learned counsel appeared for the appellant, whereas Ms Torosi, learned prosecution counsel appeared for the state. Counsel relied on their respective written submissions.

20. The appellant submitted that the trial court failed to explain the charge against him in a language he understood as envisaged under article 50(2)(g), and thereby violated his constitutional rights. In support of this argument he relied on the decisions in *Fredrick Kizito v Republic*, Criminal Appeal No 170 of 2019 and *Adan v Republic* [1973] EA 445. The appellant also faulted the trial court for admitting hearsay evidence and as a result prejudicing him.

21. The appellant was of the view that the trial court shifted to him, the burden of proof regarding the age of the complainant. It was in light of this view that the appellant pointed out that his right to be presumed innocent until proven guilty, was violated. The appellant further submitted that the trial court failed to establish the actual age of the complainant through reliable means, yet, the determination of the age of the complainant is crucial in sexual offences cases as it impacts the applicability of specific legal provisions and the severity of sentence. In the circumstances, the appellant was of the view that the conviction and subsequent sentencing was unjust and flawed.

22. The appellant faulted the trial court for failing to rule out the possibility of another individual having committed the offence, as the medical evidence adduced did not link him to the offence. The appellant submitted further that, the failure by the court to consider the evidence of the complainant undermined his right to a fair trial. The appellant also faulted the court for failing to comply with the mandatory procedure for declaring a witness vulnerable; and also for failing to comply with the requisite procedure before taking the evidence of an intermediary as envisaged under sections 31 and 32 of the *Sexual Offences Act* and rules 7(8) and 7(12) of the Sexual Offences Rules.

23. Citing article 50(2)(g) of *the Constitution*, the appellant submitted that the court denied him the right to legal counsel, and thereby violated his constitutional rights and also compromised the fairness of the trial. He cited the case of *David Macharia Njoroge v Republic* [2011] eKLR in support of his submissions.

24. In conclusion, the appellant was of the view that the sentence passed was manifestly excessive. He faulted the court for failing to consider the circumstances of the case and the mitigating factors. Relying on the decisions in the cases of *Joshua Gichuki Mwangi v Republic*, Criminal Appeal No 84 of 2015 and *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, the appellant submitted that the mandatory nature of the sentence was unconstitutional.

25. Opposing the appeal, the learned state counsel submitted that the burden of proof beyond reasonable doubt must be discharged by the prosecution. Counsel referred to the case of *Simon Ngole Katunga v Republic* [2020] eKLR in support of this statement.

26. On the issue of the complainant's age, counsel pointed out that the trial court conducted voire dire and noted that the complainant did not understand the nature of the proceedings and therefore appointed her mother to represent her as her next of kin. Counsel further submitted that the medical report produced by PW5 estimated the age of the complainant to be 7 years at the time of the incident; and that the charge sheet also did show the complainant's age as 7 years. The respondent also submitted

that the appellant neither disputed this fact nor did he lead any evidence to the contrary. It was the respondent's submission that the age of the complainant was proved.

27. On proof of penetration, the respondent relied on the testimony of PW5, who stated that the complainant had tenderness on the neck and left side of the abdomen, a blunt object had been used to occasion the injuries; there was discharge from the genitalia and although there was no presence of spermatozoa, there were sexually transmitted disease cells in the discharge. PW5 arrived at the conclusion that the complainant had been defiled and infected with a sexually transmitted disease. Counsel was of the view that, the presence of spermatozoa was just one way of proving penetration but not the only way. She submitted that penetration can be proved by the oral evidence of the victim and circumstantial evidence. To buttress this submission, counsel cited section 2 of the *Sexual Offences Act* and the case of *Mark Oiruri Mose v Republic* [2013] eKLR. Counsel drew the attention of the court to the fact that the appellant had been caught red-handed, as he was defiling the complainant.

28. Relying on the decisions in the cases of *Dennis Osoro Obiri v Republic* [2014] eKLR, *Geoffrey Kioji v Republic*, Criminal Appeal No 270 of 2010 and *Kassim Ali v republic*, Criminal Appeal No 84 of 2005, the respondent was of the view that medical evidence to link the appellant to the offence was not necessary the moment the trial court found that there was sufficient medical evidence to prove that the appellant had been defiled and that there was sufficient evidence as to the identity of the person who had defiled her. The respondent was of the view that the charge had been proved by the oral evidence of PW1, whose evidence was well corroborated by the evidence of PW2, PW3, PW4 and medical evidence adduced by PW5.

29. As to the identification of the appellant, counsel pointed out that PW1 testified that the appellant was their neighbor. The offence took place in broad daylight, and in the circumstances PW1, PW2 and PW4 positively identified the appellant. The respondent further submitted that the appellant was a person well known to PW1. He ran away from the scene leaving behind his documents which were later retrieved. Therefore, the complainant was able to identify the appellant as the perpetrator of the offence to the required standard of proof.

30. On whether the prosecution proved its case beyond reasonable doubt or not, the respondent submitted that both the trial court and the 1st appellate court made concurrent findings of fact on the credibility of PW1. The trial court believed and accepted the evidence of PW1 as truthful. It was the respondent's considered view that this was not a case of relying on the evidence of a single witness, and therefore the court needed not warn itself on the dangers of relying on such evidence. The evidence against the appellant was water-tight. The evidence of PW1 was also corroborated by the evidence of PW2, PW3, PW4 and PW5. The evidence was consistent and sufficient to support the conviction. This was not a made up case. The prosecution proved its case beyond any reasonable doubt displacing the defence of the appellant, which was taken into account by the trial court but it did not challenge the prosecution's case. That was the sum total of the respondent's answer to the appeal.

31. This is a second appeal. Section 361(1) of the *Criminal Procedure Code* enjoins us to consider only questions of law. In the case of *Karani v Republic* [2010] 1 KLR 73 the court stated thus:

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they

were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

32. We have carefully considered the record of appeal, the written submissions by both parties, authorities cited and the law. The issues for determination are; whether the appellant understood the language used in the proceedings, whether the evidence of an intermediary was properly recorded, whether the appellant was entitled to counsel provided for by the state, whether or not the ingredients of the offence of defilement were proved beyond reasonable doubt, whether the sentence meted against the appellant was excessive and whether the appellant's previous conviction was a factor in sentencing.

33. The appellant contended that the court failed to explain the charge against him in a language he understood. We note from the record that on June 7, 2012 when plea was taken, the languages used by the court were English, Kiswahili and Kipsigis and an interpreter was present in court. The appellant cannot therefore be heard to claim that the charge was not explained to him in a language he did not understand.

34. It is common ground that the trial court found the complainant to be of tender age and unable to understand the nature of an oath or proceedings. The court proceeded to direct that the complainant's evidence be taken through an intermediary, being the complainant's mother. The appellant contended that due procedure as provided for under Section 31 of the *Sexual Offences Act* and section 125(1) of the *Evidence Act* was not followed. Article 50(7) of *the Constitution* provides for an intermediary as a medium through which an accused person or a complainant communicates to the court. Section 2 of the *Sexual Offences Act* defines an intermediary as:

> "A person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counsellor, guardian, children's officer or social worker."

35. It follows therefore that, in the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court. In the case of *MM v Republic* [2014] eKLR this court stated as follows:

> "It is clear from what we have said so far that the procedure of appointing an intermediary precedes the testimony of the intended vulnerable witness even where the court does so suo moto. It is also clear that an intermediary can be an expert in a specified field or a person, who through experience, possesses special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness."

36. The court further stated that:

> "The expertise, possession of special knowledge or relationship with the witness must be ascertained by the trial court through examination of the prospective intermediary before the court appoints him or her. It goes without saying, in view of that role, that an intermediary must subscribe to an appropriate oath ahead of the witness' testimony, undertaking to convey correctly and to the best of his/her ability the general purport of the evidence. The trial court must then give directions to delineate the extent of the intermediary's participation in the proceedings."

37. The trial court in appointing PW1 as an intermediary, first declared the complainant to be a vulnerable witness. In the case of *Peter Ochoki Mogusu v Republic* [2019] eKLR the court stated that:

> " A witness must first be declared vulnerable before the process of appointing an intermediary is initiated. When an intermediary is eventually appointed then the witness will be at liberty to tender evidence. The process of declaring a witness vulnerable may be instituted by the prosecution or by the court on its own motion during say a voir-dire examination or by any witness other than the one to be declared as such. On the conditions attendant to appointing an intermediary the Court of Appeal in *John Kinyua Nathan* (*supra*) held that: - .... The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed....."

38. In the case of *JMM v Republic* [2022] eKLR the court observed:

> " Under section 31(2) of the *Sexual Offences Act*, an intermediary on motion by the court or by the prosecution can be appointed after regard to the examination of the victim, the age of the complainant, nature of the relationship between parties and intimidation of the minor and other relevant factors."

39. The court further noted that section 31(2) of the *Sexual Offences Act* gives discretion to the prosecution or the court *suo moto* to declare a child a vulnerable witness. Section 31 of the *Sexual Offences Act* which provides as follows:

> " (1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is—
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> a. the alleged victim in the proceedings pending before the court;
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> a. a child; or
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> b. a person with mental disabilities.
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> 2. The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of—
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> a. age;
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> b. intellectual, psychological or physical impairment;
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> c. trauma;
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> d. cultural differences;
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> e. the possibility of intimidation;
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> f. race;
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> g. religion;

h. language;

i. the relationship of the witness to any party to the proceedings;

j. the nature of the subject matter of the evidence; or

k. any other factor the court considers relevant.

3. The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.

4. Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures-

a. allowing such witness to give evidence under the protective cover of a witness protection box;

b. directing that the witness shall give evidence through an intermediary; (c) directing that the proceedings may not take place in open court;

d. prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or

e. any other measure which the court deems just and appropriate.

5. Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

6. An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.

7. If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may—

a. convey the general purport of any question to the relevant witness;

b. inform the court at any time that the witness is fatigued or stressed; and (c) request the court for a recess.

8. In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including-

(a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity; (b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;

b. the need to protect the witness's dignity and safety and protect the witness from trauma; and

c. the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

9. The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.

10. A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary."

40. In the result, we find that the appellant has failed to demonstrate that the procedure for declaring a witness vulnerable and the procedure for taking the evidence of an intermediary was not followed. The appellant was allowed to cross examine the intermediary. We hold that due process was followed by the court.

41. The appellant pointed out that he was not accorded a fair hearing, as he was not informed of his right to legal representation. It is evident from the record that the appellant was not informed of this right. The question that then begs to be answered is whether the failure by the court to inform the appellant of his right to legal representation was prejudicial to him. Article 50(2)(g) and (h) provides that:

2. Every accused person has the right to a fair trial, which includes the right-

g. to choose, and be represented by an advocate, and to be informed of this promptly;

h. to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result and to be informed of this right.

42. This court in the case of *David Njoroge Macharia v Republic*, (*supra*) observed as follows:

> " Article 50 sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interest of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the 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...
>
> Under the new Constitution, state funded legal representation is a right in certain instances. Article 50(2) provides that an accused shall have an advocate assigned to him by the state and at the state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the *Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of article

2(6). Therefore, the provisions of the *ICCPR* and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense..."

43. It is not in dispute that the appellant was able to represent himself before the trial court. He suffered from no disability and on the occasion where there was a language barrier, the court had an interpreter to assist the appellant understand the proceedings. The appellant was able to cross examine all the prosecution witness and give his sworn testimony and he even called two witnesses. In the circumstances, we have no doubt in our minds that the appellant understood the nature of the proceedings and that he was able to properly defend himself. There were no complex issues of law or fact which the appellant encountered in the course of the trial that would have required that he be represented. The appellant also had the right to choose an advocate but he did not. Until recently, state funded legal representation was only given to persons charged with the offence of murder. We find that the lack of legal representation was not shown to have caused an injustice to the appellant.

44. The *Sexual Offences Act* sets out the elements of the offence of defilement as follows: the victim must be a minor; there must be penetration of the genital organ, but such penetration need not be complete or absolute. Partial penetration will suffice; and the identity of the perpetrator must be established. For the offence of defilement to be established, the prosecution must prove each of the above ingredients.

45. The appellant contended that the age of the complainant was not proved. The learned Judge in her determination observed that the appellant did not dispute the age of the complainant during trial. Be that as it may, the learned Judge noted that the charge sheet and the P3 form showed the complainant's age to be 7 years. A perusal of the record shows that *voire dire* was conducted on the complainant, who stated that she was in standard one. The learned Judge held that this information placed her age below 8 years. According to the Judge, as a result of the voire dire, and because the learned trial magistrate had the opportunity to observe the complainant, she made a finding that the complainant was of a tender age and therefore unable to understand the nature of the oath or the proceedings. The learned Judge held that, the evidence clearly demonstrated that the complainant was below the age of 11 years, which is what precipitated the police to draw the charge under section 8(2) of the *Sexual Offences Act*.

46. We note that Part 1 of the P3 Form, which was completed by the officer who requested for medical examination of the complainant, indicated that the complainant was 7 years old. We take judicial notice of the fact that such information is ordinarily provided to the police, by the complainant. In this case, it is indicated in the P3 Form that the complainant was escorted to Kapkatet Hospital by her parents and the police.

47. Secondly, on section C of the P3 Form, the Clinical Officer, Mr Leonard Sang (PW5) indicated that the estimated age of the complainant, at the time when he examined her, was 7 years. Based on the said evidence, we are satisfied that the prosecution proved that the complainant was 7 years old at the material time.

48. The importance of proving age of a complainant was emphasized in the case of *Hadson Ali Mwachongo v Republic* [2016] eKLR where the court stated thus:

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim."

49. In *Alfayo Gombe Okello v Republic*, Cr App No 203 of 2009 this Court stated as follows:

> "...in its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."

50. Rule 4 of the *Sexual Offences Rules, 2014* which provides that:

> "When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents."

51. In addition, the *Sexual Offences Act* adopts the definition of a child in the Children's Act. Section 2 of the *Children Act* defines "age" as: "Where actual age is not known means the apparent age". In this case, the trial court was satisfied that the complainant was of tender age.

52. In the case of *Francis Omuroni v Uganda*, Criminal Appeal No 2 of 2000, it was held thus:

> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense ...."

53. Similarly, in *Fappyton Mutuku Ngui v Republic* [2012] eKLR the court held that:

> "... "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

54. In the end, we find and hold that the age of the complainant was conclusively proved beyond reasonable doubt.

55. Furthermore, we note that the appellant was well-known to PW1 and PW2. The appellant was their neighbour. PW1 had had occasion to see the appellant in the fields before she sent the complainant to tether the cow, and later she caught him red-handed in the act. This was a case of recognition.

56. We have no doubt that PW1 was able to recognize the appellant. In the case of *Cleophas Otieno Wamunga v Republic* [1989] eKLR, this court while dealing with the complexities of an identification of an assailant stated:

> "It is trite law that where the only evidence against a defendant is evidence of identification by recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

57. In this case we find that there was no possibility of any error in the recognition of the appellant, as the perpetrator of the offence.

58. As regards the appellant's submission that his defence was not considered, the record shows that the appellant gave sworn testimony and called two witnesses. The record is clear that the trial court analysed the said evidence. We note that the court extensively considered the appellant's defence and found

that the said defence did not displace the prosecution evidence. We find no reason to depart from the finding of the trial court, which was upheld by the High Court.

59. In the result, we find that all the ingredients of the offence of defilement were proved beyond reasonable doubt. The complainant was a child, and she was defiled by the appellant. From the foregoing, we have absolutely no doubt that the appellant's conviction was safe.

60. The appellant contended that the life sentence meted upon him was unconstitutional. On the other hand, the respondent maintained that the sentence was legal. Section 8(2) of the *Sexual Offences Act* 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."

61. This court in the case of *Christopher Ochieng v Republic* [2018] eKLR stated thus:

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

62. The mandatory nature of a prescribed sentence completely precludes the court from exercising any discretion, regardless of whether or not the circumstances of a particular case so require. The court should not be deprived of the discretion which would enable it to determine the appropriate sentence in the particular case.

63. The trial court while sentencing the appellant to life imprisonment and rejecting the appellant's plea for leniency, took into consideration; the nature of the offence, the age of the victim and the fact that the victim had been infected with sexually transmitted disease cells. The learned Judge in his determination found no reason to interfere with the sentence noting that he could only intervene where it was evident that the trial court had acted upon the wrong principles, outside the law or had overlooked material principles, and that was not the case. At no given time did the two courts below refer to the appellant's previous conviction in making their determination. We find that the appellant's conviction did not factor in his sentence.

64. We have given due consideration to the evidence on record and the circumstances of this case. We are satisfied that the sentence that was handed down by the trial court was justified. We are not persuaded to intervene. The appellant's mitigation was considered by the trial court. The complainant was a child of tender years; she could not understand what had happened to her or the implications thereof. We hold the considered view that children and the society are safer, when the appellant is kept behind bars. We therefore uphold the sentence meted against the appellant.

65. The upshot is that the appeal against conviction and sentence is without merit and is hereby dismissed.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF OCTOBER, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR