REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. E017 OF 2021

MORRIS OTIENO ABAKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(appeal against the judgement of the learned trial magistrate Hon. S.W. Mathenge in Bondo Principal Magistrate's Court Sexual Offence Case No. E017 of 2020 delivered on the 16th July 2021)

JUDGMENT

1. This is an appeal against the judgement of the learned trial magistrate Hon. S.W. Mathenge, Resident Magistrate in Bondo Principal Magistrate's Court Sexual Offence Case No. E017 of 2020 delivered on the 16th July 2021.

2. The Appellant **MORRIS OTIENO ABAKI** was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act, the particulars being that on diverse dates between 23.10.2020 to 24.10.2020 at Dunga within Siaya County, he intentionally and unlawfully caused his penis to penetrate the vagina of BAM a child aged 17 years old.

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 No. 3 of 2006.

4. The appellant pleaded not guilty to both the main and alternative charge and the matter proceeded for hearing.

5. The matter proceeded to hearing where the prosecution called 5 witnesses to prove their case. Placed on his defense, the appellant opted to remain silent. The trial magistrate, Hon. S.W. Mathenge after considering the evidence adduced by the prosecution held that the prosecution had failed to prove the offence of defilement as charged but rather that it had proved the offence of attempted defilement contrary to section 9 (1) as read with section 9 (2) of the Sexual Offences Act. After considering the appellant's mitigation as well as the pre-sentencing report, the trial magistrate sentenced the appellant to 10 years' imprisonment.

6. Aggrieved by the said conviction and sentence, the appellant filed his petition of appeal dated 28th July 2021 on the 29th July 2021, which petition was based on the following grounds:

a) ***That the learned trial magistrate erred in both points of law and fact by not informing the appellant that he was being convicted on a lesser charge of attempted defilement contrary to the charge of defilement.***

b) ***That the learned trial magistrate erred in both points of law and fact when he convicted and sentenced the appellant without regard to his basic right for disclosure of evidence which was intended to brought against him as laid down in Article 50 (2) (j) of the constitution.***

c) ***That the learned trial magistrate erred in both points of law and fact failing to observe that the prosecution case was full of contradictions and inconsistencies which rendered the case unbelievable.***

d) ***That the learned trial magistrate erred in both points of law and fact by convicting him without observing that he was prejudiced when substantial injustice occurred in his case as he was not represented by an advocate as stipulated in the constitution under Article 50 (2) (h).***

e) ***That the learned trial magistrate erred in both points of law and fact by failing to properly analyse the evidence on record thereby arriving at a wrong decision.***

f) ***That the learned trial magistrate proceeded on wrong principles and disregarded the generally applicable principles of law.***

g) ***That the learned trial magistrate's decision was against the weight of evidence.***

The Appellant's Submissions

7. There are two submissions filed on behalf of and by the appellant in this case. The submissions filed on his behalf by his advocate on record are dated 22nd November 2021 and filed on the same day.

8. It is submitted that when the matter came up for hearing on the 4th February 2021 the prosecution took the complainant to the children's office to have her coached after requesting for an adjournment under the guise that the complainant was emotional.

9. It was submitted that the case against the appellant was never proved beyond reasonable doubt. Reliance was placed on the case of **James Murigu Karamba v Republic (2016) eKLR** where the judges were unanimous that a conviction should strictly be based on the evidence and not unsubstantiated theories, and in the case of **Suleiman Kamau Nyambura v Republic (2015) eKLR** where it was held that it was necessary to support developed theories with evidence, that a theory must be canvassed in evidence by the parties.

10. It was submitted that the trial court failed to conduct due diligence to interrogate and/or access the age of the applicant who was a student at Nyagondo Mixed Secondary School and that both the complainant and appellant were young teenagers in an open relationship.

11. It was further submitted that the appellant was not informed of the lesser charge of attempted defilement having been acquitted of defilement.

12. The appellant filed his submissions on the 6th December 2021. It was his submission that the trial magistrate erred in both law and fact by not informing him that he was being convicted of a lesser charge of attempted defilement.

13. The appellant submitted that the trial magistrate agreed in his judgement that he was charged under the wrong section of the law after adjudging the age of the complainant to be 17 years, 4 months, and that the trial magistrate failed further by assuming that he knew the complainant's age and thus understood the consequences of that offence.

14. The appellant submitted that the prosecution failed to disclose any evidence they used against him thus breaching the appellant's right to a fair hearing as enshrined under Article 50 (2) (j) of the Constitution.

15. The appellant submitted that the prosecution case was full of contradictions specifically the testimony of the complainant who stated that she was born on the 11th June 2003 and then proceeded to state that the appellant was her boyfriend since late June 2002 to 3rd October 2020. He submitted that these contradictions were so grave to be considered typos as they were repeated both in the proceedings and the judgement. Reliance was placed on the case of **Richard Aspella v Republic Appeal No. 45 of 1981 CA** where the court stated that "***two contradictory statements cannot be admitted in a court of law either one is the truth and the other is not or maybe both of them are not true as there is no possibility for both of them to be admissible due to their contradictory nature."***

16. It was submitted that the trial magistrate erred by failing to appoint an advocate to him to guide him in his case considering he

was a student and further in contravention of Article 50 (2) (h) of the Constitution.

17. It was further submitted that the trial magistrate acted on wrong principles in convicting the appellant and further ignored the pre-sentencing report before proceeding to sentence the accused to 10 years' imprisonment.

18. The appellant also submitted that proper investigations were not done by the police as the investigating officer never visited the scene of crime but merely received information while at the police station that the appellant had committed the offence before proceeding to arrest him and charge him.

19. The appellant further submitted that the trial magistrate also failed to exercise discretion by giving the benefit of doubt to the appellant considering the circumstances of the case before proceeding to convict him as the trial magistrate's main aim was to secure conviction against the appellant.

20. The Respondent did not file any submissions.

Analysis & Determination

21. I have considered the the grounds of appeal and the submissions filed by the appellant and his counsel. As this is a first appeal, this court is expected to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.

22. In the case of **Gitobu Imanyara & 2 others v Attorney General [2016] e KLR,** the Court of Appeal stated that:

"[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

23. Revisiting the evidence adduced before the trial court, the complainant, BAM a minor of 17years old was taken through a *voire doire* examination and adjudged to understand the nature of an oath. She testified as PW1. It was her testimony that the accused was her boyfriend from late June 2002 to 23rd October 2020. She testified that on the 23.10.2020, she left her house and proceeded to the appellant's house in Gobei where she went to his bedroom and they spoke about her parents finding out about their relationship after which they slept.

24. It was her testimony that at about 2pm, the appellant woke her up and told her that he wanted to make love to her. She further testified that the accused told her that her mother already thought that they have sexual intercourse. She testified that the appellant tried putting his penis in her vagina but it was too painful for her so he stopped. She stated that she then woke up, dressed and the appellant took her close to her home and left her there.

25. It was her testimony that when she arrived home, she found the door locked from inside and when she knocked, her father asked her where she had been to which she responded by saying that she was in the toilet. It was her testimony that the following morning at 5 am, her father, grandfather A and Uncle K went and caned her until she admitted that she was at the appellant's place. She testified that they then proceeded to the appellant's place where they found his grandmother.

26. PW1 testified that the matter was then reported at Wagai Police Station where she was referred to Wagai Health Centre for treatment and when they went back to the police station she was issued with a P3 form which was filled at Akala Health Centre. In cross-examination, she testified that nobody saw her going to the appellant's home and she further reiterated that the appellant tried to have sexual intercourse with her but he was not successful.

27. PW2, JM, the complainant's mother testified that the complainant was 17 years old. She identified her Birth Certificate in court and testified that on the 23.10.2020 at about 10pm, she was in the house with the complainant and that they had gone to sleep but that she later woke up to go to the toilet and found the door opened and that is when she realized that the complainant was not in bed so she went outside to look for her but was not successful. PW2 testified that she returned to the house but did not sleep until 3am when she heard a knock on her door and when she opened the door, the complainant came in. She testified that she went to her

neighbour Sospeter Ayieko and told him what had happened.

28. PW2 testified that they interrogated the complainant who revealed that she had been at the appellant's place but when they proceeded to his place, they found his grandmother whom they told what had happened. She testified that they reported the matter to the assistant chief of Dienya who referred them to Wagai Police Station where they recorded their statements before proceeding to Wagai dispensary. She identified the complainant's treatment notes and further testified that the P3 form issued by the police was filled at Akala Health Centre. She testified that the appellant remained untraceable but was then arrested. She identified the appellant in court.

29. In cross-examination PW2 testified that she interrogated the complainant who revealed that she had been at the appellant's house. It was her testimony that they had warned the two to stop the relationship but they refused. She further testified that she was informed by the appellant's grandmother that he had gone to school. She further stated that she knew the appellant was the complainant's boyfriend and that she took the complainant to hospital to see whether she had been defiled or was pregnant which she was not.

30. PW3 Sospeter Ayieko testified that on the 24.10.2020 at 4am, PW2 knocked at his door and informed him that her daughter, the complainant, had just returned home. He testified that upon interrogating the complainant she revealed that she had been at the appellant's home so they all proceeded to the appellant's home and on arriving found the appellant's grandmother only who told them that the appellant had proceeded to school.

31. It was his testimony that they went to Chief Dienya who directed them to report the same which they did at Wagai Police Post where they also recorded their statements. He stated that they went to Wagai Health Centre and returned to the police post. He testified that the appellant was later arrested.

32. In cross-examination, PW3 denied threatening the appellant's life and stated that he saw the complainant at their home and not at the appellant's house. He further testified that the appellant's grandmother informed them that the appellant had just left for school.

33. PW4, Moses Onyango, a clinical officer at Akala Health Centre testified and produced a P3 for the complainant who was 17 years old and had been reported to have been defiled by a person well known to her. He testified that the complainant had been seen at Wagai Health Centre before filling of the P3 form.

34. He testified that on examination, there were no bruises, the external genitalia was normal but a whitish discharge was seen. He stated that the complainant had changed clothes and showered and that she had no physical injury on her body. He stated that the hymen was not intact and that the complainant stated that she had sexual intercourse on 23.1.2020. He testified that the approximate age of the injuries was days and that the results of the P3 form and the PRC form were the same. He produced the P3 form as PEx 2 and the PRC form filled on 26.10.2020 as PEx 3.

35. In cross-examination, PW4 stated that he had never met the appellant and that he did not say that it was the appellant who defiled the girl or broke her hymen.

36. PW5, No. 23126, Inspector Kanano Elema testified that on the 24.10.2020 a defilement case was reported by the complainant at Wagai Police Post where she worked that stated that the appellant defiled the complainant severally. She stated that she referred the complainant to hospital to ascertain defilement and that the complainant was taken to Wagai Health Centre for first treatment and later referred to Akala Health Centre where she issued the complainant with a P3 form.

37. She testified that the form was duly filled and returned to her. She stated that she carried out investigations by recording the complainant's statement. She stated that the complainant was 17 years old as she was born on 11.06.2003 as per her birth certificate which she produced as PEx 1. She further testified that she recorded the statements of the complainant's father and other witnesses. She further stated that the complainant went to the appellant's house on the night of 23rd and 24th and that her father realized that she had been defiled. PW5 identified the appellant in court.

38. In cross-examination, PW5 stated that she did not see the complainant go to the appellant's home but stated that the complainant was in a relationship with the appellant. She stated that the parents of the complainant reported her missing and that

they had warned the appellant severally. She stated that the P3 confirmed defilement and that the complainant positively identified the appellant as her defiler. She further stated that she arrested the appellant while he was at school but denied forcing the appellant to say that he was the complainant's boyfriend. She admitted that she was not present during the defilement.

39. Placed on his defence, the appellant chose to remain silent.

40. Considering all the evidence as adduced in the trial court, the grounds of appeal and the written submissions as filed by the appellant in person and his counsel, I find the issues for determination are:

a) *Whether the appellant's constitutional rights under Article 50 (2) (j) were infringed,*

b) *Whether the appellant's constitutional right under Article 50 (2) (h) were infringed,*

c) *Whether the learned trial magistrate erred by failing to inform the appellant that he was being convicted on a lesser charge of attempted defilement,*

d) *Whether the evidence on record was sufficient for the conviction of the appellant and*

e) *Whether the sentence imposed on the appellant was proper.*

Whether the appellant's constitutional rights under Article 50 (2) (j) were infringed

41. The appellant contends in his submissions that the prosecution failed to disclose any evidence they used against him thus breaching the appellant's right to a fair hearing as enshrined under Article 50 (2) (j) of the Constitution.

42. Article **50(2)(j)** provides that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence.

43. In the instant case, the trial court record shows that on the 12.11.2020 when the case came up for the first time before the trial magistrate, the prosecution supplied the appellant with the charge sheet, PRC Form, P3 Form, Complainant's Birth Certificate as well as statements of the witnesses they intended to call. The appellant herein confirmed receipt of the said documents before court and it was recorded as such.

44. In light of the above, I find that the appellant cannot therefore justifiably claim that he was not provided with the evidence the prosecution intended to rely on. This ground of appeal and submission fails and is hereby dismissed.

Whether the appellant's constitutional right under Article 50 (2) (h) were infringed

45. Article 50 (2) of the Constitution guarantees every accused person the right to a fair trial. It provides:

"50(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 the right 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 promptly."

46. Generally, Article 50(2) (g) of the Constitution guarantees a fair trial to every accused person which includes the right to be represented by an advocate and to be informed of that right promptly.

47. The appellant submitted that the trial magistrate erred by failing to appoint an advocate to guide him in his case considering he was a student and further in contravention of Article 50 (2) (h) of the Constitution.

48. The criteria for legal aid services by the state is outlined in Sections 29 (1), 30, 35 & 36 of the Legal Aid Act No. 6 of 2016. Section 43 of the Act lays down the duties of the court before which an unrepresented accused person is presented. The section provides that:

"43. A Court before which an unrepresented accused person is presented shall:

a) Promptly inform the accused of his or her right to legal representation;

b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and

c) Inform the service to provide legal aid to the accused person"

49. The key words under Article 50(2) (g) and (h) of the Constitution and section 43 is ***"to be informed promptly of the right".*** In order to fully comply with the provisions of article 50(2)(g) and (h) and section 43(1) of the Legal Aid Act, the trial court as a matter of constitutional duty and in the interest of justice, ought to give the information to the accused person and/or make a preliminary inquiry at the earliest opportunity possible, on the accused person's need to be accorded legal aid or legal representation. A determination must be made as to whether or not the accused person would require legal representation before commencing with the hearing of the case.

50. What then is this "***earliest opportunity***"" In my view, the earliest opportunity would be when the accused is first presented before court, or during plea taking, essentially before the hearing begins. In the case of **Joseph Kiema Philip v Republic [2019] eKLR** the High Court sitting at Kajiado stated that:

"The trial record of proceedings must indicate or communicate that the accused was duly made aware of his rights under article 50(2) of the Constitution and that the process expounded above was conducted where it is relevant."

51. Taking into account the aforementioned principles and upon perusal of the trial court record, I note that when the appellant was first presented before court on the 12.11.2020, the trial magistrate promptly stated as follows:

"COURT: You have the right to legal representation of your own choice. You are encouraged to exercise it. You are hereby informed that you are also entitled to apply to the Legal Aid Board for assistance should you desire."

52. The appellant responded by stating that: ***" I will proceed as I am".***

53. From the above, it is clear that the trial court fully complied with the provisions of Article 50(2)(g) and (h) of the constitution and section 43(1) of the Legal Aid Act. Accordingly, this limb of the appeal also fails.

Whether the learned trial magistrate erred by failing to inform the appellant that he was being convicted of a lesser charge of attempted defilement

54. The appellant submitted that he was not informed of the lesser charge he was convicted of. It is true that from the trial court record, the appellant herein was initially charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act and the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences. Act No. 3 of 2006.

55. In her judgement delivered on the 25.6.2020, the trial magistrate stated at page 4 of the judgement that the prosecution had failed to tender evidence of defilement but proved the lesser offence of attempted defilement. The trial magistrate further proceeded to state that sections 179 and 180 of the Criminal Procedure Code provided a scenario where an accused person is convicted of a minor offence to the one he had been charged with.

56. Section 179 of the Criminal Procedure Code provides that:

179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

57. The appellant is no doubt challenging the trial court's power to convict him of a minor offence of attempted defilement without giving him the opportunity to plead to or to be heard on the same. Regarding this issue, the Court of Appeal in **Robert Mutungi Muumbi vs. Republic [2015] eKLR** expressed itself exhaustively as follows:

"The third issue in this appeal relates to appellant's alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda's response was that the appellant could be properly convicted under section 179 of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged……

….As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171 and WACHIRA S/O NJENGA V. REGINA (1954) EA 398). Spry, J. explained the essence of the first consideration as follows in ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

"Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence."

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial." [emphasis added]

58. The Court in the above case further stated:

"The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See REPUBLIC V. CHEYA & ANOTHER [1973] EA 500)."

59. From the above cited binding case law, it is clear that the learned trial magistrate was under no obligation to give either the appellant or the prosecution an opportunity of pleading to or being heard before convicting the appellant of the cognate offence of attempted defilement.

Whether the evidence on record was sufficient to sustain a conviction of the appellant for the offence of attempted defilement.

60. The appellant has faulted the evidence adduced by the prosecution witnesses at different levels and claims that the evidence was not enough to prove the prosecution's case beyond reasonable doubt. I will consider the different attacks raised by the appellant against the prosecution evidence under this head.

61. As previously stated, the appellant herein was initially charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act. In the case of **George Opondo Olunga v Republic [2016] eKLR,** it was stated that the ingredients of an offence of defilement are*; **identification or recognition of the offender, penetration** and **the age of the victim**.* This is what is stipulated in section 8(1) of the Sexual Offences Act.

62. The identity of the appellant was not in issue, he was well known to the complainant being her boyfriend, a fact which was confirmed by PW2, the complainant's mother who testified that they had warned the appellant from carrying on a relationship with the complainant.

63. The age of the complainant was adjudged to be 17 years and 4 months as at the time the judgement was being rendered as per the birth certificate produced as PEx 1 showing that the complainant was born on the 11.06.2003.

64. As regards the ingredient of penetration, the trial magistrate relied on the complainant's testimony that as she slept with the appellant, he woke her up at 2am and tried to insert his penis into her vagina but he stopped as it was too painful. In other words, that penetration never occurred. The trial magistrate thus held that the prosecution had failed to prove this ingredient of penetration.

65. The evidence contained in PEx 2, the P3 form was that on examination, the Clinical Officer found no vaginal bruises, no sign of the injury to the genitalia, hymen not intact and concluded with additional remarks that ***"with no hymen on examination of the genitalia, a conclusion of an obvious penetration."*** In **PKW v Republic [2012] eKLR,** the Court of Appeal observed that evidence of broken, ruptured, or torn hymen was not automatic proof of penetration through a sexual act.

66. Section 2 of the Sexual Offences Act defines penetration to mean, ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*** In the case of **George Kioji v Republic Criminal Appeal No.270/2012** the Court of Appeal held that penetration is proved by evidence implying therefore that the charge is proved by the evidence of the complainant/victim who gives testimony that she was defiled.

67. In the instant case, the testimony of the complainant as reproduced above was to the effect that there was no penetration. The trial magistrate was thus right in reaching that same conclusion.

68. Before determining whether attempted defilement was proved, let me tackle some of the alleged errors raised by the appellant in regard to the trial court's analysis of the evidence.

69. The appellant submitted that the prosecution case was full of contradictions specifically the testimony of the complainant who stated that she was born on the 11th June 2003 and then proceeded to state that the appellant was her boyfriend since late June 2002 to 3rd October 2020. He submitted that these contradictions were so grave to be considered typos as they were repeated both in the proceedings and the judgement. Attending to questions of contradictions in evidence, the Court of Appeal of Kenya in **Erick Onyango Ondeng' v Republic [2014] eKLR** held that:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

70. The question thus before this court is whether the complainant's statement that the appellant was her boyfriend since late June 2002 was a grave contradiction in light of the fact she was born on the 11th June 2003, to render the complainant an untruthful witness. In my view, the answer is No. The issue is not when the appellant became the complainant's boyfriend but whether the evidence of the complainant in regard to her defilement is truthful before the court's eyes. I also note that despite the provisions of Section 124 of the Evidence Act which removed the requirements of corroboration of the evidence of children who are victims of Sexual offences, the complainant's evidence was corroborated by other prosecution witnesses. In my view, the year 2002 was an inadvertent slip of the pen error by the trial magistrate as the complainant stated in her testimony that she was born in June 2003

which was corroborated by her birth certificate produced as an exhibit and therefore she could not have been a girlfriend to the appellant before she was born.

71. Having found that the trial magistrate was under no obligation to give the appellant an opportunity of being heard before convicting the appellant of the lesser offence of attempted defilement, I now turn to the question of whether the evidence as adduced proved the charge of attempted defilement beyond reasonable doubt.

72. Section 9(1) of the Sexual Offences Act defines the offence of 'attempted defilement' as:

"9 (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."

73. Section 2 of the said Act defines a "child" as:

"Child has the meaning assigned thereto in the Children Act (Cap. 141).

74. And, in Section 2 of the Children Act, Chapter 141 of the Laws of Kenya, a "child" is defined as:

"Child" means any human being under the age of eighteen years;"

75. The complainant's age was adjudged to be 17 years 4months as at the time the judgement was being passed as per the birth certificate produced as PEx 1 that showed that the complainant was born on the 11.06.2003.

76. Accordingly, the elements of the offence of attempted defilement was proved in law.

Whether the sentence passed on the appellant was proper.

77. It was submitted by the appellant that the trial magistrate acted on wrong principles in convicting the appellant and further ignored the pre-sentencing report before proceeding to sentence him to 10 years' imprisonment.

78. Section 9 (2) of the Sexual Offences Act prescribes a sentence of not less than 10 years for someone found liable of attempted defilement. The section provides that ***(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.***

79. In the case of **Simon Kipkurui Kimori v Republic [2019] eKLR** the court cited the Court of Appeal case of **Bernard Kimani Gacheru v Republic [2002] eKLR** where the court held that:

"***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 some wrong material, or acted on a 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, any one of the matters already stated is shown to exist.***

80. In **Patrick Muli Mukutha v Republic [2019] eKLR** Odunga J, citing many other decisions had this to say quite comprehensively and I concur that:

"14. It is true that section 8(3) and (4) of the Sexual Offences Act applies the phrase 'is liable upon conviction to imprisonment for a term of not less than twenty years and fifteen years respectively.' Sir Henry Webb C.J. in Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64 had this to say on the proper construction of the words "liable to: "

"The wording used throughout the code is "shall be liable to" but a consideration of the various sections shows in our judgment, that the use of the words "shall be liable to" does not import that the sentence mentioned in any particular section in

which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."

15. The predecessor of the court went further in Opoya versus Uganda [1967] EA 752 at page 754 where Sir Clement DeLestang V.P. picked up the conversation inter alia thus:

"It seems to us beyond argument that the words "shall be liable to" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."

16. A similar position was adopted in D W M vs. Republic (supra) where the Court held that:

"As for the sentence, the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "Shall be liable to imprisonment for life" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

17. In this case, however, the relevant provisions use the phrases "shall be liable" and "not less than" in the same breath. As a result, the two provisions suffer from the malady of poor legal draftsmanship since the two phrases imply, in legal terms, diametrically opposed positions. In criminal law, where there is an ambiguity in phraseology of sentencing the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence, since as Mativo, J graphically put it in Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR:

"The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea."

18. It is therefore my view that the twin subsections must be read as if the sentences provided are the maximum sentences. Accordingly, bearing the totality of the above principles in mind, it is my view that the use of the words "shall be liable to imprisonment" in section 8(3) and (4) of the Sexual Offences Act gives room for the exercise of judicial discretion. The learned trial magistrate noted that the offence was committed against a 16 years old girl who would have to live with the trauma of the offence all her life. That position cannot be faulted since as was appreciated in Tito Kariuki Ngugi vs. Republic [2008] eKLR:

"The appeal against sentence has also no merit. The Appellant…caused her trauma which she will have to live with for the rest of her life."

19. The learned trial magistrate then proceeded to sentence the appellant to fifteen years' imprisonment which as I have found is the maximum sentence. However, the accused is a first offender. In Charo Ngumbao Gugudu vs. Republic [2011] eKLR, the Court of Appeal held that:

"It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence. It is true that the complainant suffered serious injuries but it is equally true that the appellant was provoked at the time that he hit the complainant. There was no basis for the finding made by the trial magistrate and upheld by the superior court, that the complainant was "completely mentally disabled"."

20. In my view the sentence meted out to the appellant was clearly excessive in light of my findings above."[emphasis added].

81. In the instant case, the appellant was a 19 years old and school going lad when he committed the offence. There was irrefutable evidence that he was in long illicit relationship with the complainant who was aged 17 years, the two being almost of the same age. Further, the pre-sentencing report availed to court also showed that the appellant was a first offender who was still in school and

desired to finish school. The report recommended that the appellant be sentenced to probation.

82. The appellant's mitigation before the trial court was that he was a first time offender and thus sought forgiveness. He was however given the 10 years imprisonment dictated by section 9(2) of the Sexual Offences Act. I observe that unlike the language used in section 8(2) of the Sexual Offences Act with regard to sentences which is ***"shall"***, upon conviction. The language used in section 9(2) of the same Act is ***"is liable to."*** The section does not, in my humble view, and as supported by the decisions that I have cited above extensively, mandate the ten years' imprisonment to be the minimum. If that were the case, then nothing prevented the drafter of the Act from using language used in section8(2) of the Sexual Offences Act. The Constitution of Kenya at Article 50(2)(p) guarantees an accused person the right to the benefit of the least severe of the prescribed punishments for an offence, upon conviction. Observing that the Sexual Offences Act was enacted long before the 2010 Constitution was promulgated, and considering the age of the accused/ appellant herein who is a first offender and the circumstances under which the offence was committed, I am satisfied that the sentence imposed on the appellant was excessive in the circumstances and calls for interference by this court. I set aside the 10 years imprisonment imposed on the appellant and substitute it with five (5) years imprisonment to be calculated from the date of his arrest before he was released on bond pending trial.

83. In the end, I find the appeal herein against conviction devoid of merit. I dismiss it and uphold the appellant's conviction. The appeal against sentence succeeds to the extent stated above. I so order. File closed.

DATED, SIGNED AND DELIVERED VIRTUALLY TO THE APPELLANT FROM SIAYA THIS 31ST DAY OF JANUARY, 2022. APPELLANT AT KISUMU MAXIMUM PRISON.

R.E. ABURILI

JUDGE