



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 58 OF 2018

ANS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against Judgment, conviction and sentence in Cr. Case No. 51 of 2018, R vs ANS at Malindi, delivered by Julie Oseko, C.M on 27.09.2018).

JUDGMENT

Introduction

1. The appellant, ANS challenges the conviction and sentence in criminal case number 51 of 2018 where he was convicted for the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act^[1] and sentenced to life imprisonment. It was claimed that on the 12th of July 2018 in Malindi Sub-County within Kilifi County, intentionally and unlawfully caused his penis to penetrate into the anus of a male juvenile FOA, a boy aged 11 years.

2. He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act^[2] details whereof were that on the same date and place, he intentionally and unlawfully committed an indecent act by touching the anus of FOA, a boy child aged 11 years using his penis.

Duty of a first appellate court

3. The principles to be kept in mind by a first appellate court while dealing with appeals are:-^[3]

a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.

b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.

c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.

d. When the trial Court has breached provisions of the constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.

4. The Supreme Court of India^[4] aptly stated 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*

The trial at the lower court

5. FOA, the complainant said he was in standard 3. He testified that on 12th July 2018 he attended Madrassa and at night he shared the same mattress with the appellant, but at mid-night, he pulled down his shorts and inserted his penis into his anus. He said he cried out of pain, but the appellant told him to be silent. His cries woke up Hamisi who asked him what was wrong. He said he told him what the appellant had done to him. He said he also told a one Simba and a Mr. Ramadhan. He stated that Ramadhan who asked the appellant what he had done and the confirmed it was true. He said they telephoned Ustadh who came and called a committee member and the Chairman of Madrassa who took him, Ramadhan and Hamsa to the AP's camp where they left the appellant with the police. He said the following day he was taken to Malindi Police Station and also to the hospital where he was examined. He identified the treatment book and P3 form in court. He said the appellant was known to him.

6. Ramadhan Muhamad Mureithi testified that on 12th July 2018 at 12.30am, he heard a knock on his door and the complainant together with a one Hamze entered. He said the complainant told him that the appellant had sodomized him. He said that he went to the room where they were sleeping and found the appellant lying down. He said appellant's body had water and upon asking him he said he was from bathing. He stated that he asked him if he had sodomized the complainant and he agreed and blamed the devil. He testified that after the complainant agreed, he decided to inform Ustadh, the principle of the Madrassa who also asked the appellant and he confirmed. He said the principle called one of the Committee members after which they called the Chairman who directed that the accused to be handed over to the AP post. He stated that the room has three mattresses and that he knew the appellant who comes for madrassa and a times when it is late he sleeps over.

7. SKW, the complainant's mother testified that on 12th July 2018 the complainant had gone for Madrassa. She said the complainant had said he would not return if he fails to get someone to bring him back. She stated that the following morning at 6am the complainant came back, took a shower, changed clothes and went to school. She at around 11.30am, a one Omar came to her home and called her husband who came after 30 minutes and asked her if the child had told her anything and she said he had not, then, her husband told her that Omar had told him that the complainant had been sodomized and that he was being taken to hospital. He also said the person who sodomized him was at the police post. She said she went to the police post after which they were taken to Malindi Police Station where she recorded a statement. She identified the treatment book, laboratory request and the P3 form in court.

8. Moses Simba, a Clinical Officer at Malindi Hospital testified that on 12th July 2018 at 2.30pm, the complainant was brought to the hospital with a history of sodomy, and upon examination he noted bruises on his anal surface and tenderness, and, that the anal was widely open and the spectre muscles were loose. He stated that he filled the P3 form and assessed the degree of injury as grievous. He produced the P3, treatment notes and lab report as exhibits.

9. PC Charles Muriuki from Malindi Police Station testified that on 12th July 2018 he accompanied the complainant to the Malindi Hospital for examination, and, that he recorded the witnesses' statements and charged the appellant in court. He produced the complainant's birth certificate showing that he was born on 13th March 2007.

10. At the close of the prosecution case, the trial Magistrate found that the prosecution had established a *prima facie* case and placed him on his defence. She complied with the provisions of section 211 of the Criminal Procedure Code^[5] and the appellant opted to give unsworn defence. He did not call any witnesses

11. He stated that on the material day he slept on the same mattress with the complainant, and, that, the complainant said that he had sodomized him, then he stood up and reported to others and called the teacher. He said that he asked for forgiveness. He said it is the devil who entered his head and that he did not intent to sodomize him.

The verdict

12. The learned Magistrate isolated three issues for determination, namely, age of the complainant, whether penetration was proved and whether the appellant was the offender. She was satisfied that the answers to the said issues were in the affirmative, convicted the appellant, and sentenced him to serve life imprisonment.

The appeal

13. The appellant seeks to overturn the judgment on the following grounds:-

a. That the learned trial Magistrate erred in law and fact by failing to consider that the trial proceedings were a mistrial and a nullity for reasons that she issued an extraneous order for a special hearing even before the plea taking exercise was conducted- initiated in contravention of Article 50(2) (a)(b)(c) & (j) of the Constitution.

b. That the learned trial Magistrate erred in law and in fact by not adhering to the provision of section 19(1) of the Oaths and Statutory Declarations Act in not conducting the voir dire examination before receiving the evidence from the minor.

c. That the learned trial Magistrate did not act in the merits of justice by treating the accused person as an adult while he was 17 years old.

d. That learned trial Magistrate erred in law and facts by failing to consider that the appellants right to a fair trial were violated

under Article 50 (2) (j) of the Constitution, in that he was not issued with witness statements throughout the trial.

e. **That** the learned Magistrate failed to consider that penetration was not proved as per the medical evidence P3 form.

Appellant's submissions

14. The appellant submitted that the proceedings were a mistrial because the Magistrate issued an order for a special hearing even before the plea was taken in contravention of Article 50 (2) (a) (b) (c) and (j) of the Constitution. He argued that the Magistrate had not even seen the complainant, yet he was convinced and issued an order for special hearing. He argued that he was not given adequate time and facilities to prepare his defence because he was charged on 16th July 2018 and the special hearing was conducted on 19th July 2018.

15. The appellant also argues that he was not issued with witness's statements or material to be used by the prosecution in violation of Article 50 (4) of the Constitution.

16. The appellant also argued that *voir dire* was not conducted in violation of section 19 (1) of the *Oaths and Statutory Declarations Act*.^[6] He relied on *John Muiruri v Republic*^[7] which held that a judge is under a duty to record the terms in which he is persuaded and satisfied that the child understood the nature of oath, and, that, failure to do so is fatal. He argued that in the instant case, the Magistrate did not record the answers to show how he came to the conclusion. He cited *Joseph Opondo v Republic*.^[8]

17. The appellant argued that the court failed to consider his age at the time of arrest which was 17 years, even though he gave his age as 18 years. He argued he never cross examined any of the witnesses.

18. He also argued that he was not accorded a fair trial as provided under Article 50 (2) (b) (c) (j) of the Constitution. Lastly he argued that the burden of prove was not discharged, in that penetration was not proved and the testimony that the anus was wide open is not contained in the P3 form. As for his alleged admission of the offence, he argued that he was just confused.

Respondent's Advocates' submissions

19. The Respondent's Counsel relied *CWK v Republic*^[9] for the holding that to sustain the charge of defilement, the prosecution must establish penetration, the perpetrator of the offence and the age of the victim. She cited *Fappyton Mutuku Ngui v Republic*^[10] for the proposition that absence of a medical report does not *ipso facto* mean that there was no penetration. She submitted that the complainant's age was proved by way of the birth certificate, and, that, the identity of the appellant was proved. She also argued that the appellant stated that he was 18 years, hence, he does not fall under the provisions of section 14 of the Penal Code.^[11] She argued that the prosecution proved the case to the required standard.

Determination

20. The applicant assaults the judgement on grounds that the court ordered a special hearing on grounds that the complainant was aged 11 years. The record shows that before taking the plea, the Prosecutor informed the court that the complainant was aged 11 years and that he would be asking for a special hearing. After the plea was entered, (not before at the appellant argues), the Magistrate directed the complainant's evidence to be taken on 19th July 2018, the third day after the plea was taken. In fact on the said date hearing proceeded and four witnesses testified.

21. The appellant's argument, as I understand is that the expedited hearing was prejudicial to him because he was not given adequate time to prepare for his defence. I am alive to the fact that arguments citing violation of constitutional provisions are attractive and are bound to evoke emotions because the Constitution is the supreme law of the land.

22. Indeed, this court hoists high the constitutional requirement for a fair trial which includes the right of the accused to be informed in advance the evidence against him and to be afforded an opportunity to prepare his defence. However, the court has a duty to study the entire record and satisfy itself that the trial court did not comply with this constitutional requirement and that the issue is not being raised to defeat justice. The appeal court must consider whether the misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal bearing in mind that what the Constitution demands is that the accused be given a fair trial. Ultimately, fairness is an issue which has to be decided upon the facts of each case.

23. Article 50 of the Constitution provides for the fundamental right to a fair hearing. It provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.^[12] It also provides for the right of the accused to have adequate time and facilities to prepare his defence.^[13] The right to a fair is among the fundamental rights and freedoms that may not be limited.^[14]

24. The Constitution also dictates that justice be administered without delay. The court appreciated the age of the complainant and the need to expedite the case and fixed the hearing within three days. On the 19th July 2018, the appellant informed the court that he was ready to proceed with the hearing. He cannot be heard now to state that he was not ready or he was prejudiced. This is simply an afterthought. This court acknowledges and appreciates the speed with which the hearing commenced and was concluded. In fact, the plea was taken on 16th July 2018 and judgment was delivered on 27th September 2018, a commendable period of two months. To me this is a clear example of expeditious disposal of cases as required by the Constitution.

25. The benefit of expeditious disposal of cases cannot be understated. Evidence from eyewitnesses is often the starting point for police investigations. It plays an important role in all contested cases. However, the memory is a fragile and malleable instrument, which can

produce unreliable yet convincing evidence. This is because memory can fade with time especially for young children and even for age people. Delayed cases pose a greater threat of injustice. Witnesses can forget key details, they can be interfered with, suffer from exhaustion due to incessant adjournments, or they can relocate or die.

26. The risk of injustice to both parties is far less when the evidence is still fresh in the minds of the witnesses and the defence. In fact, the risk of a wrongful conviction or a wrongful acquittal is higher where the witnesses' memory has faded. I find no prejudice at all was occasioned to the appellant, who in any event was recorded informing the court that he was ready, and who, every time he was accorded the opportunity to cross-examine the witnesses, he opted not to. This ground of appeal fails.

27. The appellant argues that *voir dire* was not conducted and invites the court to impugn the judgment on this ground. The record shows that the Magistrate recorded that *"I have examined FOA, a juvenile 11 years. He is intelligent enough for his evidence to be received. He understands the meaning of oath sworn evidence."* (sic)

28. The question that I propose to address at this stage is *'what is the purpose of voir dire examination?'* To my mind, a *voir dire* examination is conducted not to test the credibility of a minor witness, but to enable the court to satisfy itself whether the minor understands the nature of an oath. Upon being satisfied that the minor understands the nature of an oath or does not understand, the court ought to put it on record. The court ought to state clearly that it is satisfied that the child has sufficient appreciation of the solemnity of the occasion and the added responsibility of telling the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of social conduct. In such a case, the court can proceed to allow the child to be sworn. If it is not satisfied that the child understands the nature of oath, it should put it on record, and allow the child to give unsworn evidence.

29. The above process involves the court asking the child preliminary questions, and recording the question and the answer, and as part of the record, the court should record its observation and state that it will permit the child to tender either sworn or unsworn evidence. The record as reproduced above, in my view falls short of this requirement. Perhaps realizing difficulties many trial Magistrates have in conducting this important part of a trial, the court of Appeal in *Johnson Muiruri vs Republic*^[15] gave guidance on the issue of *voir dire* as follows:-

"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kariga Kiume^[16] *we said:-*

"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voir dire examination, whether the child understands the nature of an oath in which his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received. In the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is collaborated by material evidence in support thereof implicating him (Section 19, Oaths and Statutory Declarations Act, cap 15 Laws of Kenya. The Evidence Act, Section 124, cap 80, Laws of Kenya) (Emphasis added).

It is important to set out questions and answers when deciding whether a child of tender years understands the nature of oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions"

A similar opinion was expressed by the Court of Appeal in England in *Regina vs Campell*^[17]

"If the girl (ten years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.

*Dealing with the question of the girl taking oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of nature of solemnity of an oath, the Court of Appeal in *R vs Lal Khan*^[18] made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen... (Emphasis added).*

There Lord Justice Bridge said:

"The important consideration...when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct" (Emphasis added)

There were therefore two aspects when considering whether a child should be sworn: first that the child had sufficient appreciation of the particular nature of the case and, secondly a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day to day life"

*It is fortunate that we can reinforce some of the foregoing views by the decisions of our own former perceptive court of appeal...In *Gabriel Maholi vs R*,^[19] again our former Court of Appeal said that even in the absence of express statutory provisions it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood. (emphasis added).*

In *Kibangeny vs Republic*^[20] the Court of Appeal stated that:-*‘The investigation (voir dire examination) should precede the swearing and the evidence, and should be directed to the particular questions whether the child understands the nature of an oath rather than to the question of his general intelligence. Since the evidence of the two boys was of so vital a nature we cannot say that the learned trial judge’s failure to comply with the requirements of section 19(1) was one which can have occasioned no miscarriage of justice, and upon this ground alone the appeal must be allowed’* (Emphasis added)

30. In *Kivevo Mboloi vs Republic*,^[21] the court held that failure to conduct a *voir dire* rendered the entire evidence of the complainant of no use to the court. In the case of *Musyoka Mwasya vs Republic*^[22] the court held that failure to conduct *voir dire* examination in a situation where it is necessary renders the evidence of the particular witness of no use. Perhaps, the most subtle position was stated in *Nyasani s/o Bichana vs Republic*^[23] where it was held that failure to conduct a *voir dire examination is fatal to the prosecution case where there is no other evidence sufficient enough to sustain a conviction*.^[24]

31. In my view, any witness’ basic task is to give an accurate report of an accurate perception of some past event. Perceptual accuracy is meaningless unless the witness speaks truthfully. However, a commitment to tell the truth is meaningless unless the witness can form a perception of the observed event accurately. Historically, the law has used the oath ceremony and *voir dire*, or preliminary examination, to test both cognitive skills and truthfulness of a proposed witness. The essential components are that the witness must demonstrate a capacity for observation, for recollection and for communication. Communication capacity, in turn, is composed of two elements: an ability to understand and respond intelligently to questions, and a sense of ‘moral responsibility, defined as a ‘consciousness of duty to speak the truth and appreciate the nature of an oath.

32. McGough in an article entitled *Asking the Right Questions: Reviving the Voir Dire For Child Witnesses*^[25] has authoritatively observed:-

“Both common and civil law regarded child witnesses as suspect, only a short step removed from the perceived unreliability of imbeciles and lunatics. Reasons underlying this scepticism were not clearly differentiated. However, because of the spiritual immaturity of a child, his ability to appreciate an oath taken before God eclipsed all other possible concerns. Most children were precluded from testifying ‘because of their supposed inability to understand the significance of the oath’ in a religious sense. The foregoing perception was due to the child’s susceptibility to adult influence and the child’s inability to distinguish truth from fantasy. However, the test of competency for a child witness has changed. Children can be heard provided they possess sufficient knowledge and nature and consequence of an oath, and where it is demonstrated they do not understand the nature and consequence of an oath, then they give unsworn testimony.”

33. Thus, in my view, any preliminary inquiry by the court by way of *voir dire* requires a specific purpose. A limited purpose of *voir dire* examination is to ensure that the child understands his duty to report accurately and the child’s propensity for truth telling. In *Commonwealth vs Tatisos*,^[26] the child appeared *“bright and intelligent,”* and her answers were direct. However in response to questions about oath, she responded only that it was wrong to tell lies and if she did, whipping would follow. Thereupon, the court adjourned the *voir dire* until the girl could take religious instructions so that she could learn to appreciate the significance of the oath. However, courts have substantial, even unbridled, discretion to question the witnesses beliefs and moral principles.

34. The key lessons discernible from the jurisprudence discussed above as far as it is relevant to the assault on the judgment is that the Magistrate ought to have recorded the questions she asked the minor and the answers before recording her conclusion. However, she allowed the minor to give sworn evidence after she was persuaded that he understood the meaning of oath. I find no reason to exclude the evidence. The weight of the evidence will be considered together with the rest of the prosecution evidence and the appellant’s defence. This ground of appeal fails.

35. The appellant argues that his rights under Articles 50 (2) (b) (c) (j) of the Constitution were violated. A trial that is conducted fairly, justly, and with procedural regularity by an impartial court and in which the accused is afforded his or her rights under the Constitution. Instructively, Article 25 (c) of the Constitution lists the right to a fair trial as one of the fundamental rights and fundamental freedoms that shall not be limited. In effect, the right to a fair trial is sanctified and insulated from derogation even under other provisions of the Constitution itself.

36. The criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the accused is entitled to fairness and true investigation and the court is expected to play a balanced role in the trial of an accused person. The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 50 of the Constitution. The Right to a Fair Trial is one of the cornerstones of a just society. The Supreme Court of India in *Rattiram v. State of M.P.*^[27] 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.”

And again:-

“Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused...”

37. The appellant states that he was not supplied with statements. True the record does not show that he was supplied nor does it show he

ever applied for the statements. As stated earlier, the record show him stating he was ready to proceed. When such a claim is raised at this stage, the court has a duty to be satisfied that the issue is not being raised to defeat justice. The court will study the entire proceedings and satisfy itself that the proceedings were undertaken in violation of the Article 50 rights. My reading of the record is that the proceedings were conducted fairly.

38. The claims he was under age. This argument is unsustainable. First, hearing commences on 16th July 2018 and the judgment was rendered in two months. He is on record stating that he was 18 years. He was charged in court on 16th July 2018 and on 6 August 2018, barely three weeks he gave his defence and stated he was 18 years. There is nothing to show that he was not 18 years at the time he committed the offence or at the time he was charged or convicted. The learned Magistrate who had the benefit of seeing him in court addressed the issue of age in her judgment.

39. Lastly, I will address the question whether the offence of defilement was proved. I will address the ingredients of the offence. *First*, I will address the issue whether the age of the minor was proved. It's trite that age is such a critical aspect in Sexual Offences that it has to be conclusively proved. This becomes more important because punishment (sentence) under the Sexual Offences Act^[28] is determined by the age of the victim.^[29] In *John Cardon Wagner –vs- Republic*,^[30] the court held that:- *“In defilement cases, the age of the complainant is proved by either medical evidence or through other evidence since the sexual offences act have different categories of ages and sentences of different ages...”* In *Musyoki Mwakavi –vs- Republic*^[31] the court held that:- *“...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim’s parents or guardian and observation or common sense...”*

40. In *Francis Omuroni vs Uganda*,^[32] it was held thus:- *“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”* The minor’s birth certificate was produced in court. The learned Magistrate had the benefit of seeing the complainant in court. I find and hold that age was proved to the required standard.

41. *Second*, is whether penetration was proved? On record is the complainant’s evidence and the appellant’s admission on the date of the offence, and also before the court. In addition is the medical evidence which confirmed penetration. Section **8(1)** of the Sexual Offences Act^[33] provides that *“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”* The section provides the key elements of the offence of defilement. These are *“Penetration,”* and *“Child.”* The act defines *“penetration”* as partial or complete insertion of the genital organs of a person into the genital organs of another person. The act defines **“genital organs”** includes the whole or part of male or female genital organs and for purposes of this Act includes the anus. Therefore, an important element of defilement is penetration. The other element is that the person must be a child. The act defines a child as- *“child”* has the meaning assigned thereto in the Children’s Act.^[34] The Children's Act defines a *“child”* as any human being under the age of eighteen years. I have already herein held that age of the minor was established, hence, she was a child within the above definition.

42. *Third*, is whether the appellant was connected to the act. I find no contest on the question of identification. The evidence placed the appellant at the scene of crime. There is evidence that after the complainant and the other children who were in the room went to report, PW2 went to the room at around 12.30am and found the appellant lying down and that he had water on his body. This witness stated that he asked the appellant and he said he had just taken a shower and he also agreed he had sodomised the minor and blamed the devil for the act. It will add no value to repeat it here that the evidence placed the appellant at the scene. This is a case of positive identification. Positive identification of an accused is an essential element of any offence. It is a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence for the prosecution.

Final orders

43. In view of my analysis and determination of the issues discussed above, and my conclusions herein above, I find that this appeal fails both on conviction and sentence. The sentence imposed is prescribed in the statute leaving the court with no discretion to interfere. Consequently, I uphold both the conviction and sentence and dismiss the appellant's appeal.

Right of appeal explained.

Signed and Dated at **Nairobi** this **13th** day of **January** 2020

John M. Mativo

Judge

Signed, Delivered and Dated at **Malindi** this **23rd** day of **January** 2020

Reuben Nyakundi

Judge

[1] Act No. No. 3 of 2006.

[2] Ibid.

[3] See *Ganpat vs. State of Haryana* {2010} 12 SCC 59.

[4] *K. Anbazhagan vs. State of Karnataka and Others*, Criminal Appeal No. 637 of 2015.

[5] Cap 75, Laws of Kenya.

[6] Cap 19, Laws of Kenya.

[7] {1983} KLR 445.

[8] CA No. 91 of 1999.

[9] {2015} e KLR.

[10] {2014} e KLR.

[11] Cap 63, Laws of Kenya.

[12] Article 50 (2) (j).

[13] Article 50 (2) (c).

[14] Article 25 (c) of the Constitution. See High Court Criminal Appeal No. 69 of 2012, Nyeri.

[15] {1983} KLR 447 at page 448-450.

[16] Criminal Appeal No. 77 of 1982 (unreported).

[17] Times, December 10, 1982.

[18] {1981} 73 Cr App R 190.

[19] {1960} EA 86.

[20] {1959} E.A. 92.

[21] HCCR App No. 34 of 2013 (Garissa).

[22] HCC CR App No 50 of 2013, Garissa.

[23] {1959} EA 190.

[24] A similar position was held in the case of *Hussein Ali Gengavs Republic*, HC CR APP NO. 91 OF 2011.

[25] Mcgough: *Asking the Right Questions: Reviving the Voir Dire for Child Witnesses*, Georgia State University Law Review, Vol 5, Issue 2 Spring 1989.

[26] 238 Mass, at 323-24, 130 N.E at 496-97.

[27] {2012} 4 SCC 516

[28] Act No. 3 of 2006.

[29] See *Hilary Nyongesa vs Republic* High Court Cr Appeal No. 123 of 2009, Eldoret.

[30] High Court Criminal Appeal No. 404 of 2009 (Nairobi).

[31] High Court Criminal Appeal No. 172 of 2012.

[32] Criminal Appeal no 2 of 2000- Court of Appeal.

[33] Supra.

