



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gachoki v Republic (Criminal Appeal E022 of 2021)  
[2023] KEHC 3383 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3383 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL E022 OF 2021**

**FR OLEL, J**

**APRIL 25, 2023**

**BETWEEN**

**DENNIS WAWERU GACHOKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein Dennis Waweru Gachoki was charged with the offence of defilement contrary to Section 8(1) and (2) of the *Sexual Offence Act* No 3 of 2006. The particulars of the offence were that on 8<sup>th</sup> July 2019 in Mwea West Sub-county within Kirinyaga County, unlawfully and intentionally caused his penis to penetrate the vagina of EKN a child aged 9 years.
2. 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 Offence Act* No 3 of 2006. The particulars were that on the 8<sup>th</sup> day of July 2019 in Mwea West Sub-county within Kirinyaga County, he wilfully and intentionally caused his penis to come into contact with the vagina of EKN a child aged 9 years.
3. The Prosecution called three witnesses who testified in support of their case and at the close of the Prosecution case, the Appellant was put on his defence and gave sworn testimony. Upon considering the evidence as presented, the trial court did find that the Appellant was guilty of the offence of defilement and proceeded to sentence him to life imprisonment in accordance with Section 8(2) of the *Sexual Offence Act* No 3 of 2001.
4. The Appellant being dissatisfied with the said conviction and sentence filed his petition of appeal on 9<sup>th</sup> September 2021 where raised nine (9) grounds of appeal. The appellant subsequently condensed his grounds to three by the subsequent memorandum of appeal filed in court on 10<sup>th</sup> January 2023. The grounds of appeal raised included;



- a. That, the learned trial Magistrate erred in law and fact in failing to appreciate the fact that critical elements of defilement in age, penile penetration and identity of the alleged perpetrator were not proved to the required standard occasioning a prejudice.
- b. That, the trial Magistrate failed further failed to appreciate that the instant matter was riddled with material discrepancies capable of unsettling the verdict, was disproved and the use of the accused defence to fill in the glaring gaps of the prosecution case was misdirection occasioning a serious dereliction of justice.
- c. That, And without prejudice to the instant appeal the sentence meted out of life imprisonment was harsh and manifestly excessive and urge this court to review the same downward.

### **Facts of the Case**

5. PW1, EKN under went voire dire examination and was affirmed before she testified. She stated that she was a class 2 pupil at [Particulars Withheld] Primary School and was 10 years old. She testified that they used to reside in [Particulars Withheld] village and the accused was their neighbour. She testified that “the accused did bad manners to me”. In the month of July on the said date she was playing outside their house with her brother in [Particulars Withheld] village, when the accused approached them and carried her to his house. He blocked her mouth then removed her clothes, removed his clothes then did “bad manners to me” when he was done, he told PW1 to leave he locked his door with a padlock and went away.
6. PW1, went and reported this incident to Mr. “Mkora” who was the owner of the house where they lived in [Particulars Withheld]. The accused was arrested and taken to the police station. The said “Mr. Mkora” hired a motor cycle for her and took her to Sagana police station. As at that time the incident occurred PW1 mother was not at home. From the police station PW1 testified that she was taken to hospital and was admitted for three days.
7. PW1, reaffirmed that the accused house was adjacent to the house where they were staying. The accused house was 2 rooms and one was a bedroom. The incident occurred at about 4 p.m. when it was not dark. The accused removed all his clothes, while only removing her panty. Lifted her dress and proceeded to do bad manners. She stated that the accused used his organ which he uses to pass urine and put it in her organ used to pass urine. The accused did not ask the witness any question in cross examination.
8. PW2, Gideon Muchira Kinya stated that he was a Clinical Officer based at Kang’aru Health Centre. His registration No was 8600 and held a Bachelor of Science in Clinical Medicine from Jomo Kenya University of Technology.
9. On 9/7/2019 he filled a P3 Form for one EKN a child aged 9 years. He relied on the treatment card dated 9/7/2019 from Sagana Sub-county Hospital. PW1 had been examined by his colleague Jackline, who was the maker of the treatment card. PW1, had complained of being defiled by a person known to her on 8/7/2019 at about 3.00 p.m. From the treatment card the complainant had no bruises, no lacerations or bleeding from her vagina. There was no discharge or seminal fluid. Her hymen was not intact. Her finding was hyperlemic vaginal micoso, meaning her vaginal wall was red and swollen. Lab tests revealed no infection other than a few pus cells – mild infection.
10. PW2 stated that he filled the P3 with details stated in the treatment notes. There was evidence of penetration due to hyperlemic vaginal mucosa which mean swelling, reddening and inflammation of virginal wall. The reddening was in the labia minora. PW2 produced the P3 form, treatment notes and Laboratory results as Exhibit 1-3 respectively.



11. PW3 Reuben Maina testified on behalf of the initial Investigating Officer PC Isaac Mbugua who retired on 2/9/2020. He had acquainted himself with the content of the police file and established that on 8/7/2019 at [Particulars Withheld] village the Complainant aged 9 years had been left at home by her mother who had gone to work. At about 3.00 p.m. the accused who was their neighbour approached the minor and carried her to his house where he proceeded to defile her. The Complainant tried to cry but the accused blocked her mouth. Some neighbours heard the commotion and when the accused released the Complainant she informed them of what had transpired. They contacted the Assistant Chief Julius Waweru and the complainant's mother. The accused was arrested by the Assistant Chief and taken to Mutithi AP Post where he was re-arrested and escorted to Sagana Police Station and later charged in court.
12. The Appellant was placed on his defence and give sworn testimony. He testified that on the material day he was cultivating a piece of land along a river bank. On his way back home he was informed that his Area Chief was waiting for him at home and it was alleged that he had defiled the Complainant. When he reached his house he found that Chief and neighbours. He was arrested and taken to Mutithi Police Station and later to Sagana Police Station. That was all he stated.

### **Appellant Submissions**

13. The Appellant submitted that there was need to relook at the Sexual Offence Act as there were cases where it was used for extortion. In this Appeal the Appellant argued that the Prosecution failed to link him to the alleged offence and used his defence to fill in the gaping holes which was a serious misdirection. The Prosecution only had strong suspicion against him and without cogent proof such evidence remained unproved see [Sawe v Republic](#) [2003] eKLR 364.
14. Secondly, the Appellant submitted that the Prosecution had to prove age of victim, penile penetration and identity of the alleged perpetrator. The appellant submitted that the evidence on record did not prove age, penile penetration and identity. PW1 only lamented of bad manners during her testimony. She did not prove or allege that a male organ penetrated her genital organ but only used semantics to express the same. Such evidence cannot be assumed to intimate penile penetration. Reliance was placed on [Fappyton Mutuku Ngui v Rep](#) CR App No 296 of 2010.
15. The Appellant also submitted at length that the age of the child was not established and/or proved beyond doubt. There was no medical evidence, documents such as baptism cards or school documents to prove the same and the absence of such evidence was fatal to the prosecution case. The Appellant relied on [Gilbert Mirti Kanampiu v Republic](#) (2013) eKLR and [Fappyton Mutuku Ngui v Republic](#) HCC at Machakos Cr. Appeal No 296 of 2010 , and [Joseph Kieti seet v Republic](#) (2014) HCC at Machakos Criminal Appeal No 91 of 2011
16. The Appellant further submitted that there were material discrepancies and misdirection capable of unsettling the verdict arrived at. The said discrepancies were very material and affected the core root of this instant matter. Some of the discrepancies identified included; Mr Mkora who PW1 alleged owner of the house where she lived was not called to testify. Therefor the court could not ascertain that there existed such a house or the alleged crime scene both of which were not investigated and/or ascertained. Secondly the birth certificate of the minor was not produced. PW1 stated that she was 10 years old while the charge sheet stated she was 9 years old and also submitted that all other witnesses gave hearsay evidence which cannot be used or relied upon to base a conviction upon.
17. Such discrepancies could not be wished away and showed that he was framed and had to be given the benefit of doubt. Reliance was placed on [John Mutua Musyoki v Rep](#) (2017) eKLR Appeal No 11 of



2016 and *Ndungu Kimenyi v Republic* (1979) KLR 282 and *Joshua Afuna Angulas v Rep* Cr. No 277 of 2006 amongst others.

18. The final issue raised by the Appellant was that the sentence imposed was manifestly excessive and hence he sought review of the same downward and invoked provision of Section 216, 329 and 332(2) of the *Criminal Procedure Code* and Article 50(2) (p) of the *Constitution* of Kenya 2010. He relied on *Philip Mweke Maingi and 5 others v Rep*(2015) eKLR and *Yawa Nyale v Rep* (2018) eKLR.

#### **Respondent Submissions:**

19. The Prosecution submitted that the P3 form and treatment card produced indicated that the PW1 was 9 years old as at 9<sup>th</sup> July 2019 and that was conclusive proof of age. It was not necessary to produce the birth certificate. On the issue that the Appellant was not medically examined, the Respondent stated it was not mandatory for him to be examined. They relied on *Geoffrey Kionji v Rep* Criminal Appeal no. 270 of 2010. They also submitted that under Provision of Section 124 of the *Evidence Act* the court could convict the accused person on the evidence of the victim if satisfied persuaded by the truthfulness of the witness.
20. On the issue of sentence, the Respondent submitted that the court was persuaded by the statutory law in reaching the sentence meted out and the Applicant should challenge mandatory life sentence imposed on him.

#### **Analysis and Determination:**

21. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See *Okeno v Republic* 91972)EA 32 & *Pandya v Republic* (1975) EA 366.
22. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala v R* (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported in doing so, it should make allowance for the fact that the trial Court has made the advantage of hearing and seeing the witnesses.
23. Also in *Peter's v Sunday Post* (1958) E.A. 424 it was held that it is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

#### **A. That the trial Magistrate erred in law and Fact in failing to appreciate the fact that crucial elements of defilement in age, penile penetration and identity of the alleged perpetrator were not proved to the required standards occasioning a prejudice**

24. Section 8(1) of the *Sexual Offences Act* No 3 of 2006 provides as follows;
  - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

25. The ingredients for the offence of defilement can be summarized as follows;

- a. Age of the victim (must be a minor),
- b. penetration and
- c. proper identification of the perpetrator.

(see *Wamukoya Karani v Republic* Criminal Appeal No 72 of 2013 and *George Opondo Olunga v Republic* [2016] eKLR)

26. This court will look at each element exclusively starting with the first element which is age. The Court of Appeal in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.” (emphasis added).

27. In the case of *Francis Omuroni v Uganda*, court of Appeal 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 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

28. PW1 stated that her names were EKK and was aged 10 years. She could not recall her date of birth, but was a class 2 pupil at [Particulars Withheld] Primary school. PW2 the clinical officer too testified that on 9<sup>th</sup> July 2019, he filled the P3 form for PW1. She was aged 9 years at the time. The child was treated at Sagana sub county Hospital, where he worked. She had been brought for treatment on the night of 8<sup>th</sup> and 9<sup>th</sup> July 2019 and had taken part in attending to her.

29. PW3 who testified on behalf of the initial investigating officer (who had retired) testified that he had acquainted himself with the contents of the police file. It had been established that on 8/7/2019 at [Particulars Withheld] village the complainant who was 9 years had been left at home by her mother who had gone to work at about 3pm on the said date, the appellant approached the complainant and took her to his house where he proceeded to defile her. The trial court in its considered judgment dated 25/8/2021 delved at length on this issue and came to the conclusion that there are various ways to prove age. The court relied on the evidence of the complainant and medical evidence in particular the P3 form and treatments notes where it was indicated that the child is 9 years to establish that indeed the age of the child had been proved.

30. The appellant on the other hand made lengthy submissions contending that age was not proved he submitted that no birth certificate was produced before court nor was there any age assessment report which was done. Further he urged the court to take judicial notice that no one from the family of the



victim, even the victims own mother testified in support of PW1. The evidence presented was not cogent and erodes the charge. It could not be assumed that evidence of PW2 was the age assessment report and therefore left room for speculation and assumption which left doubt.

31. I have analyzed the evidence tendered with respect of the complainant's age. The charge sheet stated that she was 9 years old, while the complainant testified that she was 10 years old. All the medical evidence presented indicated that the age of the child was 9 years old. I do agree with the appellant that no age assessment report was presented to prove the age of the complainant and it cannot be held that a P3 form, and treatment notes which indicate that age of a minor constitutes medical evidence as the details are filled based on information not scientifically verified. The medical evidence as contemplated in law is a age assessment report made by a medical practitioner.
32. Be that as it may as held in several citations, Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardians' evidence or by observation and common sense amongst other credible forms of proof. See *Edwin Nyambogo Onsongo v Republic* (2016) eKLR and *Francis omuroni v Uganda* court of Appeal Criminal Appeal No 2 of 2000 amongst others.
33. The complainant testified that she was 10 years old and in class two at [Particulars Withheld] Primary School. She testified before the magistrate who physically saw her and was able to assess her age group. The complainant further was attended to by PW2 who also noted her age to be 9 years of age. As established in law age can also be established by common sense, observation or other credible forms of proof. I do find as a fact that by observation and common sense the trial court can approximate the age of a child and know if indeed she is 9 years or she is in that age bracket/group. It is common knowledge that a child in class two is still a child of tender years and given the circumstances and facts of this case it was safe to conclude that she was 9 -10 years as presented in evidence. The only question which would remain uncertain is if there is a possibility of her being older than the stated years as that would have a direct bearing on the sentence to be imposed.
34. The second element is penetration. Section 2 of the *sexual offences Act* defines penetration as;  

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
35. The complainant. PW1 did testify that the appellant found her playing outside their house with her brother at P1 area. Her evidence was that  

“He lifted me and carried me to his house in [Particulars Withheld] . He blocked my mouth and removed my cloths. He removed his cloths then did bad manners to me. When done, he told me to leave then he locked the door with a padlock and went away.”

“..... The house of the accused was adjacent to our house. The accused placed me on his bed. His house was one bedroom. I had worn a brown dress and a school sweater. The accused took me to his house at 4.00pm. It was not dark. The accused removed all his cloths. He removed my pant only and lifted my dress. He did bad manners here (pointing between the legs ). I usually use this part to pass urine. He used his organ he uses to pass urine. He put it inside my part to pass urine.”
36. PW2 the clinical officer also confirmed that even though there was no bruises, no lacerations or bleeding from the vagina, he did find that there was hyperlemic vaginal micosa, meaning that PW1 vaginal wall was red and swollen. This was proof of penetration. There was also Redding of the libia minora.



37. The appellant opted not to ask PW1 any question in cross examination and in his submissions alleged that penetration was not proved as PW1 only lamented of bad manners in the whole of her evidence and was not able to adduce clear evidence of male organ penetrating her genital organ. Her semantics could not be used to assume penile penetration.
38. The crucial evidence of PW1 as captured in paragraph 35 above was very clear and concise. She did expressly state what the appellant did and the evidence left no doubt that she was defiled. She stated that the incident happened at 4pm when it was not dark. Further she expressly stated that the appellant used his organ to pass urine and put it inside my organ to pass urine. The complainant was taken to hospital the same evening she was defiled. The medical examination found as a fact that she had “hyperlemic vaginal micoso, meaning her vaginal wall red and swollen. The Redding was in the labia manora. The opinion of the medical expert was that the same was caused by penetration. The question of penetration was therefore proved.
39. The final element to be proved was identity of perpetration. The complainant testified that the appellant was a person she knew and was their neighbour at [Particulars Withheld] village before they moved to P1 area. She stated that the incident occurred at 4pm and was able to see the person who defiled her and immediately after the incident she told her guardian one Mr Mkora. P3 also confirmed this fact by alluding to the fact “some neighbours heard the commotion. The accused released the complainant and she in turn informed her neighbour’s after she left the house.”
40. Given the above facts identification was by way of recognition and such evidence must be carefully examined to satisfy if the circumstances of identification were favourable and free from possibility of error before it can safely be made as a basis of conviction. See *Wamunga v Republic* (1989) KLR at 426. This incident occurred at 4pm during the day, the complainant was able to describe the house of the appellant and vividly describe what he did. She also knew him as a neighbour at [Particulars Withheld] village. Having carefully examined the evidence adduced identification of the appellant was by recognition and reliance on the same was safe. The trial court cannot be faulted for arriving at that conclusion.

#### **The Evidence tendered was full of contradiction and inconsistencies**

41. In *Philip Nzaka Water v Republic* CA Criminal Appeal No 29 of 2015 while relying in the decision of *Dickson Elia Nsamba Shapwater & another v Republic* CA App No 92 of 2007 the Court of Appeal of Tanzania address the issue of discrepancies in evidence and conclude as follows

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out one sentence and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradiction are minor or whether they go to the root of the matter.”

42. The question to be addressed is whether the contradiction mentioned are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. While defining contradictions, the court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria* stated that;

“Now, contradictions means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while



a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.”

43. Further in *Joseph Maina Mwangi v Republic* (2000) eKLR it was held that;
- “In any trial there are bound to be discrepancies. An appellate court in considering these discrepancies must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”
44. The appellant submitted that there were material discrepancies capable of unsettling the verdict as arrived at. The material discrepancies and inconsistencies in evidence were that Mr Mkora, who PW1 alleged to have informed of this incident did not testify, the house where the incident happened was not ascertained, the birth certificate was not produced to prove the age of the minor, while the minor testified that she was 10 years old, in the charge sheet it was indicated that she was 9 years old and all other witnesses other than PW1 tendered hearsay evidence and this clearly showed that there was clear orchestrations of a frame up and whose benefit ought to have been resolved to the appellants benefit.
45. As provided for under section 382 of the *Criminal Procedure Code* the court must be guided whether such discrepancies alleged are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence. Further for contradiction it has to be shown that there is lack of agreement between two facts, while discrepancy occurs where a piece of evidence stops short or contains a little more than what the other piece of evidence contains.
46. This court has gone through the entire evidence as presented and does not find any inconsistency or discrepancy in evidence which if so fundamental as to cause prejudice to the appellant. The prosecution under section 143 of the *Evidence Act* can call any number of witnesses to establish a fact and it was not mandatory for Mr Mkora to be called. PW2 and PW3 did not give hearsay evidence as alleged, while the issue of age has already been dealt with herein above. Nothing turns on this ground of appeal.
- The sentence meted out of life imprisonment was harsh and manifestly excessive and urge this court to review the same downward.
47. As regards the sentence and whether it should be reduced, this Court is guided by the principles in the Court of Appeal case of *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was stated as follows:
- “It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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 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, anyone of the matters already stated is shown to exist.”
48. The Court of appeal also rendered itself as follows on sentences in sexual offences in the case of *Athanas Lijodi v Republic* [2021] eKLR
- “On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out



in deserving cases Muruatetu’s case (supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance *Evans Wanjala Wanyonyi v Republic* [2019] eKLR). Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited.”

49. The same court in the case of *Dismas Wafula Kilwake v Republic* [2019] eKLR stated as follows;

“Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

50. In *Maingi & 5 others v Director of Public Prosecution & another* (Petition No E117 of 2021) (2022) KEHC 13118 (KLR) the Petitioners who were convicts serving offences under *Sexual Offences Act* No 3 of 2006 sued the Attorney General and sought for declaration that the mandatory nature of sentence under the *Sexual Offences Act* were unconstitutional as it fettered the discretion of Judges and Magistrates in meting out sentence. Justice G.V Odunga vide his considered judgment dated 17<sup>th</sup> May, 2022 did find that –

“to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentence fall foul of Article 28 of the *Constitution*. However, the courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be mandatory minimum prescribed sentences.”

51. The provision of section 8(1) as read together with provisions of section 8(4) of the *Sexual Offences Act* No 3 2006 and legislation that was in force before commencement of the *Constitution* of Kenya 2010 must be considered with adaptation, qualification and exception when it comes to the mandatory minimum sentence and in particular when the said sentences do not take into account the dignity of the individual as mandated under article 27 of the *Constitution* and as appreciated in the Francis Muruatetu case and applied by courts in several cases . See Christopher Ochieng v Republic Kisumu CA Criminal Appeal No 202 of 2011 and Jared Koita Injiri v Republic Kisumu CA Criminal Appeal No 92 Of 2104.

52. The trial magistrate did consider the appellant’s mitigation and also took into consideration all the circumstances of this case and sentenced the appellant to life imprisonment.

53. At this point before considering the sentence it would be prudent to revisit the issue of the age of the complainant. While by observation one can objectively assess and approximate the age of a child , when it comes to sentencing under provisions of the *sexual offences Act*, it would have been necessary to know with precision the exact age of a child for purposes of sentencing as this determines the amount of



sentence to be imposed on conviction. See *Gilbert Miriti Kanampius v Republic* (2013) eKLR HCC at Meru Criminal Appeal No 97 of 2009

54. The only evidence presented in these proceedings was that of PW1 who testified that she was in class 2 and was 10 years old. She had informed the clinical officer who treated her that she is 9 years old and on that basis the P3 form and treatment notes indicated as much. The charge sheet also indicated that she is 9 years old. While it can be safely assumed that PW1 age is between the age of 9 years to 12 years, for purpose of sentencing it would be necessary to establish the exact age of PW1 as this would impact on the sentence meted out. In such borderline cases justice and fairness would dictate that additional evidence be taken to prove the exact age of PW1 to enable the court make an informed decision while considering the question whether the sentences imposed was proper or it was harsh and excessive. This is in line with Article 27 and 50(2) of the *constitution* of Kenya 2010, which calls for equality and fairness.
55. In criminal appeal this court is empowered to order the retaking of additional evidence. Section 358 of the criminal procedure code provides that;
- a. “In dealing with an appeal from a subordinate court, the high court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.
  - b. When the additional evidence is taken by a subordinate court, that court shall certify the evidence to the high court, which shall thereupon proceed to dispose the appeal.
  - c. Unless the high court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.
  - d. Evidence taken in pursuance of this section shall be taken as if it were evidence taken at trial before the subordinate court.”
56. For the reasons advanced in paragraph 54 above and especial for purposes of sentencing it would be proper to get the specific age of PW1.
57. I do therefore order as follows:-
1. This file be sent back to the trial magistrate to take additional evidence with regard to the age of PW1. The evidence shall be recorded by the trial magistrate and if already transferred such evidence be taken by the Chief Magistrate –Baricho court.
  2. The evidence will be taken in the presence of the appellant and his advocate if he opts to have one. He will be at liberty to cross examine the witness.
  3. The trial Magistrate shall certify the evidence so taken and have it forwarded to this court within 60 days so as to enable this court issue final orders.

**JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF APRIL, 2023**

**FRANCIS RAYOLA**

**JUDGE**

**Delivered on the virtual platform, Teams this 25<sup>th</sup> day of April, 2023.**

**In the presence of;**

.....for the Appellant



.....for O.D.P.P

.....Court Assistant

