



**Ngeno v Republic (Criminal Appeal 90 of 2019)  
[2022] KEHC 11813 (KLR) (21 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 11813 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL 90 OF 2019**

**OA SEWE, J**

**APRIL 21, 2022**

**BETWEEN**

**JOSEPH KIPSANG NGENO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence dated 20th day of May 2019 in Eldoret Chief Magistrate's Criminal Case No. 119 of 2017 by Hon. H. Barasa, SPM)*

**JUDGMENT**

- [1] This appeal arises from the conviction and sentence passed against the appellant, Joseph Kipsang Ngeno, by the Senior Principal Magistrate's Court in Eldoret Chief Magistrate's Criminal Case No.69 of 2019: Republic vs. Patrick Kiptoo Rono. The appellant was charged, in Count I, with the offence of defilement, contrary to Section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the charge were that on 17<sup>th</sup> day of June 2017 in Keiyo South Sub-County within Elgeyo Marakwet County, he unlawfully and intentionally caused penetration by his genital organ (penis) into the genital organ (vagina) of FJN, a girl aged 12 years.
- [2] In the alternative, the appellant was charged with indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. It was alleged that on 17<sup>th</sup> day of June 2017 in Keiyo South Sub-County within Elgeyo Marakwet County, the appellant unlawfully and intentionally caused his genital organ (penis) to come into contact with the genital organ (vagina) of FJN, a girl aged 12 years.
- [3] The appellant denied those allegations; whereupon the case was heard by Hon. Barasa, SPM. At the conclusion of the appellant's trial, the lower court found him guilty of the substantive count of defilement, in a judgment delivered on May 8, 2019. Hence, the appellant was convicted and sentenced to serve 20 years' imprisonment on May 20, 2019.



- [4] Being dissatisfied with that decision, the appellant filed this appeal on May 31, 2019, on the following grounds:
- [a] That the trial magistrate erred in law and fact by failing to scrutinize and evaluate the whole evidence on record and thereby occasioned injustice;
  - [b] That the trial court erred in law and fact by failing to observe that there was no age assessment conducted on the victim which led to a miscarriage of justice;
  - [c] That the trial magistrate misdirected himself by convicting the appellant based on insufficient evidence;
  - [d] That the trial magistrate erred in convicting the appellant whereas vital prosecution witnesses were not availed in court to testify;
  - [e] That the trial magistrate erred in convicting him when he failed to observe that he was not medically examined to prove the nexus between him and the alleged crime;
  - [f] That the trial magistrate erred in law and fact by failing to observe that there was no DNA test carried out as required by section 36(1) of the *Sexual Offences Act*;
  - [g] That the trial magistrate erred in law and fact by misapprehending the evidence of the victim, a single witness without corroboration, hence leading to injustice;
  - [h] That the trial magistrate erred in law by failing to evaluate the appellants alibi defence in compliance with section 212 of the *Criminal Procedure Code*; hence shifted the burden of proof to the appellant.
- [5] Accordingly, the appellant prayed that his appeal be allowed, his conviction quashed and the sentences set aside. The appeal was urged by way of written submissions, pursuant to the directions given herein on July 8, 2021. The appellant's first point in submissions was that the charge of which he was convicted was defective in so far as the particulars alleged that "...he caused penetration of his own genital organ..." and not that of the complainant. He relied on *Yengo v Republic* [1983] KLR and *Sigilai v Republic* [2004] 2 KLR 480 for the proposition that an accused person should be charged with an offence known in law; and that the offence should be disclosed in a clear and unambiguous manner to enable the accused prepare his defence.
- [6] The appellant faulted the lower court's judgment, contending that no reasons for the decision was given by the trial magistrate. He also submitted that the lower court neither framed issues for determination nor indicated the provision of the law under which the conviction was made. He relied on *Nyanamba v Republic* [1983] KLR in urging the court to find that the judgment did not comply with the provisions of section 169 of the *Criminal Procedure Code*.
- [7] In respect of Grounds 2, 3 and 4 of appeal, the appellant submitted that the evidence of the complainant ought to have been treated with caution in that she opted to spend the night in a shed rather than go home to report the incident to her parents. He therefore submitted that the act complained of was consensual; and that the complainant was afraid that Kipkoech who had seen them engage in sexual intercourse, would report the matter to her parents. The appellant further questioned why Kipkoech who was said to have witnessed the offensive act, and Harrison, who escorted the complainant home the following morning, were not called as a witnesses. He urged the Court to conclude that, had they been called, their evidence would have been adverse to the Prosecution. He relied on *Peter Gitau Munene v Republic* [2006] and *Kivie v Republic* [1952] (full citation not provided).



- [8] With regard to the medical evidence adduced before the lower court, the appellant questioned why the complainant had to be subjected to examination at Kocholwa Sub-County Hospital and thereafter at Moi Teaching and Referral Hospital. His argument was that the first examination must have been flawed and should therefore be treated as such. He further submitted that the mere fact that the complainant's hymen was broken is not proof of penetration. He relied on *David Mwingirwa v Republic* [2017] eKLR to the effect that other factors, such as rigorous exercise, can rupture a hymen.
- [9] Lastly, the appellant questioned why the investigating officer did not visit the scene to ascertain the truth; such as whether there is indeed a goat shed where the complainant could have slept as alleged by her.
- [10] On behalf of the State, learned counsel, Mr. Mark Mugun, opposed the appeal. He relied on his written submissions dated July 9, 2021. He submitted that for a charge of defilement, the Republic is duty bound to prove the following ingredients:
- [a] That the complainant was a minor;
  - [b] Penetration;
  - [c] Positive identification of the accused person as the person who caused the penetration of the complainant's genitalia.
- [11] It was counsel's submission that all the three elements were proved beyond reasonable doubt, in that, at page 22 of the Record of Appeal, the complainant testified that she was 12 years old and her Immunization Card was exhibited to confirm her date of birth as 25th April 2005. He further pointed out that at pages 21-22, the complainant told the lower court that she was collecting firewood when the accused met her and demanded for sex; and that he threatened her using a panga before defiling her. He also mentioned that the clinician who examined the complainant also testified and confirmed that there was recent penetration of the complainant's genital organ.
- [12] Regarding identification of the appellant, counsel urged the Court to believe the complainant's account and pointed out that she knew the appellant by name prior to the incident, given that they are neighbours. As to sentence, counsel made reference to the directions issued by the Supreme Court on 6th July 2021 and urged the Court to uphold the mandatory minimum sentence of 20 years' imprisonment. He prayed therefore for the dismissal of the appeal.
- [13] I have given careful consideration to the appeal in the light of the evidence presented before the lower court as well as the written submissions filed herein. I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon; this being a first appeal. In *Okeno vs. Republic* [1972] EA 32, the Court of Appeal for East Africa, held that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; 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 had the advantage of hearing and seeing the witnesses...”



- [14] In the premises, I have carefully considered the lower court's record and note that the complainant testified on th November 2017 and told the lower court that she was out collecting firewood on the 17th June 2017 when the appellant approached her and demanded for sex. She declined but was nevertheless accosted by the appellant who threatened to cut her with a panga if she screamed. He then got hold of her and defiled her; and was found in the act by Kipkoech. She explained that she spent the night in a goat shed and went home the following morning in the company of Harrison. She thereupon reported what had happened to her and she was then escorted to Kocholwa Hospital for examination and treatment. She added that, with the involvement of her teacher, she was escorted to Moi Teaching and Referral Hospital where she was again examined. The complainant told the lower court that the accused is a neighbour and therefore well known to her.
- [15] Harrison Ngeno testified before the lower court as PW2. He identified the complainant and told the court that she is his younger sister. His evidence was that on 17th June 2017 at about 8.00 p.m. he returned home after his activities for the day and found the complainant missing. He made enquiries with a view of finding out where she was but did not receive any information. The complainant did not return home that night. The following morning, he visited a neighbouring home and got to learn from a boy called Kipkoech Rotich that he had seen the complainant having sex with the appellant. He had then told her that he would report the incident to him (Harrison); which was why the complainant spent the night away from home. PW2 further stated that he thereafter mounted a search for the complainant and found her at about 4.00 p.m.; and that she confirmed that she had been defiled by the appellant.
- [16] Dr. Eunice Temet, a doctor based at Moi Teaching & Referral Hospital, testified as PW3. She stated that she examined the complainant and filled her P3 Form following allegations of defilement. She confirmed that the girl was then aged 12 years and that she had fresh hymenal tears at position 6.00 o'clock. She also noted redness and swelling of her genitalia; as well as in her posterior fourchette. In her opinion the findings were consistent with defilement. She produced the P3 Form before the lower court as the Prosecution's Exhibit 2.
- [17] John Kipkoech Martim (PW4) was then the clinical officer in charge of Kocholwa Sub-County Hospital. He confirmed that the complainant was seen at their facility on 19th June 2017 by a clinical officer named Margaret Cherotich; who had since been transferred to another facility. Thus, PW4 produced the complainant's treatment notes on behalf of Margaret Cherotich and confirmed that a diagnosis of defilement was made; and that the patient was put on appropriate treatment.
- [18] The last prosecution witness was PC (W) Sofia Ramadhani (PW5). She was at the material time, attached to Kaptagat Police Station and was in the office on 20th June 2017 when an AP from Kocholwo brought two suspects, including the appellant. She confirmed that the appellant was in custody for alleged defilement; and that she booked him in and placed him in the cell. Thereafter she was assigned the case for investigation; and proceeded to record statements from the witnesses, issued P3 Forms to both the complainant and the appellant and escorted them to hospital for purposes of medical examination. She added that the child was found to have been defiled. She consequently charged the appellant and caused him to be arraigned before court. She produced the complainant's Immunization Card which was handed over to her by the complainant's parents as an exhibit before the lower court (see the Prosecution's Exhibit No. 3).
- [19] In his defence, the appellant told the lower court, in an unsworn statement of defence that the allegations against him were untrue. He contended that the young man who complained against him (presumably Kipkoech) framed him so that he could be locked up and afford the young man an opportunity to sell the land.



[20] I have carefully considered the appellant's Grounds of Appeal in the light of the written submissions filed herein and the record of the lower court. For purposes of the substantive charge, with which the appellant was convicted and sentenced to 20 years' imprisonment, Section 8(1) as read with section 8(3) of the *Sexual Offences Act*, stipulates that:

(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.

[21] In the premises, and as correctly pointed out by counsel for the state, the Prosecution needed to prove beyond reasonable doubt the three elements of defilement; namely:

[a] Whether the Complainant was, at the material time, a child for purposes of section 8(3) of the *Sexual Offences Act*;

[b] Whether there was penetration of the complainant's genital organ;

[c] Whether the penetration was perpetrated by the appellant.

[22] In addition to satisfying myself in connection with the three elements, I propose to consider whether or not the sentence of 20 years imposed on the appellant by the lower court is excessive in the circumstances.

**[a] On the age of the Complainant:**

[23] It is now trite that the age of a minor is a critical component of a defilement charge; and that it is an element which must be proved by the Prosecution beyond reasonable doubt. In *Kaingu Kasomo vs. Republic* Criminal Appeal No. 504 of 2010 the Court of Appeal made this point thus:

“Age of the victim of 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”.

[24] As to what amounts to credible evidence, rule 4 of the *Sexual Offences Rules* of Court Rules provides that:

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

[25] Needless to say therefore that, in addition to the documents set out in Rule 4 above, the age of a minor for purposes of the *Sexual Offences Act* can also be proved by the oral evidence of the minor's mother, by way of age assessment as well as by observation and common sense. Hence, in *P.M.M. vs. Republic* [2018] eKLR, it was held thus:

“...whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant...”



[26] Accordingly, the complainant testified before the lower court that she was 12 years old as of 17th June 2017 when she was defiled. Her evidence was buttressed by the Immunization Card, which gives the complainant's date of birth as 25th April 2005. That card was produced by the investigating officer, PW5, and marked as the Prosecution's Exhibit 3. There is therefore no dispute that the minor was within the age bracket provided for in Section 8(3) of the *Sexual Offences Act*. And any argument, such as was raised by the appellant, that age assessment ought to have been done, is pointless in the light of the clear provisions of Rule 4 of the Sexual Offences Rules of Court Rules.

**[b] On Penetration of the Complainant:**

[27] The complainant testified that, on the date in question, she had gone to collect firewood; and that while out there, the appellant approached her and demanded for sex and she declined. The appellant then threatened to cut her with a panga if she screamed; and then proceeded to defile her nevertheless. Her evidence was lent credence by the evidence of both PW3 and PW4; both of whom testified that the complainant had injuries in her genitalia consistent with defilement. In particular, PW3 testified that personally examined the complainant and filled her P3 Form which was produced before the lower court as the Prosecution's Exhibit 2. She noted redness in the complainant's genitalia as well as a whitish discharge and formed the impression that the minor had indeed been defiled.

[28] I am therefore satisfied that penetration was likewise proved by the Prosecution beyond reasonable doubt.

**[c] On whether the penetration of the complainant was perpetrated by the appellant:**

[29] The evidence presented before the lower court by the complainant was that the appellant is a neighbour; and that he was well known to her before the incident. The incident occurred in broad daylight and therefore there was no question of mistaken identity. The appellant first approached the complainant and had a face to face conversation with her. In the circumstances, she was able to see him without any impediment. It is also noteworthy that at the first opportunity, the complainant reported to PW2 about the incident and gave the name of the appellant as her assailant. I find the evidence in that regard cogent and credible.

[30]\*\* On whether the testimony of PW1 required corroboration, the proviso to section 124 of the *Evidence Act* is explicit\*\* that:

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.

[31] It is evident at page 7 of his judgment that the learned trial magistrate complied fully with the strictures of the aforestated proviso. Here is what he had to say in this regard:

“The only evidence available as to who committed the offence is the testimony of the child survivor herself and the question is whether she was speaking the truth. This court carried out a *voire dire* and found that the child was intelligent enough to testify under oath. Her evidence was clear, detailed enough and consistent. It was clear that the accused was well known to her since he was their neighbour. She was firm that the accused is the one who defiled her. The accused duly cross-examined the child but her evidence was not shaken at all. In his defence, the accused claimed that he had been framed up by a young man who wanted to sell his land. I however observed the minor keenly as she testified and when she was



being cross-examined and there was no indication even remotely that she had been coached on what to say...The child was defiled and she mentioned the accused as her assailant. She was not mistaken and neither was she being used by anyone...”

[32] I am therefore satisfied that there was credible evidence placed before the lower court connecting the appellant with the crime. He was therefore positively identified as the culprit.

[33] In his written submissions the appellant made the assertion that the act complained of was consensual; and therefore he ought not to have been convicted thereof. It is however trite that, for purposes of the *Sexual Offences Act*, for a person to give consent, he or she must agree by choice, and must have both the freedom and capacity to make that choice. It is for this reason that a person under 18 years is presumed by law to be incapable of giving consent. Hence, Section 43(4)(f) of the *Sexual Offences Act* stipulates that:

“The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act ... a child.”

[34] Accordingly, I am in complete agreement with the position taken by Hon. Korir-Lagat in *Luka Waitbaka Ndegwa v Republic* [2017] eKLR, that:

“In the offence of defilement, the law presumes that a child being one who is below the age of 18 years is incapable of giving consent to sex. I do not agree with the Martin Charo case that the conduct of the child is relevant to the offence of defilement. Children are among the vulnerable members of our society by reason of their age, their inability to protect and provide for themselves and also are unable to appreciate dangerous situations. It is for these reasons that the law presumes that they are incapable of consenting to sexual intercourse. In enacting this provision, the legislature was only discharging its duty to act in the best interest of the child.

Therefore once it is proved that the complainant was below the age of 18 years the offence is completed and it is immaterial that she or he consented to sex. The defence afforded by section 8 (5) of the *Sexual Offences Act* does not refer to consent, but rather to reasonable belief that the complainant was above the age of majority...That she consented to the sexual intercourse is not sufficient to exonerate the appellant of the offence. It is not the consent of the child that exonerates the appellant from the offence but the reasonable belief that she was above the age of majority therefore capable of consenting, and the evidence of steps taken to establish this fact. There was no evidence of any steps that the appellant took to ascertain the age of the complainant. This ground of appeal must fail.”

(35) A similar stance was taken by Hon. Mwangi, J. in *Peter Charago vs. Republic* [2019] eKLR, that:

“Unless there is proof that the complainant deceived the appellant, any sexual act between the two is treated as non-consensual sex and therefore amounted to defilement, as the complainant was a child under the age of 18 years and incapable of giving consent in law. Even where a minor behaves like an adult, the law still recognizes that person as a child.”

[36] In the premises, the argument that the sexual act was consensual is untenable. The appellant also urged the Court to take an adverse view of the fact that no DNA test was conducted to medically link him with the alleged crime. He was therefore of the view that, without a DNA test, the Prosecution could not be said to have proved penetration beyond reasonable doubt. While it is true that DNA testing



is provided for in section 36 of the *Sexual Offences Act*, that provision is not mandatory. It provides thus in Subsection (1):

“...where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.” (Emphasis added)

[37] Hence, in *Evans Wamalwa Simiyu vs. Republic* [2016] eKLR, for instance, the Court of Appeal was of the view that:

“...section 36 of the *Sexual Offences Act* that gives the trial court powers to order an Accused person to undergo DNA testing uses the word “may”. Therefore, the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover, the trial court found material corroboration of the complainant’s evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa...”

[38] Thus, the Court of Appeal reiterated its stance in *Mbogo Raphael Chengo v Republic*(supra):

“...the ground that no DNA was conducted on the complainant has no substance. The appellant was identified by way of recognition as the person who committed the offence as alleged.”

[39] I similarly find that the appellant’s complaint that no DNA test was ordered for by the lower court is of no substance; and that credible inculpatory evidence of recognition was adduced by the complainant before the lower court that linked the appellant with the defilement of the complainant.

[40] It is therefore my finding that sufficient material was placed before the lower court to prove beyond reasonable doubt that the complainant was a minor for purposes of section 8(3) of the *Sexual Offences Act*; that she was defiled and that the defilement was perpetrated by the appellant.

[41] I now turn attention to the submission of the appellant that the substantive charge as laid was defective, in that the particulars alleged that the appellant had caused penetration to himself. A perusal of the lower court’s record reveals that nothing could be further from the truth. Section 8(1) of the *Sexual Offences Act* defines defilement as an act “...an act which causes penetration with a child...”<sup>\*\*\*</sup> Accordingly, in the particulars of the main charge, the appellant was accused of having “caused penetration of his genital organ” into the genital organ of the complainant. Selective reading, which is what the appellant proposed in his submissions, will not do as it undoubtedly results in a distortion of the facts.

[42] Moreover, section 134 of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya, is explicit that:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with



particulars as may be necessary for giving reasonable information to the nature of the offence charged.”

[43] Accordingly, having looked at the Charge Sheet, at pages 3 and 4 of the Record of Appeal, it is clear that the Charge along with the applicable provisions of the law have been explicitly set out. It is manifest too that the particulars set out therein are in accord with the charge. Thus, in *[Obedi Kilonzo Kevevo v Republic](#)* [2015] eKLR, the Court of Appeal made it clear that:

“The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants’ conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of *JMA v Republic* [2009] KLR 671, it was held inter alia that:

It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible.”

[44] In the instant case, the Charges and the particulars thereof were clearly stated and the appellant well knew the charge he was faced with and respondent thereto effectively.

[45] The appellant also urged the Court to draw an adverse presumption from the fact that some vital witnesses, particularly Kipkoech, who allegedly witnessed the commission of the crime by the appellant, was not called to testify. The appellant therefore submitted that the presumption to draw from that omission is that had the witnesses been called, their evidence would have been adverse to the Prosecution case. The appellant relied on *[Peter Gitau Muchene v Republic](#)* (supra) in which the Court held:

“In the present case with the evidence on record, I make that adverse inference that if the witnesses who were mentioned by the complainant as having respondent to her screams were called to testify their testimony would have been adverse to the case. Then the conviction of the appellant cannot be safely sustained.”

[46] The general position, as expressed in *[Bukenya & Others v Uganda](#)* [1972] EA 549, is that:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

[47] The principle was restated by the Court of Appeal in *Sahali Omar vs. Republic* [2017] eKLR thus:

“The principle used to determine the consequences of failure to call witnesses was succinctly stated in *Bukenya & Others v Uganda* (1972 E.A; where the court held that: -

- i. “The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
- ii. That court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.



- iii. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

[48] The point is clear, namely that the prosecution is not expected to call a superfluity of witnesses. Secondly, the presumption can only be drawn in a situation where the evidence presented by the Prosecution is barely adequate. In this instance, the lower court found sufficient evidence upon which to convict; which evidence has been re-evaluated by this Court and found adequate. Thirdly, the presumption can only be drawn in circumstances where the trial court has first intervened in vain to have the witnesses called. In the premises, I am not in the least persuaded that failure to call Kipkoech was in any way detrimental to the Prosecution case.

[49] Then there was the complaint by the appellant that his alibi defence was not taken into account. I have looked at what he told the lower court in his unsworn statement of defence. He did not explicitly say that he was not at the scene of crime when the alleged offence took place. His contention was that he was framed by the young man who complained against him. An “alibi” is defined in *Black’s Law Dictionary*, Tenth Edition, to mean:

“A defence based on the physical impossibility of a defendant’s guilt by placing the defendant in a location other than the scene of the crime at the relevant time.”

[50] There is no such allegation in the defence presented by the appellant before the lower court. As to whether his defence was taken into account, the judgment of the lower court does confirm that it was. First, the defence was discussed at page 4 of the judgment; then at page 7 as part of the analysis before being rejected. The judgment reads thus:

“...In his defence, the accused claimed that he had been framed up by a young man who wanted to sell his land. I however observed the minor keenly as she testified and when she was being cross-examined and there was no indication even remotely that she had been coached on what to say. It is preposterous to imagine that the so-called young man planned to have the minor defiled then pin the offence on the accused. I do not believe his line of defence...”

[51] In any event, the evidence presented by the Prosecution did place the appellant at the scene and therefore ruled out any such *alibi* as the appellant may have had in mind. I am further satisfied that his defence was indeed considered and properly rejected by the learned trial magistrate. Indeed, the judgment complied well with the requirements of section 169 of the *Criminal Procedure Code* in that it set out the charges, the evidence in proof of the Prosecution case, the accused’s defence as well as the applicable law, before delving into the issues, which were clearly framed for determination. The learned trial magistrate also gave his reasons for his decision; and in his conclusion, he made it clear that the conviction was in respect of the principal charge.



[52] Turning now to the sentence imposed on the appellant, although he was not explicit in his submissions on this, I presume that he had in mind the decision of the Supreme Court in *Francis Karioko Muruatetu v Republic* [2017] eKLR as applied to sexual offences in the guideline judgments of the Court of Appeal. For instance, in *Jared Koita Injiri v Republic* [2019] eKLR, the Court of Appeal held that:

“ Arising from the decision in Francis Karioko Muruatetu & Another v Republic, SC Pet. No. 16 of 2015 where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional. The Court took the view that;

Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of *the Constitution*; an absolute right.”

In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.”

[53] The same stance was taken in a host of other cases before the Supreme Court stepped in with further directions as to the applicability of Muruatetu. The directions are dated 6 July 2021; and, at paragraphs 11, 12 and 14 thereof the Supreme Court stated thus:

[11] The ratio decidendi in the decision was summarized as follows;

“ 69. Consequently, we find that Section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment”.

[12] We therefore reiterate that, this Court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.

...

[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.”

[54] In the light of the directions, there is no jurisdiction to interfere with the sentence imposed on the appellant by the lower court. The result therefore is that the appeal against sentence is also untenable.

[55] In the result, it is my finding that this appeal is utterly devoid of merit. It is consequently dismissed.



It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA VIA MICROSOFT TEAMS  
PLATFORM THIS 21ST DAY OF APRIL 2022.**

.....

**OLGA SEWE**

**JUDGE**

