



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIMINAL APPEAL NO E033 OF 2021

MOSES MUTAHI MUGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment and Sentence of Hon B. Kasavuli in the Chief Magistrates Court at Mavoko delivered on the 7th day of April, 2021 in Criminal Case (S.O) No 25 of 2019)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

MOSES MUTAHI MUGO.....ACCUSED

JUDGEMENT

1. The appellant, **Moses Mutahi Mugo**, was charged with the offence of Defilement Contrary to Section 8(1) as read with Section 8(2) of the **Sexual Offences Act**. The particulars of the offence were that the accused on diverse dates between January 2019 and 24th August 2019, in Athi River Sub -County within Machakos County, intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of one MWW a child aged 10 years.
2. In the alternative charge, he was charged with committing an indecent act with a girl contrary to Section 11(1) of the **Sexual Offences Act**. The particulars were on diverse dates between January 2019 and 24th August 2019, in Athi River Sub -County within Machakos County intentionally and unlawfully committed an indecent act by touching the vagina of MWW a child aged 10 years.
3. The prosecution called 6 witness in support of its case and upon conviction, the appellant was sentenced to serve Fifty (50) years imprisonment.
4. After carrying out *voir dire* examination of PW1, the Court concluded that she was possessed of sufficient intelligence and understood the purpose of an oath.
5. Upon being sworn, PW1, who stated that she was 11 years old, testified that in January 2019, she was playing with her friends on unfinished construction site next to their house when the Appellant, her uncle, went and gave her Kshs.10/- which she spent in buying sweets and then went home. The next day, she met the Appellant at pool-station and he gave her Kshs.20/-. She was in the company of **A**, her sister's daughter. The two went to buy fresh, cherry gums, biscuits and sweets. Two days later, the Appellant found the Complainant playing and he called her. The Complainant followed him and he took her to his house where he locked the door, removed her clothes, removed his trousers and he did bad manners to her (*Akanifanya tabia mbaya*) by inserting his penis (meant for urinating) in her vagina (for *kususu*).
6. During the incident, the Complainant felt pain and cried but was told by the Appellant not to cry. It was her evidence that she was lying on the bed facing the wall beam and accused lay on top of her. After that the Appellant gave her Kshs.60/- to go buy whatever she wanted. The Appellant told her not to report the incident otherwise, he would not give her any more money.

7. A year later, the Appellant once again called her and took me to his place where the Appellant removed her pants and did *tabia mbaya* after which the Appellant gave her Kshs.50/-. According to the Complainant, the Appellant's house accused had TV, clothes and cartons. The following day, the Appellant called her and took her to another home under construction where the Appellant once again did *tabia mbaya* to her.
8. One time, the Complainant narrated, the Appellant followed her and took her to his house where he removed her clothes and had sex with her and as he did not give her any money, the Complainant started following him. However, the Complainant's sister noticed this and told the Appellant not to be giving the Complainant money. The following day, however, the Appellant told her to follow him and when she did so she saw a man outside the house and she did not enter the house. Later, her sister saw her following the Appellant and demanded that she tells her the truth. The Sister called their mother and they demanded that the Complainant tells them the truth which the Complainant yielded to and disclosed the happenings. After that, they went to the police from where they were referred to Nairobi Women hospital where she was examined. The following day, they returned to the police station where they recorded statements and we went home.
9. According to the Complainant, the Appellant's house was at Maasai not near their home. It was her evidence that the day the Appellant took her to another construction site, it was school going day and that there were no people in the unfinished house which had several rooms made of stone.
10. She stated that she was informed by her sister that the Appellant was her uncle. She however stated that they were not related and that she used to call the Appellant uncle because he was a grown up man.
11. PW2, **EWK**, the Complainant's mother testified the Complainant was 11 years old and relied on the age assessment report. She stated that in January 2019 their caretaker called Mama Faith told her that the Appellant was giving the Complainant money. She then sent her first born daughter, **A**, PW3, to ask the Appellant why he was giving the Complainant money and the Appellant responded that it was his nature to give money and that he would give PW2's son, son **Dennis Kamau**, who was DJ at club Pioneer as well, a position which her said son confirmed. PW2 however told the Appellant to desist from giving her daughter money.
12. On 24th August, 2019, **JW**, PW5, PW2's daughter, informed PW2 that she had been informed by the woman running the kiosk that the Complainant had been seen with the Appellant who gave her money to buy sweets. In the company of her daughter, **AW**, who testified as PW3, PW2 went to the said J who told her about the whole incident. They then called the Complainant, took her to the house and upon checking her private parts, they found mucus like fluid. When they asked the Complainant what had happened, the Complainant disclosed that it was the Appellant who was responsible.
13. They then proceeded to Athi River Police Station where they reported the incident before proceeding to Nairobi Women Hospital, Kitengela where the Complainant was tested and given medications. Since it was at night they went to the police station the following day and a P3 form was filled in.
14. She stated that she never knew the Appellant prior to being told that he was giving her daughter money. She stated that her daughter told her she had been raped (4) times but did not specify dates or months. She denied that the case was fabricated against the Appellant because the Appellant separated from PW2's daughter, PW3 and stated that PW3 was married.
15. PW3, **AWW**, testified that in January 2019, her daughter went to her eating snacks and upon asking the daughter where she got money, the daughter informed her that it was the Complainant who had bought it for her. PW3 then called the Complainant and asked her where she got money but the Complainant declined to disclose the same. However, PW3's daughter informed her that she the Complainant had been given the money by a person who was at the pool table. They then proceeded to the pool station where her daughter pointed to her a man in white shirt who have given the Complainant the money. PW3 then called the man and asked him why he was giving a child money and told him to stop. She was however informed by the man that it was his nature of generosity to give money to people. PW3 then reported the matter to her mother, PW2.
16. According to PW3 in August, 2019 she was with PW2 at the market where her sister, **J**, PW5, called them that there was emergency. They rushed to her sister's place where the said sister was called by a neighbour who told her to go check the child as she has seen her with a man who gave her money. PW3 told the Complainant to remove her trouser and lie on the sofa set and upon checking her vagina, PW3 saw a white discharge and upon threatening the Complainant, the Complainant disclosed that she was with the Appellant. The Complainant divulged that the Appellant had raped her severally but she would not remember and pointed out to them the Appellant's house since PW3 never knew the Appellant's house.
17. In the company of her said sister's husband and his two friends, they proceeded there, the Complainant knocked and the door was opened by the Appellant, whom she knew as a neighbour whom she used to serve bees in a club. According to her, the Appellant was her customer for whom she could buy beers and the Appellant could also return the favours whenever he had money. She however averred that she did not have any grudge with the Appellant.
18. According to PW3, the Appellant was arrested by **PK**, PW3's sister's husband. She however denied that she had intimate relationship with the Appellant. It was her evidence that the Appellant wanted to escape but was held by the shirt.
19. PW4, **John Njuguna**, a clinician at Nairobi Women Hospital, testified that he was in possession of medical documents filled by his colleague, **Everlyne Njambi**, who no longer worked at the hospital. Having worked with her for 2 years, he was familiar with her handwriting and signature. According to him, the Complainant accompanied by her mother gave a history of sexual assault and the urinals showed she had some vaginal infection though no spermatozoa was noted. He also had a PRC Form filled for the Complainant. According to him, on physical examination, there was no injury but an examination of the sexual organ though had no inflammation or bruises, a greenish vaginal discharge was seen and the hymen was torn at 5'Oclock which was an old tear. The clinician concluded that there was per vaginal penetration. He then exhibited the medical documents including the P3 form. He also produced the age assessment report which showed that the Complainant was more than 11 years old. According to him, the minor reported she had just had sex with accused on 24th August, 2019.

20. The witness stated that it is normal for a woman to have a discharge and admitted that loss of virginity can be through any other means other than sex.

21. PW5, **JWW** was on 24/8/2019 at around 4p.m., called by her friend, **Mama Kefa**, who told her she had seen her sister with a tall man and that she should interrogate her upon reaching home. After 20 minutes, the friend went and told her that her sister had gone to her shop and bought sweets. When the Complainant returned home, PW5 asked her and the Complainant informed her that she told me a man had given her 50/-. PW5 then called PW2, her mother who went and interrogated the Complainant and upon undressing the Complainant and checking her private parts, the Complainant disclosed that she had had sex. They also saw that the Complainant had vaginal discharge.

22. PW5 denied that the charges were fabricated after the Appellant separated from PW3 and that she swore to teach the Appellant a lesson.

23. PW6, **Cpl Carolyn Seeti**, the investigating officer, testified that on 24/8/2019 at 4p.m., the complainant was taken to police station with her mother and sister with report that they suspected the minor had been defiled. She booked the report and referred them to Nairobi Women Hospital where the child was examined and P3 form filled. The following day they went for statements recording. The doctor had conducted age assessment and found she was 10 years old. After recording the statements, she rearrested the Appellant.

24. Upon being placed on his defence, the Appellant testified that on 25th August, 2019, he was ambushed by five people who entered his house, one of whom was his former lover from whom he had separated on 16th August, 2019. According to him, one time when he met her with her sister on the road, she wanted them to reconcile but when the Appellant refused, the sister warned him that he would face the music.

25. According to him, when he was ambushed the five beat him, tied his hands and locked his house and took him outside. While there, PW3 screamed and claimed that he was defiling her sister. As a result, members of the public arrived and when they sought to see the girl that was allegedly raped, there was none. According to him the five included PW3, his former lover and Rasta, the husband to PW3's sister. Upon the arrival of the police he was arrested and charged. According to him, the charges were fabricated after he stooped living with PW3 as his wife. It was his evidence that he saw the Complainant for the first time in Court.

Determination

26. I have considered the evidence on record as I am duty bound to do. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174**. I have also considered the submissions made by the parties herein.

27. In this case the prosecution's case was that on diverse dates between January 2019 and 24th August 2019, the Appellant lured the Complainant into his house or in an uncompleted building where the Appellant severally defiled the Complainant. It was the evidence of the prosecution that the tool used to entice the Complainant was money.

28. From the evidence of the Complainant herself, the first time the incident occurred was in January 2019. A year later, the Appellant repeated the same act.

29. From the evidence of PW2, PW3 and PW5, the person who aroused their suspicion that there was something sinister going on between the Complainant and the Appellant was the caretaker of the premises where they were staying, Mama Faith. This Mama Faith was however not called to testify since, according to PW5, she had since moved out from where they were staying.

30. The appellant's evidence was that the case against him was fabricated due to the fact that his relationship with PW3 went sour.

31. Section 8 of the ***Sexual Offences Act*** provides as follows:

8. (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.

(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.

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

(5) It is a defence to a charge under this section if -

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

32. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013 where it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

33. In this case, there was clearly evidence on record by way of age assessment report which proved that the Complainant was a minor. In the case of Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000, it was observed as follows:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence.”

34. Closer home in the case of Kaingu Elias Kasomo vs. Republic in Malindi the Court of Appeal in criminal appeal No. 504 of 2010 stated as follows:

“Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

35. The Court quoted with approval its own decision in Alfayo Gombe Okello vs. Republic (2010) eKLR where again it commented on the age of the victim of a sexual assault; in that case it said: -

“In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)... In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother MA when she testified on 16th October, 2007 that... “This child in court is mine aged 14 years born in 1992...The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find.”

36. However, in Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000, it was observed as follows:

“Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

37. The emphasis is therefore that the onus of proving the age of the Complainant lies on the prosecution and that while, in the absence of any other evidence, medical evidence is paramount in determining the age of the victim, where there is credible evidence other than medical evidence, the conviction will not be overturned simply because of lack of medical evidence. In fact, according to the above authorities age may well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words, in assessing age a holistic approach must be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other information and circumstances. See Aroni, J in Kevin Kiprotich Amos alias Rotich vs. Republic - Criminal Appeal No. 89 of 2016.

38. Accordingly, I find that the prosecution proved the age of the Complainant.

39. Regarding penetration, the evidence of PW4 was that when the Complainant was examined, it was found that she had a greenish vaginal discharge and that her hymen was torn at 5'Oclock, though it was an old tear. Though the clinician concluded that there was vaginal penetration, PW4 stated that it is normal for a woman to have a discharge and admitted that loss of virginity can be through any other means other than sex.

40. From this evidence, the only evidence connecting the Appellant to the act was that of the Complainant since there was no independent eye witness evidence adduced. It is not in doubt that the evidence of a minor requires corroboration and in this regard the Court of Appeal in Bernard Kebiba vs. Republic [2000] eKLR stated that:

“The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn

itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result.”

41. Similarly, in Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR the Court of Appeal was of the opinion that:

“The relevant law in Kenya is succinctly set out in Chila vs. The Republic (1967) EA 722 at page 723:

‘The law of East Africa on corroboration in sexual cases is as follows: the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that here evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.’

The decision was applied in Margaret v the Republic (1967) Kenya LR 267. In view of Consolata’s evidence, it was necessary for sexual intercourse to be proved by establishing penetration: Halisbury’s Statutes of England, Third Edition, Volume 8 page 440 para 44. Be that as it may, the trial magistrate did not warn himself as we have already held. That was a grave misdirection. In the absence of such a warning, the convictions for rape are not for sustaining unless we are satisfied that Consolata’s evidence is true. We are not so satisfied and so the convictions cannot stand: Rv Cherap arap Kinei & Another (1936), 3 EACA 124.”

42. It follows that as a matter of practice, corroboration is necessary in sexual offences. What then is corroboration? The meaning of corroboration as defined or stated in the Nigerian case of Igbine vs. The State {1997} 9 NWLR (Pt.519) 101 (a), 108 is thus: -

“Corroboration means confirmation, ratification, verification or validation of existing evidence coming from another independent witness or witnesses”.

43. In Mukungu vs. Republic [2002] 2 EA 482, the Court of Appeal citing Mutonyi vs. Republic [1982] KLR 2003, held that:

“An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See Republic vs. Manilal Ishwerlal Purohit [1942] 9 EACA 58, 61.”

44. In R vs. Kilbourne [1973] 2 WLR 254, 267, Lord Hailsham of St Marylebone LC stated:

“Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness’s testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroborated in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed.”

45. In Khalif Haret vs. The Republic [1979] KLR 308, Trevelyan and Hancox, JJ pronounced themselves as hereunder:

“What then, is corroboration? As was put succinctly in R vs. Kilbourne (at page 263) it means “no more than evidence tending to confirm other evidence”. It is not, as the judge-advocate correctly stated, confirmation of everything, so that it amounts to a duplication of the evidence needing corroboration.”

46. It is therefore clear that corroborative evidence or material ought to confirm, ratify, verify or validate the existing evidence and must emanate from another independent witness or witnesses. It must affect the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

47. In this case there was clearly no material corroborating the Complainant’s evidence on penetration as that of PW4 was inconclusive. That however, is not the end of the matter. In sexual offences, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the *Evidence Act* makes this quite clear:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material 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 offence, 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.” [Emphasis added]

48. Dealing with a similar issue in the case of Mohamed vs. R, (2008) 1 KLR G&F 1175, the Court held that:

“It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that he child is truthful.”

49. The Court of Appeal sitting in Mombasa in Sahali Omar vs. Republic [2017] eKLR held that:

“On the first issue, the appellant took issue with lack of corroboration of the complainants’ evidence, which he said ran afoul of section 124 of the Evidence Act...The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful...It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)...In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:

“...The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4.”

The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail.”

50. Therefore, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. What is required of the trial court is to be satisfied that the victim is telling the truth. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. The fact of the warning must appear in the judgement of the trial court and the record itself must show that the trial court was so satisfied. It was therefore held in Omuroni vs. Republic (2002) 2 EA 508 that:

“Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial judge to make favourable or unfavourable impression about the credibility of a particular witness.”

51. In this case however, it would seem that the learned trial magistrate believed that there was corroboration of the Complainant’s evidence rather than the truth of the same. As was held by **Warsame, J** (as he then was) in Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR:

“It is required, which is of paramount of importance, that a trial court must indicate or point out instances of demeanour which he noted and which he relies upon as a basis of accepting the evidence of a particular witness. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing the instances as to why and how he thinks that particular witness is a witness of truth. In this case the trial court did not pay any regard to this elementary principle of law in arriving at the decision as to whether the three complainants were witnesses of truth. In the absence of any basis for establishing whether the three witnesses were witnesses of truth, the trial court was wrong in its decision.”

52. The learned trial magistrate seemed to have considered the evidence of PW2, PW3 and PW5 as having corroborated that of the Complainant. With due respect that was not correct. The said witnesses only testified on the suspicions based on the suspicions of one **Mama Faith** who herself was not called to testify on the basis of her suspicions.

53. It is therefore clear that there was no evidence corroborating the evidence of the Complainant regarding the fact of penetration and that the penetration was by the Appellant. In the absence of the said corroboration, the only route towards conviction of the Appellant was to make an express finding that the evidence of the Complainant was truthful. A consideration of the evidence on record reveals that the Complainant was very reluctant to divulge the fact of her defilement and who the perpetrator was. From the evidence of the prosecution witnesses, it took threats for her to open up. Her conduct leaves doubt as to whether she was a truthful witness whose evidence could be relied upon to convict the Appellant, in the absence of corroborating evidence. It also brings into question the motives of those who exerted pressure on her to open up.

54. The appellant in his evidence and right from cross-examination pointed a finger at PW3 as the person who, in cahoots with PW5, orchestrated the events that led to his being arraigned. According to him, he was in relationship with PW3, relationship which became sour and as a result, PW3 decided to hit back at him. That the PW3 and the Appellant seemed to have been close comes out from the evidence of PW3 herself who testified that the Appellant was her customer at a club where she worked and on good days they would buy each other drinks.

55. The learned trial magistrate seemed not to have sufficiently addressed his mind to this line of defence, apart from casually mentioning it. In Nguku vs. Republic [1985] eKLR, it was held by the Court of Appeal that:

“Quite obviously when analyzing the facts and the opposing evidence in a trial the individual facts and the assessment of the relative credibility of the witness thereon come first. It is incumbent on the trial magistrate or judge to consider the evidence in its respective stages and then arrive at a general conclusion on the totality of the evidence after doing so. In this case Mr Menezes’ contention regarding the second ground is borne out by the record of the judgment, which shows that the general conclusion was arrived at in advance of the individual analysis of the facts. We do not think that this point was fully appreciated by the learned judges of the High Court on the first appeal for after reciting ground two of the memorandum, which is similar to ground two in the one to this court, they said simply that on their own reading of the file and the judgment they took the view that the allegation was unjust in relation to it. If the course taken in this case is followed the point is almost bound to be taken on an appeal that the directions of this court’s predecessor in *Okethi Okale v Republic* [1965] EA 558 at page 559, which was cited to us by Menezes and which we now set out,

‘He submitted that the passage suggests that the learned judge first accepted the case for the prosecution and then cast upon the appellants the burden of disproving it or raising doubts about it. We think with respect that the learned judge’s approach to the onus of proof was clearly wrong, and in *Ndege Maragwa v Republic* (10), where the trial judge had used similar expressions this court said:-

“... We find it impossible to avoid the conclusion that the learned judge has, in effect, provisionally accepted the prosecution case and then cast on the defence an onus of rebutting or casting doubt on that case. We think that is an essentially wrong approach: apart from certain limited exceptions, the burden of proof in criminal proceedings is throughout on the prosecution.

Moreover, we think the learned judge fell into error in looking separately at the case for the prosecution and the case for the defence. In our view, it is the duty of the trial judge, both when he sums up to the assessors and when he gives judgment, to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think no single piece of evidence should be weighed except in relation to all the rest of the evidence. (These remarks do not, or course, apply to the consideration whether or not there is a case to answer, when the attitude of the court is necessarily and essentially different).”

We think that the observations of this court in that case apply with equal force to the present appeal’ have not been complied with.

It is true that in that case there had been an acceptance of the prosecution case followed by an indication that the burden was cast on the appellant to rebut it, which is not the complaint here, but we nevertheless think that the direction given in that case should always be observed.”

56. In *Lukas Okinyi Soki vs. Republic Kisumu Criminal Appeal No. 26 of 2004*, the Court of Appeal noted that:

“The appellant also claimed that the complaint was made as a result of grudge between the complainant and the appellant’s father over a piece of land that was in dispute between the two. The learned trial Magistrate did not consider this defence and never made any finding on it. The superior court dismissed it stating that the issue was introduced by the appellant late and was not afforded an opportunity to be tested and countered.

.....

The court ended its observation by saying that the trial Magistrate must have seen the issue was of no probative value. It did not make any decision on the issue and in our humble opinion, abdicated its role of analysing that evidence (considering that the appellant was unrepresented, and that the appellant was facing a serious charge which carried death sentence) and making its own conclusion on the same. As it stands, all that the superior court did was to state that the matter was introduced late and as there was no opportunity to cross examine on it, the trial court found it was not of probative value. That evidence was on record and deserved to be fully considered and either dismissed or accepted.”

57. In this case, the only witnesses who testified as independent witnesses were close relatives of the Complainant. I don’t mean to say that where the only witnesses available are related to the Complainant then conviction ought not to result since as was held in *Keter vs. Republic* [2007] 1EA135, the Court held *inter alia* that:-

“Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not. There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused.”

58. However, where the said witnesses based their suspicion on the information relayed to them by a third party who herself was not an eye witnesses and who was not called to lay a basis for having such suspicion, the evidence of the witnesses may well carry little weight. This is particularly so when the accused alleges which allegation may well have some substance that the decision to charge him was as a result of a frame up instigated as a result of a grudge between himself and one of the witnesses.

59. In *Ayub Muchehe vs. The Republic* [1980] KLR 44, Trevelyan and Sachdeva, JJ held that:

“Just as animosity is a factor which is properly to be taken into account where required, so is lack of animosity. We see nothing wrong in an appropriate case for the court to ask “What reason had the witness to lie?”...The fact that people have no grudge against someone does not mean that they cannot, at the same time, be mistaken or, for that matter, deliberately untruthful...There are spiteful people about.”

60. Having considered the evidence placed before me in this case, I find that the same fell short of the standard expected in criminal cases. The law is that where a reasonable doubt is created as to whether or not the accused committed an offence, that benefit must be in favour of the accused. In this case the reasonable doubt was created by lack of corroboration which in the absence of an express finding as to the truthfulness of the Complainant falls short of the proof required in these type of cases. This, coupled with the allegations of an existing grudge between the Appellant and the PW3, further makes the evidence doubtful.

61. The trial courts ought to take into account the opinion of the Court of Appeal with respect to heavy minimum sentences in the case of **Hamisi Bakari & Another vs. Republic [1987] eKLR** that:

“...where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear.”

62. In the premises, I allow the appeal, set aside the appellant’s conviction and set him at liberty forthwith unless otherwise lawfully held.

63. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 23RD DAY OF FEBRUARY, 2022.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant in person

Mr Ngetich for the Respondent

CA Susan