Mbui v Republic (Criminal Appeal E019 of 2022)
[2023] KEHC 18122 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18122 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E019 OF 2022

FR OLEL, J

MAY 31, 2023

BETWEEN

DAVID MUTHIKE MBUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) and 8(2) of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence were that on the 20th April 2020 and on the 7th day of May 2020 in Mwea East Sub County within the county of Kirinyaga intentionally caused his penis to penetrate the vagina of GW a child aged 15 years.

2. On the alternative charge the appellant was charged with the offence of having an indecent act with a child contrary to section 11(1) of the *Sexual Offence Act* no. 6 of 2006. The particulars of the offence were that on the 20th day of April, 2020 and on the 7th Day of May 2020, in Mwea East sub county within the county of Kirinyaga intentionally touched the vagina of GW a child aged 15 years with his penis.

3. The prosecution called five (5) witnesses in support of its case and at the close of the prosecution case the appellant was put on his defence. He gave sworn evidence. The trial court considered the evidence put forth and convicted the appellant on the main charge of defilement. He was sentenced to 15 years imprisonment.

Brief Facts

4. PW1 GWM testified that she was 16 years old and was born on 4/10/2005. She attends school at [Particulars Withheld] Secondary School and was a student in form 2. She stated that she knew the appellant who was a friend of their neighbour. She stated that on 18/4/2020, she met the appellant who

asked for directions to Muthoni's house. She volunteered to take him there. After she left 'Muthoni' called her and told her that the appellant wanted to know her better and he had a birthday party which they wanted her to attend. She declined the offer as she was home alone. Later 'Muthoni' convinced her and her other friends to attend the birthday party.

5. They went to the appellant's house where the party took place. The following day 'muthoni' told her that the appellant was interested in her. She went with 'Muthoni' to the appellants house and Muthoni left her at the appellant's house. It was a single room partitioned with a leso. They chatted with the appellant and got to know each other. The appellant told her that he had separated from his wife and that day she slept at the appellant's house.

6. At night the appellant started to touch her and they had sex. The appellant removed her clothes and inserted his penis into her vagina. During the night Muthoni called and told her to do whatever the appellant wanted and she would be given money, which was to be sent on Muthoni's phone. During sex, the appellant was touching her all over her breasts and vagina. The following morning, she went to her auntie's place. She requested Aunty R to cover up for her and if asked she would say that she slept at her place. They agreed and when she went home, she told her parents that she was at aunty R place.

7. After a few days she met 'Muthoni' who had come to borrow shoe brush. The appellant coincidentally called Muthoni and after they finished chatting, Muthoni told her that appellant wanted to see her. She went to the appellant's house at about 4.00pm. They had sex and the appellant went to close his business. While in the house she heard someone knocking at the door. When she opened it was her father. He locked her inside the house and later they came with the appellant who was under arrest. They were taken to Wang'uru police station and later she was taken to Kimbimbi sub county hospital. She stated that on the day she was found at the appellant's house, her father was with other people including Josephine, Kamau, Ndegwa and the village elder. At the police station she told them about 'Muthoni' who was also arrested.

8. In cross examination she testified that 'Muthoni' was older than her and she had known her from childhood. 'Muthoni' knew her secrets and would occasionally blackmail her. Her secrets were about owing a certain lady money and was not about boys and it was 'Muthoni' who convinced her to go to the appellant's house. Further it was the said Muthoni who threatened to expose her secret to her parents and she also directed the complainant to ask for money from the appellant. PW1 also confessed that she asked aunty R to lie and cover up for her as she feared being punished by her parents who would beat her up if she did a mistake.

9. PW1 further testified that she was not a truant and did not have boyfriends and that as at 20.04.2020 she had not known the appellant well. On the 2nd occasion they met she agreed to spend a night at the appellants house and it was the first time she had sex. She denied and told court that one Walai and Paul were not her boyfriends, while F was her cousin. On the second occasion she went to the appellant's house, it was 'Muthoni' who blackmailed her to go and it was not her intention to go and have sex with the appellant. By the time her father came at about 6.00pm they had already had sex and the appellant had gone to close his business. In re-examination PW1 testified that 'Muthoni' was older that her and had two children. She followed her instructions as she feared she would report her secrets to her parents. She confirmed that she had sex with the appellant and was not forced to testify.

10. PW2 PM testified that he is a farmer at Kirugi village and PW1 was his daughter. She was born on 4.10.2005. He identified her birth certificate. On 7.5.2020 he directed PW1 and her sister to go and drive away birds from the rice field. At about 5pm he went to the rice field and noticed that PW1 as not there. He inquired from the sister who reported to him that a certain lady had told her that PW1 was at the appellant's house. He called his friends 'Kamau and Ndegwa' and they went to the appellant

house and found PW1 therein. They locked her inside using a padlock they found inside the house. They then waited for the appellant at the gate, where he resided. When he came, they held him, called the village elder and thereafter took him to Wang'uru police station. He further clarified that they went to the appellant's house at about 8.00pm. After arresting the appellant, they also took PW1 to hospital for treatment.

11. In cross examination, he stated that he was not aware of the time PW1 left home, whom she left with and what she did but both PW1 and the appellant had confessed to the police that they had sex. Earlier on 20.4.2020 PW1 has also not slept at home and told them (her parents) that she had slept at her aunt's place (R) and they had believed her because on the said date it had rained heavily. PW2 also stated that he has seen the appellant, come to look for a house within the same plot where he stayed. Further he knew him as a barber because he operated a 'Kinyozi'.

12. PW2 further testified that the 1st time he heard that his daughter was in the appellant's house was on 7.5.2020. He knew a boy called 'Walai' he was a young man from [Particulars Withheld]. His mother had come to his house and reported that PW1 has gone to her home. She requested PW2 and his wife to tell PW1 not to go to 'Walai's' home as she suspected that they had a relationship. PW2 advised his daughter PW1 not to go back to the said home and punished her. PW2 also stated that he knew Muthoni who was their neighbour within the plot. She was 22 years old and had two children. Muthoni was a friend of PW1 but they would not move together in the village. He did not know if 'Muthoni' threatened PW1 but his wife had told him that 'Muthoni' was bad influence on PW1.

13. PW1 was a good girl and she could not be easily influenced. He was a strict parent and was in court to testify about what he witnessed. The incident of 20.04.2020 was narrated to them by PW1 on 7.5.2020 and they had not known about it before. During the arrest he called PW1 uncle who was their family in charge and village elder in charge of [Particulars Withheld] village. He denied assaulting the appellant during arrest. PW2 also stated that they wanted to settle the case out of court but the police advised otherwise. He did not want problems for the appellant. Finally, he also stated that the police also wanted to lock up 'Muthoni' but he advised against it as her mother was unwell.

14. In re-examination, PW2 stated that he did not know where PW1 spent on 20.4.2020 and one Kamau had told him that PW1 spent that night at the appellant's house. The boy called Walai was PW1 age mate and they would sit together at the rice field. PW1 also did not lie when she stated that she had sex with the appellant.

15. PW3 FKK testified that he was the in charge of one side of [Particulars Withheld] village. He was 65 years old. The village was vast and divided into three areas, with each having an in charge. He knew the appellant as a person who runs a kinyozi shop. On 7.5.2020 PW2 came to him and told him that they had arrested a person who was having an affair with his daughter. He called the police who advised that they take the appellant to the police station even if there was a curfew. He went and found the appellant had been tied with ropes. The child admitted she was having an affair with the appellant and the appellant too also admitted the same and pleaded that the matter be solved amicably. PW3 stated that he refused and they took the appellant to the police station and the child to hospital. In cross examination he confirmed that he found the accused hands had been tied up, but the accused never told him that he had been assaulted nor did he see him being assaulted. PW1 had confessed that they had sex with the appellant from 3.00pm before the appellant went back to work. In re-examination he reiterated that both PW1 and the appellant confessed to having sex on 7.5.2020.

16. PW4 George Kariuki testified that he was a clinical officer registration Number. 20836 based at Kimbimbi Sub county hospital and had 4-year experience. He had outpatient card of PW1 dated 8.5.2020 filled by one Consolata and P3 form filled on 8.5.2020 by one Francis Omondi. He said

Francis Omondi was away on training for one month but they had worked together for 3 years and he knew his handwriting and signature. Consolata too was away pursuing further studies but he was conversant with her handwriting. PW4 was allowed to produce the said document under section 77 of the *Evidence Act* as the appellant advocate did not object.

17. The outpatient card was filled on 8.5.2020, the report was of alleged defilement of PW1 by a person known to her. The incidents had occurred on 20.4.2020 and 7.5.2020 and PW1 had been influenced by an adult to have sex. The complainant was in good and fair condition. Pregnancy test, HIV and Syphilis were all negative. High vaginal swab showed yeast cells of over 50 pass cells and spermatozoa was also seen. There was a foul-smelling whitish discharge and the hymen was torn. PW1 was put in antibiotics, anti-allergies, prophylaxis (PEP) and P2 was administered. The labia were normal and did not have any lacerations. From the history and test done it could be safely concluded that there was penetration especially due to spermatozoa seen and torn hymen. The P3 and PRC form were produced as Exhibit 2 and 3.

18. In cross examination, PW4 stated that his colleague Francis Omondi did the speculum examination to enable him see the vagina wall and hymen, but the forms did not indicate so. Both forms were filled based on the examination done and also information provided by the victim. PW1 had sever UTI-fungal infection and it was not possible to tell if hymen was torn during intercourse on 7.5.2020 or earlier. He could also not tell if the patient had been pregnant earlier in her life. DNA also was not done and he could not tell whose spermatozoa it was. In re-examination, PW4 stated that the results of the tests done were indicated on both forms but it should be noted that physical examination was done as well. The patient also did not have any history of underlying medical condition. The victim was 15 years old.

19. PW5 PC Faith Maluba testified that she was stationed at Wang'uru police station and on 7.5.2020 was assigned this case by the OCS. The victim's father and village elder had reported as case of defilement which had occurred on 20.4.2020 and 7.5.2020. Upon investigation she established that under influence of one 'Muthoni' PW1 attended a birthday party at the appellant's home, the appellant developed interested in having an affair with PW1 and the following day on 20.4.2020 PW1 went back to the appellant house with her friend Muthoni who eventually left her there. On the said 20.4.2020 the appellant had sex with PW1 and she spend a night at this house. One 7.5.2020 again under the influence of 'Muthoni', PW1 again went to visit the appellant. PW1 and the appellant had sex and at about 5pm the appellant left to go close his shop, leaving PW1 in his house. PW2 discovered where her daughter was and the appellant was arrested.

20. PW5 further testified that she did not arrest 'Muthoni' because she had a sick child and she late moved houses. She also visited the appellant's house and charged the appellant after investigations were complete. She produced the birth certificate as exhibit 1 and identified the accused on the dock. In cross examination she stated that PW1 went to the appellant's house on two occasions and was defiled on both instances. Before 18.4.2020 they were not friends and were introduced to each other by Muthoni. There was no independent witness and she did not record Muthoni's and Hellen's statement. But when the matter was reported to the police station it was indicated that the PW1 did not sleep at home on 20.4.2020 and it was her aunty who covered up for her. PW5 did not know her aunt's name and did not interrogate her. On 7.5.2022 PW1 was found in the appellant house and the medical reports confirmed that indeed she had been defiled. She also did not know about a boy called Msupa.

21. In re-examination PW5 stated that Muthoni had used undue influence and threated PW1. Further she did not know about Paul, Walai and Msupa as they were not mentioned at the time of investigations. Hellen and Muthoni and PW1 aunty too did not record their statements. Hellen parent refused to allow their daughter to be involved in this matter, while Muthoni had a sick child.

22. The appellant was placed on his defence and gave sworn evidence. He stated that he knew PW1 on 17.4.2020 when he had his birthday, PW1 she came to the party with her friend Hellen and went home at about 5.00pm. On 20.4.2020 PW1 never came to his place and it was not true that she came to wash his clothes. On 7.5.2020 he was washing his clothes at about 5.30pm when the two girls came. They were PW1 and Hellen. They told him they were hungry and he allowed them into his house since Hellen was his client at the barber shop.

23. He left them there and went to close his barber shop. Since it was about curfew time. At the shop he found clients and worked until 7.00pm. Enroute back he was informed that PW1 was in his house. He met PW1 parents and they assaulted him. At the house he found that PW1 had been locked inside his house and the village in charge was called but he refused to deal with the case as it was a frame up. PW2 looked for another village elder and he was taken to the police station. The appellant denied sleeping with PW1. He later learnt that PW1 had a boyfriend called Francis and another unknown boyfriend from Kiroga village. It was also not true that Muthoni is the one who told PW1 to come to his house. He also alleged that he paid the victim's father Ksh.15,000/- through Lucy to withdraw the case.

24. In cross examination the appellant stated that during his party there were many adults in his house and it was Hellen who came with PW1. On 7.5.2020, the two came to his house between 5.00pm – 5.30pm and found him washing clothes. He left them to go close his kinyozi business. He did not know why PW1 remained in his house and denied having any sexual contact with PW1 and further testified that PW1 had lied to court about their alleged relationship.

25. DW2 Jacinta Muthoni testified that she knew the accused and attended his birthday party on 16.04.2020. At the party, she did not see the complainant nor did she see Hellen. She further denied cajoling and convincing PW1 to go to the appellant's house. She also stated that one Lucy told her that the appellant was assaulted when he was being arrested. In cross examination she confirmed that PW1 was her neighbour's child at Kirongo, while appellant lived at an area known as Block, which was about 15km away. She also did not know how old PW1 was and reiterated that she did not invite PW1 to the appellant home nor did she see her there on the day there was the birthday party.

26. The trial magistrate considered all the evidence and sentenced the appellant to serve 15 years imprisonment. The appellant being dissatisfied with the conviction and sentence field his petition of appeal and raised the following grounds of appeal;

    i. That the learned magistrate erred in fact and in convicting the appellant on the evidence of the complainant who was untruthful and admitted to having lied to her aunt and parents severally and lied about being influenced on what to do by one Muthoni.

    ii. The learned magistrate erred in fact and in law in convicting the appellant when there was no evidence of sexual intercourse between the accused and the complainant on 7/5/2020.

    iii. The learned magistrate erred in fact and in law in holding that the complainant had not behaved in a way to suggest she was a person below 18 years of age.

    iv. The learned magistrate erred in fact and in law in holding that it was not possible for the complainant to have had sex elsewhere whereas there was no account of her whereabouts on 7.5.2020 before she met the accused later that afternoon and discrepancies on the time indicated in the P3 form.

    v. The learned magistrate erred in fact and in law in convicting the accused only on the ground that he had allowed the complainant and her friend to feed in this house and implying they

were friends and involved in sexual relationship when there a no evidence to this effect and the house was not locked.

vi. The learned magistrate erred in holding that the complainant was able to prove whose spermatozoa was not examined to connect it with the accused and medical evidence revealed that spermatozoa could have been there up to 72 hours prior to the examination.

vii. The learned magistrate erred in fact and in law in failing to consider the offence of the appellant.

viii. The learned magistrate erred in fact and law in failing to note the crucial witnesses were not called whose evidence was adverse to the prosecution.

ix. The learned magistrate erred in fact and in law in failing to give the accused a noncustodial sentence when the probation report had recommended a noncustodial sentence.

x. The learned magistrate erred in fact and in law in failing to consider that the probation report was favourable and in giving the appellant a harsh and excessive non-custodial sentence with no option of a fine.

xi. The learned magistrate erred in convicting and sentencing the appellant.

27. Both the appellant and the Respondent did not file any submissions.

Analysis and Determination

28. 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* (1972)EA 32 & *Pandya v Republic* (1975) EA 366.

29. 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.

30. In *Peter's v Sunday Post* (1958) EA 424 it was said that it is not the function of the first appellant 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.

31. The main issues raised in this appeal by the appellant can be summarized as follows;

a. Did the prosecution discharge the burden of proof to the required standard? {Grounds 1-6 & 9 of the Grounds of appeal}

b. Did the prosecution fail to call crucial witnesses and what is the effect of the same on the prosecution case?

{Ground 7 of the Grounds of appeal}

c. Was the sentence passed harsh and/or excessive and should this court interfere with the same. {Ground 9,10 and 11 of the Grounds of Appeal}

Burden of Proof

32. It is trite law that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller v Ministry of Pensions* (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

33. The conceptual framework for burden of proof to be discharged by the prosecutors consists of two components i.e the burden of proof and evidential burden which duty is clearly enunciated by Fidelis in his book *Modern Nigerian Law of Evidence*, University of Lagos Press, Lagos (1999) 379 when he stated that;

> " The term burden of proof is used in two different sense. In the first sense, it means the burden or obligation to establish a case. This is the obligation which lies on a party to persuade court either by preponderance of evidence or beyond reasonable doubt, that the material facts which constitutes his whole case are true, and consequently to have the case established and judgment given in his favour. The other meaning of the expression burden of proof is the obligation to adduce evidence on a particular fact of issue. This evidence in some cases, must be sufficient to prove the fact or issue to justify a finding on that fact or issue, in favour of the party on whom the burden lies. It is called the evidential burden. This is the sense in which the expression is more generally used.

34. The enormous task of proof beyond reasonable doubt by way of direct or circumstantial evidence rests with the prosecution and the fact the accused is put on his defence does not shift that burden and standard of proof in any way.

35. The ingredient's provided for under section 8(1) of the *Sexual Offences Act* No.3 of 2006 and which must be proved for a conviction to ensue are Age of the victim (must be a minor), penetration and proper identification of the perpetrator. (see *George Opondo Olunga v Republic* (2016)eKLR) .

36. Section 8 (1) and (2) of the Sexual Offences Act provides as follows:

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

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

37. 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)

A. Was the Age of the complainant proved

38. 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).

39. PW1 testified that she was 16 years old years and was a student at [Particulars Withheld] Secondary school in Form 2. PW2 PM, who was the father to PW1 also testified that she was born on 04.10.2005 and was aged 15years old.PW5 PC Faith Maluba produced PW1 birth certificate as Exhibit 1. A review of the birth certificate serial No xxxx showed that PW1 was born on 04.1o.2005. The age of the complainant was thus adequately proved. She was 15 years of age as at April 2020 when the incident occurred.

B. Was Penetration proved

40. Section 2 of the *Sexual Offences Act* defines penetration as follows;

> " Penetration; "means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

41. PW1 did testify that on 18.04.2020 she met the appellant on the road and he was looking for a house. She volunteered to take him to their neighbor known as," Muthoni". Later the said neighbor "Muthoni" told her that the appellant was interested in befriending her and had invited her for a birthday party at his house. Initially she was hesitant to go but eventually accompanied Muthoni to the said birthday party. The following day she went back to the appellant's house with Muthoni and she remained behind. The appellant told her that he had separated from his wife and requested for a relationship. That night PW1 slept at the appellant's house and it was her evidence that they engaged in sex.

42. PW1 evidence was that;

> " in the night David started touching me and we had sex..... when we had sex, David was touching me all over my breasts and vagina ... David took me to bed (PW1 looks down and shakes as she speaks). We then removed our cloths. I saw his penis. He inserted his penis into my vagina. I wanted him to have sex with me, he said if I refused, he would tell my parents."

43. The second time PW1 went to the appellant's house was on 07.05.2019. She testified that she was with Muthoni, when the appellant called and told her that he wanted to see her. She went to his house at about 4 pm and they engaged in sex with the appellant before he went to close his business. Later in the evening while still at appellant's house, she had a knock on the door and when she opened it was her father accompanied by other elders. She was locked in the house and later when the appellant came, they were arrested and taken to the police station and later to Kimbimbi sub county Hospital. In cross

examination by the appellants' advocate, the appellant reiterated that, on 20.04.2019 she had sex for the first time with David and further also testified that,

> "I had gone to David's house at 5. 00pm.By the time my father came we had already had sex. David did not lock me inside the house."

44. PW2, PM and PW3 Francis Kamotho Karogo both confirmed that acting on a tip off they went and found the complainant at the accused house and they locked her therein as they waited for the appellant to return. When he came back home at about 9.00pm, they arrested him and together with PW1 and were taken to the police station.PW4 George Kariuki, who was the clinical officer confirmed that PW1 was taken to Kimbimbi sub county hospital on 08.05.2019 and underwent both physical and laboratory examination, which revealed that she had a torn hymen and spermatozoa was seen. This conclusively proved that there was penetration.

45. The evidence of PW1 was thus adequately corroborated by the medical evidence produced by PW4. PW1 knew the person she was with and was clear in her testimony that she had spent the night on 20.04.2019 at the appellant's house and had engaged in sex. Further on 07.05.2019in the evening, she had engaged in sex with the appellant before he went to close his shop. She was found red handed at the appellant's house and medical examination later the same night revealed that she still has spermatozoa. This indeed conclusively confirmed that there had been penetration. This element was thus proved.

Positive identification of the Perpetrator

46. PW1 knew the appellant very well and confirmed that they were in an amorous relationship. The appellant in his defense confirmed that, PW1 came to his house for his birthday party and on 07.05 .2019 came with Hellen and told him they were hungry. According to him he allowed them to remain in his house as he went to close his business. Given the facts herein the identification of the appellant was not in doubt as the two knew each other from their social setting. This was a case of recognition and thus the identification was free from error. The appellant testified in court that she had sex with the appellant on two occasions and even on the evening she was found by PW2 at the appellant's house they had already engaged in sex. The identification of the appellant as the perpetrator was thus free from error; See *Wamunga v Republic (1989)* KLR 424.

47. All the ingredients of the offence were fully established by the prosecution and thus burden of proof was discharged contrary to the appellant's submissions. There was a clear demonstration of what transpired and PW1 evidence was further corroborated by the medical evidence produced. The appellants ground of appeal that the evidence of PW1 consisted of untruthful evidence has no basis. Further his allegation that the complainant had behaved in a way to suggest that she was a person above 18 years too is an afterthought as he did not raise this line of defense when given the opportunity. He completely denied having sex on any occasion with PW1 and did not testify that he believed she was above 18 years old, thus capable of giving consent.

Did the prosecution fail to call crucial witnesses and what is the effect of the same on the prosecution case?

48. Section 124 of the *Evidence Act*, Cap 80 provides as follows;

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declaration Act*, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be

liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

49. Section 143 of the *Evidence Act* also provides that;

> " No particular number of witnesses shall in the absence of any provision of the law to the contrary be required to prove any fact.

50. The court of Appeal in *Julius Kalewa Matunga v Republic* stated that;

> " As a general principal of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

51. The prosecution called five witnesses and their evidence fully established the appellant's guilt. It was not necessary to call other witnesses as the evidence of PW1 was adequately corroborated by PW2 – PW5. The appellant further did not specify which witnesses the prosecution failed to call and their relevance. The prosecution evidence thus cannot be faulted and it was correctly analyzed by the trial magistrate to convict the appellant.

Was the sentence passed harsh and should this court interfere with the same.

52. The appellant was sentenced to 15 years imprisonment. The minimum mandatory minimum sentence as provided under section 8(2) of the *Sexual Offences Act* No 3 of 2006, is twenty (20 Years).The Appellant urged the court to reconsider the sentence imposed as it was harsh, excessive.

53. The provision of section 8(2) 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.*& In *Maingi & 5 others v Director of Public Prosecution & Another* (Petition No.E117 of 2021) (2022) KEHC 13118 (KLR).

54. This court does appreciate the gravity and nature of the offence committed and does not condone offences against minors and vulnerable persons. This was appreciated by Madan J as he was then in *Yasmin v Mohammed* (1973) EA 370 –

> " The High Court is specially endowed with jurisdiction to safeguard interest of infants, as the court is the parent of all infants. The welfare of the infant is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infant in Kenya of whatever community tribe, sect fall within the ambit of guardianship of Infant Act and the court is charged with the sacred duty to ensure that their interest remain paramount and can duly preserve."

55. In the case *R v Scott* (2005) NSWCCA 152 Howle J. Grove & Baar JJ then stated –

> " There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and then must be a reasonable proportionately between the sentence passed in the circumstance of the crime committed...one of the purposes of punishment is to ensure that the offender is adequately punished... a further purpose of punishment is to denounce the conduct of the offender."

56. In this case the appellant unlawfully violated an innocent girl who was obviously in need of care and protection. This court notes that the trial magistrate took into consideration the appellant's mitigation and also factored in the victim's sentiments and sentenced the appellant to 15 years imprisonment.

57. In the particular circumstance of this case, the trial magistrate correctly exercised her discretion while sentencing the appellant. But there was need for the trial court to further consider the *judiciary sentencing policy guidelines* especially section 23.7 thereof to note that there were no aggravating circumstances and therefore it would have further considered a more rehabilitative sentence and punishment which is proportional to circumstances of the crime.

Conclusion

58. Having considered all factors in this case, considering the gravity of the offence against an innocent minor and Appellants mitigation and also bearing in mind the persuasive finding in. In *Maingi & 5 others v Director of Public Prosecution & Another* (Petition No.E117 of 2021) (2022) KEHC 13118 (KLR) as well as the dicta in *Francis Muruatetu case* and the judiciary sentencing policy I do hereby set aside the sentence of 15 years imposed on the Appellant in Wang'uru Chief Magistrate court Criminal Case SOA No.9 of 2020 vide judgment / sentence dated 15th September 2022 and substitute it with a sentence of ten (10) years imprisonment to run from the date of the trial court judgment to wit 15th September 2022.

59. For avoidance of doubt the appeal on conviction is dismissed.

60. Right to Appeal 14 days.

Judgement accordingly

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF MAY 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 31st day of May 2023

In the presence of;

Appellant

..... For O.D.P.P

..... Court Assistant