Too v Republic (Criminal Appeal 27 of 2019)
[2022] KEHC 12382 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12382 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL 27 OF 2019

RL KORIR, J

JULY 29, 2022

BETWEEN

ERASTO KIPRONO TOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged 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. Particulars were that on the July 12, 2018 in Chepalungu sub-county within Bomet county intentionally and unlawfully caused his penis to penetrate the anus of EK (EK) a child aged 13 years old.

2. The Appellant faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. Particulars of the offence were that on July 12, 2018 in Chepalungu subcounty within Bomet county, intentionally and unlawfully caused his penis to come into contact with the anus of EK (EK), a child aged 13 years old.

3. The Appellant was arraigned before the trial court on August 28, 2018 where he took plea. He pleaded not guilty to both the main and alternative charges. The case proceeded to full trial where the Prosecution called six witnesses. At the close of the Prosecution case, the trial cout found that the Appellant had a case to answer and placed him on his defence. He elected to give an unsworn statement and called no witnesses.

4. At the close of the defence case, the trial court found the Appellant guilty of the offence of defilement and sentenced him to serve life imprisonment.

5. Being dissatisfied with the judgement, the Appellant filed his homemade Memorandum of Appeal on November 7, 2019 against the conviction and sentence. He raised six (6) grounds to the effect that the case was not proved beyond reasonable doubt and that the trial court did not consider his defence.

6. Subsequently, the Appellant filed amended grounds of appeal on March 23, 2022, in which he raised five (5) grounds as follows:-

    1. Thatthe learned trial magistrate erred in law and fact by failing to find that the prosecution did not discharge its duty of disclosure hence violated the Appellant's right to a fair trial as provided for by Article 50(2) (j) of the *Constitution*.

    2. That the learned trial magistrate erred in law and fact by failing to find that penetration was not positively proven by the Proseuction thus not discharging its duty beyond reasonable doubt.

    3. That the learned trial magistrate erred in law and fact by failing to consider that the Prosecution's case was marred with contradictions and inconsistencies.

    4. That the learned trial magistrate erred in law and fact by failing to appreciate that the medical report presented did not corroborate the charge.

    5. That the sentence imposed was not only harsh and excessive and not informed by the facts and circumstances of the offence nor supported by evidence on record, since it was imposed as per the dictates of the statute.

7. It was the Appellant's prayer that the appeal be allowed, conviction quashed and sentence set aside.

8. The Court directed on March 9, 2021 that the Appeal be canvassed by way of written submissions.

Appellant's Submissions:

9. The Appellant filed his submissions on May 4, 2022. He submitted that the trial commenced before he was supplied with all the statements that the prosecution intended to rely on, that PW1 testified before he could adequately prepare which was a gross violation of his rights under Article 50(2) (j). He further submitted that the court had a duty to ensure that not only were the witness statements supplied beforehand to enable him prepare for his defence, but that he was also able to understand whatever was recorded therein so that he was not prejudiced by language barrier. He cited the case of *Thomas Patrick Gilbert Cholmondeley vs Republic (2008) eKLR*. He contended that his right to a fair trial could not be limited and cited the case of Supreme Court of India in *Natasha Singh vs CBI (2013) 5 SCC 741*. That the Prosecution was under a duty of full disclosure before and during the trial as stipulated by Article 50(2) of the *Constitution* and the cases of *R vs Ward (1993) 2 ALL ER, 557* and *R vs Stinchcombe (1992) LRC (Cri) 68*. He urged the Court to make a finding that his right to a fair trial was violated and his ability to prepare for his defence compromised.

10. Secondly, the Appellant submitted on grounds 2-4 jointly that penetration was not proven and that the Prosecution evidence was marred with inconsistencies and contradictions. He argued that the victim PW1 only testified that he was penetrated in his anus but never described what he felt and that the evidence of identification was not watertight since PW1 testified that the Appellant had a torch which was reflecting away from him (the Appellant) and thus PW1 could not ascertain whom he saw. He cited the case of *Ndiso Mbuthia and Others vs Republic HCCR No 360 of 1990* in this regard.

11. The Appellant submitted that the testimony of the victim was imaginary because the other people who were in the room did not hear any confrontation between him and the victim. He cited the Supreme Court of India case: *State of Punjab vs Jagit Singh (1974) 3 SCC 277*. In adidtion, he submitted that a conviction should be based on the prosecution proving its case and not the weakness of the defence case as was held in the case of *Sekitoleko vs Uganda (1967) EA 531.*

12. The Appellant submitted that the Prosecution case was full of contradictions. He cited Court of Appeal of Nigeria in *David Ojeabuo vs Federal Republic of Nigeria (2014) LPELR-22555 (CA)* in defining the term contradictions. He also cited the case of *Twehangane Alfred vs Uganda Criminal Appeal No 139 of 2001 (2003) UGCA 6*, *Uganda vs Rutaro (1976) HCB* and *Uganda vs George W Yiga (1979) hcb 217* in his submissions to the extent that not all contradictions warranted the rejection of evidence. He contended that the inconsistencies in this case were grave and pointed out to deliberate untruthfulness. He also cited *Theophilus vs State (1996) 1 NWLR (Pt 423) 139.*

13. Lastly on grounds 2-4, the Appellant submitted that he had been charged under section 8(3) but was convicted under section 8 (2) in mandatory terms as provided by law thus the sentence was illegal. He submitted that mandatory minimum sentences barred the courts from considering the circumstances of a case. He cited the High Court of Mombasa in *Criminal Appeal No 262 of 2012, Hamisi Mwangeka Mwero vs Republic* and the South African Court of Appeal case of *S vs Malgas (2001)2 SA 1222 SCA, 1235* at paragraph 25. He also submitted that sentencing should consider other factors such as the age of the offender and should not crush the possibility of reintegration. To support this position, he cited the Canadian cases of *Republic vs CA (1996) 1 SC Republic 500*, *Republic vs Manybears, (2009) ABCA 82* and *Republic vs Johnson 2012 ONCA 339* and *Peter Mungai Njoroge vs Republic (2020) eKLR* together with *Mohamed Iddi Omar vs Republic (2019) eKLR.*

14. In advancing his argument on sentencing, the Appellant also submitted that the trial court was bound to take cognizance of sections 216 and 329 of the *Criminal Procedure Code* together with section 389 of the Penal Code and exercise its discretion in considering mitigating circumstances such as the fact that he was a first offender and the kind of sentence meted violated Article 27 (1) - (3) of the *Constitution*. He cited the cases of *Edwin Otieno Odhiambo vs Republic (2009) eKLR* and *Joseph Njuguna Mwaura and 2 Others vs Republic (2013) eKLR* where the court considered mitigation in a murder case and argued that the he ought to have been accorded a similar consideration.

15. Finally, he submitted that Article 6 of the International Covenant on Civil and Political Rights, Article 26(3) of the *Constitution* and the Judiciary Sentencing Policy Guidelines (2016) provided that life sentence was not in tandem with the principle of rehabilitation. He urged the Court to be persuaded by the High Court at Meru decision in *Douglas Muthaura Ntoribi vs Republic (2014) eKLR* and High Court at Narok in *Sammy Wanderi Kugota vs Republic (2021) eKLR* in which life sentences were reduced to 15 and 20 years respectively.

Respondent's Submissions

16. The Respondent's submissions were dated and filed on March 28, 2022. They submitted that indeed PW1 testified before the witness statements were supplied to the Appellant but PW1 was recalled upon the request of the Appellant. That the Appellant upon cross-examining PW1, changed tact and demanded that the other people who were sleeping with them should be called as witnesses, even though the Prosecution had not recorded their statements.

17. The Respondent cited the case of *Miller vs Minister of Pensions (1974) 2 ALL ER 372-373* in expounding on the legal standard of proof in criminal cases. They referred to the case of *Charles Wamukoya Karani vs Republic Criminal Appeal No 72 of 2013* in outlining the ingredients of defilement and submitted that the age of the victim was established by the health card even though the charge sheet indicated that he was 13 years old. That the medical evidence adduced by PW3 the clinical officer confirmed that he had injuries in the anal area proving penetration and this was further corroborated by the victim when he testified that he felt the Appellant penetrate him and he was able to positively identify him in court.

18. Lastly, on sentencing, the Respondent submitted that the law stipulated a minimum mandatory sentence and urged the Court to uphold the sentence meted by the trial court. They urged the Court to dismiss the appeal and uphold both the conviction and sentence.

Issues For Consideration

19. Having reviewed the trial Record, the grounds of appeal and the parties' respective submissions, the two main issues for determination are: -

    i. Whether the offence of Defilement was proven to the required legal standard.

    ii. Whether the sentence meted out was legal and justitious.

    i. Whether The Offence Of Defilement Was Proven To The Required Legal Standard.

20. The duty of a first appellate court was aptly discussed by the Supreme Court of India in the case of *K Anbazhagan vs State of Karnataka and Others, [Criminal Appeal No 637 of 2015]* as follows:-

> ' The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.'

(See also *Pandya vs Republic [1957] EA 336* and *Kiilu & Another vs Republic [2005] 1 KLR, 174]*)

21. Section 8 (1) of the *Sexual Offences Act* No 3 of 2006 defines the offence of defilement as follows: -

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

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

    (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.'

22. The offence of defilement is premised on three main ingredients being the age of the victim (must be a minor),that there must be penetration; and positive identification or recognition of the perpetrator.

(See *George Opondo Olunga vs Republic [2016] eKLR*).

23. The legal standard of proof cannot be gainsaid. It has been defined in several cases as proof beyond reasonable doubt. In the Supreme Court of Nigeria, *Bakare vs The State (1985) 2 NWLR* Lord Oputa stated at page 465 as follows:-

> ' Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability'.

24. It follows then that for the offence to stand, each of the ingredients outlined above must be proven beyond reasonable doubt.

25. The age of a victim is a critical ingredient in a sexual offence case because it determines the gravity of the offence and the subsequent punishment to be meted to the offender in case of a conviction. In *Hadson Ali Mwachongo vs Republic [2016] eKLR*, the Court of Appeal in Mombasa held thus:-

> ' The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In Alfayo Gombe Okello vs Republic Cr App No 203 of 2009 (Kisumu). This Court stated as follows;

'In its wisdom Parliament chose to categorize 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).'

26. Similarly, in *John Otieno Obwar vs Republic [2011] eKLR*, Asike Makhandia J (as he then was) observed:-

> ' Defilement is a strict offence, whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly, it is important that the age of the victim be proved by credible evidence.'

27. In the present Appeal, PW1, EK testified that he was 13 years old. PW2, JS who was the victim's mother testified that he was 14 years old. The age of a victim can be proven in several ways with one of them being the production of a birth certificate or any other document that would demonstrate the exact date of birth. This was aptly stated in the case of *JOA vs Republic (2019) eKLR* as follows:-

> ' It is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim.'

28. In this case, the testimonies of the witnesses with respect to the victim's age differ. I am guided by the documentary evidence on record, PEX-1 which was the victim's Healthcard produced by PW6, PC Joash Apiyo, the investigating officer indicates that the victim was born on October 16, 2006. The alleged offence was committed oon July 12, 2018. This means that the victim was 11 years and 9 months old by this time as he was 3 months shy of attaining 12 years. I therefore find that at the time of the offence, he was minor aged 12 years and 10 months. The contradictory evidence of the mother and the child with respect to his exact age was not material as argued by the Appellant. I find his age conclusively proven by the medical record contained in his Health card.

29. Penetration is defined under section 2 of the *Sexual Offences Act* as 'The partial or complete insertion of the genital organ of a person into the genital organs of another person.' While 'genital organs' include the whole or part of male or female genital organs and for purposes of his Act include the anus.'

30. Penetration is proven by the testimony of the victim and corroborated by medical evidence or in the alternative, through the sole evidence of a child as guided by section 124 of the *Evidence Act*, Cap 80. The Supreme Court of Uganda in the case of *Bassita vs Uganda SC Criminal Appeal No 35 of 1995* held: -

> ' The act of sexual intercourse or penetration may be provided by direct or circumstantial evidence. Usually, sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable, it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it sufficient to prove the case beyond reasonable doubt.'

31. From the Record, PW1 testified as follows:

> ' He proceeded me to his home (sic). The accused did sex to me. The accused told me to lie on the bed which was made of mud. He had opened my belt before I slept. He had removed my trouser. I asked why he was removing my belt. He told me to keep quiet or he would stab me. I slept, when I woke up, I found the accused doing bad manners to me. He had removed his penis and had placed it in my anus.'

32. PW1 also stated during cross-examination that when he got up, he felt pain because of the defilement. PW5, WN, the school teacher at [particulars withheld] Primary School where the victim studied testified that on July 13, 2018, he noticed that the victim was not walking normally and upon interrogation, he learned from the victim that the Appellant had defiled him.

33. Kiprono Ian Samwel, (PW3) was the clinical officer at Siongiroi Health Centre who examined the victim. He testified as follows: -

> ' On genitalia exam, I found injuries on the anal area epithelial cells and pus cells were noted. We concluded that there was the offence of sodomy.'

34. I have scrutinized the P3 form (PEX 2a) and the Post Rape Care Form P.EX 2(b) produced by PW3. I have also the trial court record with respect to the testimony of PW3. The Appellant cross examined PW3 and PW3 answered that he found pus cells and epithelial cells upn examining the victim and that he did not recall examining the Appellant. It is clear to me therefore that the evidence of the victim was clearly corroborated by the medical evidence tendered by PW3. The evidence givne by PW5 WN who was the victim's teacher is only importanct to the extent that the observed that the victim ws not walking properly and upon interrogating him, the victim said tha the had been sexually assaulted by the accused. The role of PW5 though limited to triggering the investigation that followed was corroborative to the extent that he realised that the victim had some injury. I am satisfied from the evidence that penetration was proven to the required legal standard.

35. The last ingredient is the positive identification of the accused. Identification according to *Black's Law Dictionary, 10th Edition at page 862* is, 'To prove the identity of a person or thing or look on as beinga ssociated with.'

36. The evidence on Record in respect of identification is the sole testimony of the victim. This Court finds guidance from section 124 of the *Evidence Act*, Cap 80 and section 19 of the Oaths and Statutory Declaration Act. They provide as follows: -

Evidence Act, Cap 80

Corroboration required in criminal cases

'124. Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap 15), where the evidence of the alleged victim is 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 criminal cases 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.'

Oaths and Statutory Declarations Act

'19. Evidence of children of tender years

> Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinionof the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap 75), shall be deemed to be a deposition within the meaning of that section.'

37. From my perusal of the Record, I noted that a voire dire was conducted by the trial magistrate who was satisfied that the victim understood the meaning of the oath and was equally possessed with sufficient intelligence to tender sworn evidence. The victim thereafter testified on his encounter with the Appellant and gave evidence on how he was able to identify his assailant which I will now analyze.

38. PW1 testified that it was from the funeral on his way home, that he first encountered the Appellant who held him and pulled him to his home. The Appellant never controverted this testimony. Next, PW1 testified that it was about 7.00 pm and that the Appellant's house was dark. However, the Appellant lit a cigarette with which he used to locate the torch after locking the door. It was through the light from the torch that he was able to see what was going on in the house and who was with him, including the other two people who were present.

39. Any evidence adduced in support of identification in a criminal trial must be weighed and carefully examined. The House of Lords in *R vs Turnbull & Others (1976) 3 ALL ER 549* outlined the factors to be considered in analysing the evidence of recognition:-

> ' The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.'

40. The Court of Appeal restated the above principles in *Wamunga vs Republic (1989) KLR 424* at 426 where it held that:-

> ' Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.'

(See also *Nzaro vs Republic (1991) KAR 212*).

41. In this case, PW1 testified that during the encounter, he was able to see the Appellant from the time they met on his way home, to the Appellant's house and when the Appellant lit the torch and the cigarrete. He also testified that he confronted the Appellant by asking him why he was removing his belt and he was threatened that he would be stabbed. He further testified that they slept on the same bed and when he awoke, he found the Appellant defiling him. It was also his testimony that in the morning, the Appellant got up to make tea and offered him some but he (the victim) refused.

42. From the foregoing, it is my finding that this lengthy and eleborate encounter would make it possible and easy to identify one's assailant. But more importantly, is the testimony of PW1 when he stated, 'I knew the accused as a neighbour'. Clearly, this was a case of recognition because the victim had prior knowledge of the Appellant.

43. It is settled law that recognition is more reliable in evidence that mere identification. In the Court of Appeal case of *Anjononi & Others vs Republic [1980] KLR*, the court held that:-

> ' The evidence of recognition is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.

44. I have considered the amount of time that the Appellant spent with the victim in this case and I am satisfied that it was sufficient for the victim to identify him. I have also taken into account the victim's prior knowledge of the Appellant as his neighbour. I am convinced that the victim knew the Appellant and was able to recognize him from the time they met on the way home. It is my finding that the evidence adduced in respect of identification was free from error and therefore confirms the Appellant was the one who penetrated the victim. This third ingredient has therefore been proven beyond reasonable doubt.

45. The final issue for my determination is whether the Appellants right to a fair trial was violated. This issue was raised by the Appellant in his grounds of appeal and subsequent submissions. His complaint is that PW1 testified before he(the Appellant) had been supplied the witness statements.

46. The *Constitution* of Kenya enshrines the rights of an accused person under Article 50 (2). In particular, is the right to be informed promptly of any evidence that is intended by the Prosecution to be brought against an accused under Article 50 [2] [j]). It provides thus:-

(2) Every accused person has the right to a fair trial, which includes the right-

(j) To be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence;"

47. The right to fair trial is sacrosanct and inalienable under our Constitution. I find an anchor on this position in the case of *Rattiram vs State of MP {2012} 4 SCC 516]*, where the Supreme Court of India ruled thus:-

> ' Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism. Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused'

48. In line with the above is the English case of *R vs Ward [1993] 2 ALL ER 557*, where the court stated thus: -

> ' The prosecution's duty at common law is to disclose to the defence all relevant material, i.e evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the

prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses.'

49. I have perused the trial Record and noted that the first prosecution witness PW1 did indeed testify in court before the Respondents could provide the Appellant with witness statements. The Record shows that the Prosecution subsequently issued the Appellant with the witness statements after three requests. This was an omission which offended Article 50(2) of the *Constitution*. However, I observe that the trial court cured this omission by allowing the Appellant's prayer to recall PW1 at which point he was afforded an opportunity to further cross-examine PW1. To this extent, I am satisfied that failure by the Prosecution to supply the witness statement of PW1 ahead of the trial did not prejudice the Appellant as the omission was remedied by the trial Court. All the other witnesses testified after the statements had been supplied.

50. Lastly, I address the issue of inconsistent evidence as raised by the Appellant. The inconsistency referred to in this case is the fact that PW1 originally stated in examination-in-chief that he and the Appellant slept on the same mud bed. Later, during cross-examination, PW1 stated that he slept in between the Appellant and Baba Lilian, close to the legs of Baba Lilian who was facing the other side.

51. The principle applicable in dealing with inconsistent evidence was adequately explained in *Joseph Maina Mwangi vs Republic CA No 73 of 1992 (Nairobi)* where Tunoi, Lakha & Bosire JJA held: -

> ' In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.'

(See also *Twehangane Alfred vs Uganda, Crim App No 139 of 2001, [2003] UGCA, 6*).

52. It is my conclusion that the inconsistencies highlighted by the Appellant, in this case, are not material as to cast doubt or shake the Prosecution's case. The three ingredients of the offence of defilement were firmly established and it follows then that the Prosecution adequately discharged its burden of proof to the required legal standard, being proof beyond reasonable doubt. Consequently, I uphold conviction.

II. Whether The Sentence Meted Out Was Legal And Judicious

53. The principles of sentencing in Kenya are outlined in the Judiciary Sentencing Policy Guidelines (2016). In sentencing, a judicial officer must take into consideration several factors including the circumstances of a case. Where the law imposes mandatory sentences, it has been argued that the same fetters the discretion of the court in that, the judicial officer is bound to follow what is prescribed by the law. In the *Woodson vs The State of North Carolina (1976) 428 US 280*, the court held that:-

> ' A statute that prescribes a mandatory sentence on conviction would treat all persons convicted of that designated offence as 'members of a faceless undifferentiated mass'. This would be against the judicial aspect of considering each case individually and in a unique manner by subjecting such convicted persons to the blind infliction of the death penalty.'

54. In the present case, the Applicant was convicted in accordance with section 8(2) which is couched in mandatory terms and provides for life imprisonment upon conviction. In the case of *Wanjema vs. Republic (1971), Criminal Appeal No. 204 of 1971, EA 493, 494*, the court laid down the general

principles for consideration by an appellant court in considering whether to interfere with the sentence of a trial court. It stated thus:-

> ' An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.'

55. I have considerered that the Appellant was a first offender. In his mitigation however, he merely denied the charge and offered no mitigating circumstances. He merely stated that:-

> ' I dont know about this case. I pray that the Court considers both sides.'

56. Recent jurispendence however, frown upon the application of mandatory sentences, without consideration of any mitigation circumstances. I therefore depart from the mandatory sentence. I substitute the life imprisonment imposed by the trial court and substitute therefor a term of 15 years' imprisonment. The sentence shall run from the date of first conviction and sentence being October 29, 2019. This reduced sentence has taken into account the period spent in pre-trial custody.

Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF JULY, 2022

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered virtually in the presence of Mr. Muriithi for the State, Appellant present in person virtually at Naivasha Maximum Prison and Kiprotich (Court Assistant).