REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 49 OF 2018

KEVIN OTIENO OWINO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence imposed by Hon. Obiero, Principal Magistrate, in Bondo PM, SOA Case No 51 of 2018 on 11/9/2018)

JUDGMENT

1. The Appellant **KEVIN OTIENO OWINO** was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006, the particulars of the offence being that on the 13th day of December, 2017 at around 1500 hours at [particulars withheld] village in Rarieda sub-county within Siaya County he intentionally caused his penis to penetrate the vagina of NMA [full name withheld], a child aged 10 years.

2. The appellant also faced the alternative charge of committing an indecent act with the child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**.**

3. The appellant pleaded not guilty to both the main and alternative charge and the case proceeded to hearing.

4. The trial magistrate, Hon. M. Obiero after hearing six prosecution witnesses and testimony of the appellant found that the prosecution had proved their case beyond reasonable doubt that the appellant had committed the alternative count of committing an indecent act with the child and convicted the appellant and sentence him to serve ten (10) years imprisonment.

5. Aggrieved by the said conviction and sentence, the appellant filed his initial petition of appeal based on three grounds as follows:

a) THAT he pleaded not guilty to the charge.

b) THAT the learned trial magistrate did not consider the contradictions in the testimony of PW1.

c) THAT PW1 was duly coached by his brother on how to testify in the case.

d) THAT the case was a ploy by PW1's brother to fix him since they had a grudge over unpaid debt of Kshs. 20,000/= owed to the appellant.

e) THAT PW1 confessed during cross examination that she was trained on how to testify.

6. The appellant subsequently filed further grounds of appeal accompanying his written submissions as follows:

a) That the charge sheet was defective.

b) That the learned trial magistrate failed to consider the glaring contradiction in the testimony of the prosecution witnesses.

c) That leaned trial magistrate erred when he failed to sum up the law and evidence in support of the prosecution's case and this occasioned a miscarriage of justice.

d) That the learned trial magistrate erred in law and fact by failing to properly evaluate the evidence on record and relied on insufficient, uncorroborated and incredible evidence hence came to a wrong conclusion that the appellant herein had committed

an indecent act with a child named NMA

e) That the learned trial magistrate erred in law and facts by allowing the burden of proof to be shifted from the prosecution to the appellant herein.

f) That the learned trial magistrate failed to realize that the prosecution failed in its mandate to prove their case to the required standard of proof beyond reasonable doubt.

g) That the leaned trial magistrate erred when he sentence the appellant to a mandatory sentence (10) ten years imprisonment as prescribed under section 11(1) of the Sexual Offences Act No.3 of 2006 hence did not exercise discretion while sentence the appellant herein.

h) That the learned trial magistrate failed to summon all the essential prosecution witnesses.

i) That the alleged evidence of confession that led to the arrest of the appellant herein was unprocedurally conducted as per Section 25 of the Evidence Act.

Submissions

7. The appellant filed written submissions and asserted that the charge sheet brought against him is defective and as such prejudices him. The appellant's submissions are based on the fact that the charge sheet against him bears two rubber stamps, one of the OCS and the other for the Senior Resident Magistrate (SRM) Bondo but lacks that of the Director of Public Prosecutions who is supposed to authenticate the charge brought against him.

8. Further in relation to the alleged defectiveness of the charge, the appellant submits that the particulars of the alternative charges in relation to the appellant's penis coming into contact with the vagina of NMA contradict the trial magistrate's finding that the appellant touched the minor's vagina using his finger which according to the appellant constitutes a notable defect in the charge sheet.

9. The appellant relies on the case of **Kilome v R (1990) KLR 194** in which the appellant states that it was held that the paramount consideration in determining whether or not a defect in the charge is incurable or not is whether there is prejudice occasioned to the accused in putting up his defense because of the words used in the charge sheet.

10. The appellant further submits that in the case before the trial court, the burden of proof was shifted to him and as a result his defense was ignored. The appellant submitted that throughout the trial he maintained that the case was as a result of revenge by PW2 whom he had lend Kshs. 20,000 which PW2 was unable to repay.

11. The appellant submitted that he did give an alibi defense in the trial court and that he had no other defense witness however he submitted that as an accused person he was not bound to prove anything. The appellant relied on the Ugandan case of **Uganda v Sebyala (1969)** in which the court observed that an accused does not have to establish that his alibi Is reasonably true but that all he has to do is to create doubt as to the strength of the case for the prosecution and further that when the prosecution case is thin, an alibi which is not particularly strong may well raise doubts.

12. Accordingly, the appellant submitted that the learned trial magistrate was biased when dealing with his matter especially by not considering the defense and only accepting the prosecution evidence as gospel truth.

13. The appellant submitted that the prosecution failed to prove its case beyond reasonable doubt. The appellant faults the prosecution use of the clinic heath card of the complainant which was not verifiable as it lacked a rubber stamp to prove that it emanated from Ndori dispensary and also a signature from the clinical officer who filled it.

14. Further the appellant submitted that the prosecution ought to have relied on the birth certificate of the complainant to really prove the age of the complainant conclusively or in the worst case scenario, the birth notification card and not the clinic health card.

15. The appellant further submitted that the prosecution was bound to prove that the appellant herein had committed an indecent act with a child as the age of the complainant was not conclusively proven by the child and as such it was wrong for the trial court to make that assumption.

16. The appellant further submitted that the term *'tabia mbaya'* as used by the complainant in her testimony specifically that; "*The accused came and called me, he told me` `tabia mbaya' 'he told me to lie on the ground. I complied he touched me on my private part with his hand. Sustained injuries on my private part. I experienced pain……*" did not amount to defilement and as such the prosecution failed to prove the offence of defilement against the appellant beyond reasonable doubt.

17. The appellant further submitted that the learned trial magistrate did not exercise discretion in sentencing as at the time he was being sentenced, the only sentence as stipulated in section 11(1) of the sexual offences Act no.3 of 2006 was that of "*a term of (10) years"* but that recent jurisprudential developments of the law such as in the case of **Evans Wanjala Wanyonyi v Republic (2019) eKLR** and **Jared Koita Injiri v Republic (2019) eKLR** the courts exercised discretion in sentencing as a result of the case of **Francis Karioko Muruatetu & Another v Republic (2017) eKLR**, and as such the appellant implored the honourable court to exercise the same discretion in his case if in any case it found him guilty of the offence he was convicted for.

18. The appellant further submitted that the evidence of his alleged confession as given by PW3 and PW5 was not admissible as the

circumstance in which the alleged confession was made were circumstances of arrest contrary to the provisions of section 26 of the Evidence Act, and further that if he would have made such confession, which he did not, then it could have only been to avoid further problems with the law enforcers who arrested him. Accordingly, the appellant submitted that the evidence of his alleged confession ought not to see the light and should be discarded by this honourable court as it was also discarded by the trial court.

19. The appellant submitted that there were contradictions in the testimony of the complainant who testified as PW1 that on one occasion, in the company of her friends, she went to play where the appellant herein lived during which the appellant called her to his house and further that on another occasion, the 13th of December 2017 at undisclosed time while in company of her brother by the name F, the appellant came and called her and she then accompanied the appellant into the forest where the appellant herein did to her "*tabia mbaya*" leading to her sustaining injuries in her private part and experiencing pain but was able to walk home.

20. The appellant submitted that there are various contradictions and inconsistencies that create doubt in the prosecution's case, Firstly, that if at all the term *"tabia mbaya"* as used in this case referred to sexual intercourse as alleged by the minor then the minor was trying to allege that she had been defiled some other time before the incident she alleged to have occurred on the 13th December 2017.

21. The appellant further submitted that the complainant never stated anywhere that she was either lured by the appellant or threatened in any manner so as to be defiled by the appellant and this created a manifest doubt as to whether she was right to state that she experienced pain during the alleged incident and was still able to walk normally and only developed complications after one week. Accordingly, the appellant submitted that the complainant who testified as PW1 was an incredible witness whose evidence was not supposed to have seen the light of the day.

22. The appellant also submitted that the trial magistrate contravened section 150 of the Criminal Procedure Code by failing to summon crucial witnesses in support of the prosecution's case such as PW1's friends whom shall alleges to have been with her on the material date as well as her brother F who would corroborate PW1's testimony. The appellant relied on the case of **Donald Majiwa Achilwa and 2 other v R (2009) eKLR**, where it was stated:

> ***"The law as it presently stands is that the prosecution is obliged to call witness who are necessary to establish in the case even though some of those witnesses may be adverse to the prosecution's case' in appropriate case, the court is entitled to infer that had a witness been called his evidence would have tendered to be adverse to the prosecution case''***

23. The appellant further submitted that the prosecution in a clever way of defeating justice through dubious means decided not to bring vital witnesses. He relied on the Ugandan case of **Bukenya Vs R (UGC 1952)** in which it was held:

> ***"It is not the duties of the court to stage manage the case for the prosecution, nor is it duty of the court to endeavor to make a case where there is none to an accused person. The duty of the court is to hold the scale to see that justice is done according to the law on evidence before it (sic)."***

24. The appellant further submitted that the law indeed confers powers upon the trial court to summon any witness or evidence it deems essential for a fair, just and impartial decision to be arrived at as envisaged under sections 144 and 150 of the Criminal Procedure Code and section 107 of the Evidence Act which responsibility was not carried out by the trial court magistrate.

Analysis

25. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction 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, see (Peters V Sunday Post 1978) E.A. 424."***

26. The prosecution evidence as laid out in the trial Court was as follows; the complainant, NMA testified on oath as PW1 that he knew the appellant as Kevin and that the appellant lived near their house. She further testified that sometime in the year 2017 whilst playing with her friends where the appellant was living, the appellant called her to his house and did to her ***"tabia mbaya."***

27. She further testified that on the 13th day of December, 2017 while at home with her brother F, the appellant came and called her and told her to go and meet him somewhere in the forest where she went and he did ***"tabia mbaya"*** to her.

28. She further testified that the appellant told her to lie on the ground which she complied with and the appellant touched her on her private part with his hand after which she sustained injuries on her private parts. The complainant further testified that the appellant then took water and walked away and she followed him as she was able to walk.

29. The complainant testified that when she went home she found her brother R and that after some days she had a problem and could not walk well after which she explained to R what had happened and he went to look for Kevin. She further testified that they went to the Assistant Chief's home where they made a report and the assistant chief arrested Kevin after which they headed to the police station at Ndori police patrol base where she explained to the police what had happened and finally they went to Akala Health Centre where she was

examined on her private parts.

30. The complainant identified that the accused person in court as the person who did *"tabia mbaya"* to her and stated that the appellant's home was near their home.

31. In cross-examination the complainant stated that the appellant called her and told her to follow him into the forest near their home. She further stated that there was a time when the appellant took her into the maize plantation but she did not report that incident.

32. She further testified that it was her brother who enquired as to what had happened as she had difficulties in walking although she could not remember the exact date. She testified that on the 20th December 2017 she was taken to the hospital as she was sick and experiencing a headache and further her private part was also paining. She stated that the incident had occurred earlier.

33. The complainant further stated in cross examination that the appellant was not present when she was taken to the hospital and that there was no eye witness. She further testified that there was a day the appellant came and requested her brother for her to go and look for a wheelbarrow for him.

34. In re-examination the complainant stated that she went to hospital on two occasions, the first time, her head was aching and on the second instance, she went for examination.

35. PW2 ROO testified that he lived in Ndori and that he worked as a businessman and that the complainant was his sister. He further testified that on the 20th December, 2017 at 11.00am, he was at home and that the complainant, was sick. He further testified that he realized that she had difficulties in walking and upon inquiring as to what the problem was, she told him that Kevin had done to her *"tabia mbaya."*

36. He further testified that he asked her what she meant by *"tabia mbaya*" and she explained to him that Kevin removed her pant and did to her *tabia mbaya* after which PW2 called the village elder George Otieno who came and told them to take the child to the hospital from where they took the child to Akala health centre.

37. PW2 further testified that the girl was examined and he was told by the doctor that the girl had been defiled. He further testified that the doctor asked him whether Kevin had been arrested and upon him affirming the same, the doctor gave him a letter to take to Ndori Police Post informing the police to take Kevin to the hospital but the police officer refused.

38. PW2 further testified that while at Akala police station, a doctor was called who came and he gave him the treatment documents after which he recorded his statement at the police station. He further identified the appellant in court and stated that he was their neighbour at home.

39. Further evidence from PW2 was that the complainant was 11 years old. He identified the Child Clinic Card showing that the complainant was born 20.8.2007. He further identified the treatment book dated 20/12/2017 issued to him from Akala Health Centre in respect of the complainant as well as the P3 form in respect of the complainant similarly dated 20/12/2017.

40. In cross-examination by the appellant, PW2 stated that he did not witness the incident but only testified on what the complainant had told him after which he took the child to the hospital to confirm what she had told him. He further stated that he became suspicious when he saw the child walking with difficulties after which the child disclosed to him what had happened on the 10th day of December, 2017.

41. PW2 further stated in cross examination that on 19.12.2017, the complainant told him that she felt pain on the thighs. He further stated that on 10th December, 2017 he had taken her to Ndori dispensary where she was diagnosed with malaria and on 20th December, 2017 he took her to Akala Health Centre.

42. He further stated that the child, the complainant, told him that she had been defiled and as she was walking in a funny style, he concluded that she must have been defiled. He also stated that the girl did not report the incident to him immediately. He further stated that he could not explain the walking style of a person suffering from malaria.

43. PW2 further stated that the child told him that the appellant had done to her *tabia mbaya* and when he took the child to the hospital, she was treated and examined and the doctor told him that the child had been defiled. He further stated that the first doctor treated malaria. He further denied any grudge with the appellant or owing the appellant any money specifically Kshs. 20,000.

44. PW2 stated that the P3 form was filled at Ndori Police Station and that he paid the doctor who filled it. He further stated that he did not know where the appellant was arrested and further that he did not go to the place where he was arrested.

45. In re-examination PW2 reiterated that the first time the child was treated was on the 10th day of December, 2017 when she was diagnosed with malaria and the second time was on 20.12.2017 when he took her to Akala health centre. He further stated that the person who wrote his statement did not capture it well. He further stated that he was not present at the time of the arrest of the accused person (appellant herein).

46. PW3 George Otieno Oluoch a village elder at Miriha village testified that on the 20/12/2017 he was at his home when he received a phone call from one O who told him to go to the latter's home. He further testified that he went to O home where he found Kevin detained and upon inquiry he was informed that Kevin had been detained for defiling a girl.

47. PW3 testified that he then called the Assistant Chief who came and took Kevin to the Police Patrol Base at Ndori. He further identified Kevin as the accused.

48. In cross-examination, PW3 stated that he investigated the case but did not know the date of the incident. He further stated that he saw signs that the girl had been defiled and had difficulties walking and further that the girl informed them of what had happened.

49. PW3 further stated that the appellant admitted defiling the girl and that the Assistant Chief also heard the appellant's admission.

50. PW4 Jared Obiero Opondo the Chief Clinical Officer in charge of Bondo sub-county Hospital testified that he examined the complainant whom he stated to be in fair condition and upon examination of her genitalia noted that the hymen was broken and there was swelling of the vagina.

51. The Clinical Officer further testified that the P3 form in relation to the complainant was dated 20/12/2017 and in it he noted that the minor was allegedly defiled severally the last date being the 13th December, 2017 by a person well known to her.

52. He further testified that though the samples he took to the laboratory tested negative, he concluded that the minor was defiled. He further testified that the complainant had been earlier treated at Akala Health Center and he relied on the resultant treatment notes.

53. In cross-examination by the Appellant, PW4 stated that he took the complainant's medical history and examined her and noted that the hymen was not intact. He further stated that he could not remember the person who brought the child to the hospital.

54. PW4 stated that there were injuries in the complainant's genitalia and that her vagina was swollen. He stated that the complainant's injuries were not old injuries but recent ones and confirmed that the complainant had been defiled.

55. He further stated that he examined the complainant and filled the P3 form at the hospital. He further stated that the absence of the minora showed penetration of the said hymen and though the hymen can be broken through accident, in the instant case, it was through sexual penetration.

56. PW5 Mourice Omondi the Assistant Chief of North Ramba sub-location testified that on the 20/12/2017 at 12.30pm he received a phone call from the village elder Mr. George Otieno Oluoch who told him that a man had defiled a girl after which PW5 proceeded there immediately. He testified that on arrival, he found Stephen Ouma Owino, the appellant.

57. Omondi further testified that he spoke to the appellant who had been arrested and tied with a rope and the appellant admitted having defiled the girl and asked for forgiveness. The Assistant Chief further testified that he also saw the complainant whom he noticed had difficulties in walking. He testified that he re-arrested the appellant and took him to Ndori Police Patrol Base. Omondi further testified that the appellant was also known as Stephen and he identified him before court.

58. In cross-examination, PW5 stated that he found the appellant already arrested and that the appellant was the one who gave the name Stephen Ouma Owino but that he knew him as Kevin.

59. He further stated that the complainant had difficulties in walking and that he was informed that the appellant had defiled the girl to which he took the act of arresting him. He further stated that he did not witness the incident but that upon admitting the offence, the appellant had explained that he had been defiling the girl on several occasions.

60. The Assistant Chief further stated that the appellant had been arrested and tied with a rope but since the people knew him they did not harm him. He further denied taking away any money from the appellant.

61. PW6 No. [xxxx] CPL Kennedy Mwendwa Muli testified that he took over the instant file from PC Samuel Katatu who was transferred from Ndori to Siaya on the 3/6/2018. He testified that the investigations had been completed and the victim's age was revealed to be 10 years of age. He further testified that he saw the Immunization Card which revealed that the victim was born on 20/8/2007. CPL Muli further testified that though he did not conduct any investigations he perused the witness statement and discovered that the suspect defiled the girl on four occasions.

62. In cross-examination he stated that he only received the report which he stated was made on 20/12/2017 but that upon reviewing the P3 form saw that it showed that the report was made on 13/12/2017. He further stated that he could not explain the discrepancies as he did not investigate the matter.

63. In re-examination CPL Muli stated that the offence was booked under OB 8/20/12/2017. He further stated that the P3 form shows that the report was made on the 13.12.2017 whereas the file showed that the report was made on 20/12/2018. He further explained that the date 13/12/2017 was the date of the offence and as such there was no contradiction.

64. At the close of the prosecution's case, the appellant gave a sworn statement of defence that on the 13/12/2017 he was at his place of work at his village where he worked as a gold miner. He further testified that he was with ROO who owed him some money.

65. He further testified that they discussed the issue and O was to pay him on the 20/12/2017 at 9.00am after which they parted ways. He testified that on the 20/12/2017 in the morning he went to O home where he found O preparing to take a sick child to hospital and upon inquiry for his money a quarrel ensued as O insisted he was taking the child to hospital after which the appellant told him that if he could not pay he would take the cow.

66. The appellant further stated that O informed him that he would pay him when he returned from the hospital so he left with the cow as security but at around 12.00pm he saw two people, the village elder and the Assistant Chief in the company of O who pointed at him saying that he was the one.

67. The appellant stated that he was arrested and taken Ndori Patrol Base cells where he was held for three hours without being told the reason for his arrest and that he was later taken to Aram Police Station and on the 21/12/2017 he was charged with the offence before court.

68. In cross-examination by the prosecutor, the appellant stated that O, who testified as PW2, was trying to fix him in this case as he-PW2 owed the appellant money though he did not state the exact amount of money. The appellant further stated that he did not defile the complainant neither did he ever give her money.

69. The trial magistrate, Hon. M. Obiero framed two issues for determination firstly whether the case was a case of revenge by PW2, O and if not, whether the prosecution had proved the essential elements of defilement. On the first issue the trial magistrate found that the appellant's revenge defense was an afterthought and on the second issue the trial magistrate found that the prosecution failed to prove the offence of defilement but that the evidence on record proved the offence of committing an indecent act with a child. After considering the mitigation of the appellant, the trial magistrate sentenced the appellant to 10 years imprisonment.

70. The Respondent filed no written submissions.

Determination

71. Having carefully considered the appellant's grounds of appeal, the evidence on record and the submissions and the authorities cited, both statutory and case law, the main issues for determination in this appeal are:

1) Whether the charge sheet brought against the appellant was defective.

72. It is the appellant's case that the charge sheet brought against him was defective. The appellant submits that the charge sheet against him bears the rubber stamp of the OCS and that of the Senior Resident Magistrate (SRM) Bondo but lacks that of the Director of Public Prosecutions who is supposed to authenticate the charge brought against him.

73. He further submits that the particulars of the alternative charges in relation to the appellant's penis coming into contact with the vagina of NMA contradict the trial magistrate's finding that the appellant touched the minor's vagina using his finger which according to the appellant constitutes a notable defect in the charge sheet.

74. The charge brought against the appellant read as follows;

"Defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006."

75. The alternative charge and particulars brought against the appellant read as follows;

> ***"Alternative charge Indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.***
>
> ***<u>KEVIN OTIENO OWINO</u>: On the 13/12/2017 at around 15:00 hours at Miriha Village at Rarieda Sub County within Siaya County, intentionally and unlawfully caused his penis to come into contact with the vagina of N.M.A, a child aged 10 years. "***

76. It is trite that an accused person is entitled to not only be charged with an offence recognized under the law but also to be furnished with all the necessary details of the offence so as to enable him appreciate the nature of the charge(s) against him and to prepare an appropriate defence. The converse would prejudice an accused person's right to a fair trial contrary to ***Article 50(2) (b)*** of the ***Constitution***. This is the rationale behind ***Section 134*** of the ***Criminal Procedure Code*** which stipulates:

> ***"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 such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

77. Section 8 (1) of the Sexual Offences Act provides for the offence of defilement whilst section 8 (2) provides that *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* . Finally section 11 (1) provides that *any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.*

78. The Court of Appeal in **Peter Ngure Mwangi v Republic [2014] eKLR,** stated that:

> ***"A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO v R, [198] eKLR that:***
>
> ***"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:***
>
> > ***(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,***

(ii) when for such reason it does not accord with the evidence given at the trial."

79. It is my considered opinion that the evidence adduced by the prosecution in the trial court are not at variance with the charges brought up against the appellant. In fact, the evidence adduced led to conviction of the appellant on the alternative charge.

80. The Court of Appeal in the **Peter Ngure case** was further guided by the case of **Peter Sabem Leitu v R, Cr. App No. 482 of 2007 (UR)** where the Court held thus:

> ***"The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."***

81. In the present case the particulars in the charge sheet made clear reference to the offence of defilement against a minor. The alternative charge further made clear reference to the offence of committing an indecent act with a minor. The trial magistrate having conducted the trial and had the opportunity of hearing the evidence and scrutinising the same proceeded to find the appellant guilty of the alternative charge and proceeded to sentence the appellant as provided by law.

82. The appellant in his submissions relied on the **Kilome (supra)** case whose finding I am in agreement with that the paramount consideration in determining whether or not a defect in the charge is incurable or not is whether there is prejudice occasioned to the accused in putting up his defense because of the words used in the charge sheet. The appellant further raised issues with the charge sheet in that it lacked the stamp of the Director of Public Prosecutions who was supposed to authorise the charges brought up against the appellant.

83. My understanding of the procedure of preparing a charge sheet is that once a charge sheet is prepared against an accused, the OCS stamps it after which the charge sheet is in many cases sent to the ODPP who either signs or stamps the same to prove that they have authorized the charge. The Charge sheet is then filed at the relevant court registry and stamped. This procedure, in my opinion, validates the reason the charge sheet in this case had both the stamp by the OCS and the SRM's court. In my view whether or not the charge sheet was stamped or signed by the ODPP does not amount to prejudice against the appellant, considering the fact that the appellant was prosecuted by a competent officer from the Office of the Director of Prosecutions.

84. In my considered view I am unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before the trial court.

85. Furthermore, I find that there was no risk of confusion in the mind of the accused as to the charge framed and evidence presented as the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice.

86. I am convinced that this court must, therefore, reject the appellant's belated complaint that the charge sheet against him was defective and thus caused him prejudice.

87. Section 382 of the Criminal Procedure Code provides, in material part that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

88. The proviso to Section 382 provides that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

89. As earlier herein stated, the principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

90. Hence, as our case law has established, the test for a defective charge sheet is a substantive one, not a formalistic one and when it is used here it establishes that the charges gave fair notice to the Accused Person to the charges he was facing, and the trial was fair in a substantive sense. No miscarriage of justice was occasioned in the charges brought against the appellant. It is my considered opinion that the defect if any, was in any event, curable under Section 382 of the Criminal Procedure Code.

91. On whether the trial magistrate erred in convicting the appellant on the alternative charge which disclosed the touching of the vagina of the complainant with a penis yet the conviction was based on touching of her vagina with hands, section 2 of the Sexual offences Act defines indecent act to mean: ***"Indecent act" means an unlawful intentional act which causes—***

> ***(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;***
>
> ***(b) exposure or display of any pornographic material to any person against his or her will.***

92. From the above definition of indecent act, it is clear that the person committing the offence need not use or touch the genital organ of the victim with another genital organ such as the penis. Any contact between any part of the body of a person coming into contact with the genital organ, breasts or buttocks but which does not cause penetration is an indecent act. Therefore using a hand or fingers to touch any of the parts named in the section is an indecent act. Accordingly I find no error in the judgment of the trial court finding that the evidence proved touching of the victim's vagina with the hand and not the penis. The ground of appeal fails and is dismissed.

2) Whether the alleged confession by the appellant after his arrest is admissible.

93. It was the appellant's case that evidence of his alleged confession as given by PW3 and PW5 was not admissible under the provisions of section 26 of the Evidence Act and the same ought to be discarded by this honourable court as it was also discarded by the trial court.

94. The right of an accused person to a fair trial is guaranteed under Article 50 (2) of the Constitution of Kenya 2010. Of particular relevance to us is Article 50 (2) (l) which guarantees him/her a right to refuse to give self-incriminating evidence. Generally, confessions made by an accused person are not admissible in Kenya unless when they are made strictly under the law. Section 25 of the Evidence Act defines a confession as follows:

> ***"A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence."***

95. Section 25 of the Evidence Act was amended by Act No. 5 of 2003 and Act No. 7 of 2007 by inserting into the Act Section 25A which reads as shown below:

> ***"25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.***
>
> ***(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court."***

96. The rules envisaged under (2) above are known as the Evidence (out of Court Confessions) Rules, 2009 hereinafter the Confessions Rules. Under these Rules, specifically under Rule 4 the rights of an accused are specified. This Rule requires the recording officer to ensure that the accused person chooses his preferred language of communication; is provided with an interpreter free of charge where he does not speak Kiswahili or English; is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment; is informed of his right to have legal representation of his own choice among others.

97. Rule 4 (2) requires the recording officer to ensure that the accused has not been subjected to any form of torture and Rule 4 (3) requires the recording officer to ask the accused person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded.

98. In addition to this, the Confessions Rules require the accused to be informed of the option to record his own statement in his preferred language or to have it recorded for him (Rule 7); the option to clarify or add anything in the statement after the same has been recorded (Rule 8) and the requirement to administer a caution before recording the statement (Rule 5). In addition to the legal provisions on this issue, there are numerous pronouncements by judges on the subject of extra-judicial confessions.

99. PW5 testified that the appellant admitted to having defiled the minor and asked for forgiveness. In his submissions, the appellant stated that he only confessed to having committed the act to avoid further action from the mob that had arrested him.

100. In my humble view, after the Confessions Rules and the Constitution of Kenya 2010 came into effect all that the accused needs to do is to raise doubts in the court's mind about the voluntariness of such a statement, which in my view has been done in this case, as the onus of proving voluntariness of a retracted statement lies with the prosecution.

101. Accordingly, I find that the alleged confession testified by PW5 is not admissible and I do note that neither the prosecution nor the trial court relied on it in proving their case and or in convicting the appellant as there is nothing on record to show that the alleged confession was relied on by the magistrate to convict the appellant hence the ground of appeal and submission is far-fetched, superfluous and is hereby dismissed.

3) On the alleged Inconsistent and contradictory evidence

102. The appellant asserted and submitted that there were various contradictions and inconsistencies that created doubt in the prosecution's case specifically to the number of times the alleged act of defilement occurred as the term **"tabia mbaya"** as used by the complainant pointed to numerous incidents of defilement.

103. I have perused the evidence on record especially that by the complainant who testified as PW1 and it is my opinion that there are no contradictions or inconsistencies in her testimony. My understanding of PW1's testimony is that the appellant had defiled her on numerous occasions. She states that sometime in the year 2017 whilst playing with her friends near the appellant's residence, the appellant called her to his house and did to her ***"tabia mbaya."*** She also states that on the 13th day of December, 2017 while at home with her brother F, the appellant came and called her and told her to go and meet him somewhere in the forest where he did "*tabia mbaya*" to her.

104. To my mind these are two different occasions where the complainant recalls and claims being defiled by the appellant. They do not, in my opinion, amount to contradictions or inconsistencies to warrant doubt being entertained in the prosecution's case against the appellant. In any case the the Court of Appeal of Kenya in **Erick Onyango Ondeng' v. Republic [2014] eKLR** held;

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

105. More recently the Court of Appeal at Nyeri in **Richard Munene v Republic [2018] eKLR** stated as follows:

> ***"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."***

106. On the alleged use of the phrase "*tabia mbaya"* by the victim which the appellant claims is not the same as defilement, **PW2** further upon asking the child what the problem was, the child would only say Kevin did to me *"tabia mbaya."* It is now legally accepted that the term ***"tabia mbaya"*** used by young children refers to sexual intercourse or conduct. It should therefore be understood as such, as a small child cannot be able to otherwise describe the act. The **Court of Appeal** discussing the meaning and purport of the phrase ***"Tabia mbaya"*** by minors in the case **Muganya Chilegi Saha –vs- Republic (2019) e KLR** held that such phrase meaning bad manners in English connotes sexual conduct or intercourse.

107. Thus, it is acceptable that sexual conduct or intercourse that a minor of tender years has no other language to explain to the act. See also **JE –vs- Republic (2017) e KLR** where the phrase ***"tabia mbaya"*** –(bad manners) was construed to mean sexual intercourse or conduct. "*Tabia Mbaya"* when directly translated means bad manners. This is a common euphemism used by young children to mean sexual intercourse. Accordingly, I find no fault in the victim using the term *tabia mbaya* in this case to describe what the offender did to her. The ground of appeal and submission is found to be devoid of any substance and the same is hereby dismissed.

4) *On alleged Failure to summon essential witnesses*

108. It was the appellant's case that and that the trial magistrate contravened section 150 of the criminal procedure code by failing to summon crucial witness in support of the prosecution's case such as PW1's friends whom shall alleges to have been with her on the material date as well as her brother F who would provide corroboration to PW1's testimony.

109. Section 150 of the Criminal procedure Code provides:

> ***"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:***
>
> ***Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."***

110. A reading of Section 150 of the CPC shows that it empowers the court to, at any stage of the trial, summon a new witness or recall a witness already examined for re-examination. Where the court determines that the evidence of the new witness or the witness to be recalled is essential to the just decision of the case, the court is under a duty to summon the witness. In exercising the power, the court should ensure the protections afforded to the parties in the proviso are adhered to.

111. In **Kulukana Otim v Republic [1963] EA 257**, cited by J. Ngugi, J in **Stephen Mburu Kinyua v Republic [2016] eKLR**, the Court of Appeal of Uganda, in considering Section 146 of the Ugandan Criminal Procedure Code, which is similar to our Section 150 of the CPC, stated that:

112. ***"It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself…."***

113. In **Stephen Mburu Kinyua v Republic [2016] e KLR,** Ngugi, J held, and I concur, that it was necessary for the court to form an opinion that it would be essential to the just decision of the case to call or recall a witness. The learned judge stated:

114. ***"This is important because it would appear that the second part is triggered when the Court itself forms the opinion that the evidence to be called is essential to the just decision of the case. Section 150 implies that once a Trial Court comes to that conclusion, the duty to call that witness is triggered. This is not the situation we have here. The Trial Court did not make any assessment or finding that the evidence of the three witnesses it permitted to be called were essential to the just determination of the case. Instead, the Trial Court acquiesced to the Prosecution request to call the three witnesses. We must therefore conclude that the Trial Court acted pursuant to the first discretionary part of section 150 of the CPC."***

115. In the instant case, I find that whereas a trial court has the discretion to summon a fresh witness or recall a witness who has testified, this discretion should be exercised with caution so as to ensure that the prosecution does not use the opportunity to clean up its act. Much greater caution is called for when the court decides to act *suo moto.* It is always better to let the parties present their cases in the manner they think best. The prosecution should be left to identify the witnesses it wants to call. Likewise, the defence should be left to decide on the witnesses to call. This was stated by the court in the case of **Clement Maskati Mvuko v Republic [2018] eKLR.**

116. Further, this courtt is alive to the fact that there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of Evidence Act (Cap 80) Laws of Kenya provides:-***"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"***

117. In the case of **Bukenya** (supra), the court addressed itself thus: -***"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. (ii) That Court has right and the 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 tendered to be adverse to the prosecution."***

118. The full quotation in the case of **Donald Majiwa Achilwa** (supra) relied on by the appellant in his submissions is as follows: ***"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."***

119. In the case of **Keter v Republic [2007] 1 EA 135** the court held inter alia thus: ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

120. In my humble view, based on the evidence adduced by the prosecution witnesses, I find no value addition that the alleged witnesses would have given to the prosecution or the defence hence the trial court cannot be faulted in its reluctance to exercise its powers under section 150 of the CPC.

On whether the prosecution proved its case beyond reasonable doubt

121. The appellant in this appeal was charged with the offence of defilement contrary to Section 8(1) of the Sexual Offences Act as read with section 8(2) of the Sexual Offences Act which provides: ***"A person who commits an act which causes penetration with a child is guilty of the offence termed defilement and depending on the age of the victim i.e, if under eleven years shall upon conviction be sentenced to imprisonment for life."***

122. Going by this definition of the offence under section 8(1) above, for the prosecution to sustain a conviction against an offender, the following elements must be proved beyond reasonable doubt. ***i. Penetration of the male offender into the genitalia of the female victim. ii. The age of the child must be established in view of Section 8(1), (2),(3) and (4) of the Sexual Offences Act. iii. Evidence that the accused was positively identified as the perpetrator.***

123. When dealing with sexual offences involving under the age of maturity the court is entitled to apply Section 124 of the Evidence Act on corroboration. However, in absence of corroboration the proviso of Section 124 provides as follows: ***"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 be reached in the proceedings the court is satisfied that the alleged victim is telling the truth."***

124. It is therefore necessary to re-evaluate and subject the evidence to afresh scrutiny to be satisfied that the prosecution proved its case in the court below beyond reasonable doubt.

125. Regarding the element of penetration, Section 2 of the Sexual Offences Act defines penetration to mean ***partial or complete insertion of the genital organs of a person into the genital organs of another person***. According to the interpretation of Section 2 above, the slightest and brief arousal Penetration is sufficient to complete the crime. The law does not envisage absolute penetration into the genital nor the release of spermatozoa or semen of the male organ for the act of penetration to be said to be complete.

126. In this case the complainant stated that the accused person touched her private part with his hand. According to the complainant, on the 13th day of December, 2017 the accused person told him to go and meet him in the bush. She went and met him in the bush. While in the bush, the accused person removed her dress and touched her private part with his hand. She explained that she experienced pain during the incident. PW4 examined the complainant and noted that the hymen was broken and there was swelling in her genitalia. He formed the opinion that there was penetration. He documented his findings in the P3 form.

127. During cross-examination by the appellant, there was no *iota* of material to render rebuttal to the testimony by the complainant in this ingredient. The complainant even made reference to past acts of *"tabia mbaya"* which had not reached the attention of PW2 or the law enforcement agencies.

128. Turning to the age of the child, the courts have on many occasions pointed out how desirable it is to for the prosecution to prove beyond reasonable doubt the age of the child victim. It is trite that the prosecution ought to prove the age of the child by either direct testimony of the parent, guardian, or victim herself, birth certificate, medical age assessment or by other expert means to finally establish the age. In the case of **Hilary Nyongesa v Republic High Court Appeal No. 123 of 2009** and in two courts adopting the dicta in the case of **Francis**

Onamu v. Uganda the court held as follows:

> ***"In defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim. In the case of any other evidence apart from medical evidence age may also be proved by a birth certificate, the victim's parents or guardian and by observance and common sense."***

129. In the trial court there were findings from PW2 as to the age of the complainant. PW2 testified that the complainant was born on the 20th day of August, 2007 and as such, she was ten (10) years old as at the time of the incident. He identified a copy of the Child Health Card which was produced by the Investigating officer PW6 as an exhibit. According to PW6, the initial Investigating Officer gave him the child health card which shows that the complainant was born on the 20th day of August, 2007. Accordingly, there was proof that the victim was a child.

130. Finally, as to the identity of the appellant as the one who did to her tabia mbaya-bad manners by touching her private parts with his hand whereas PW2 testified that when he noticed PW1 walking with difficulties and inquired of her what was wrong, she disclosed that Kevin the appellant herein had done to her *tabia mbaya* by inserting his hand into her private part.

131. It is thus clear that there was no eye witness to the incident and the evidence available against the appellant on this issue of identification of the offender is the evidence of PW1 only. Section 124 of the Evidence Act Laws of Kenya provides that:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence, where 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 reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

132. **From a reading of section 124 of the Evidence Act, it is clear** that a trial Court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. (***See George Kioyi V R Cr. App. No. 270/2012 (Nyeri) and Jacob Odhiambo Omumbo V. R. Cr. App No. 80 of 200 (Kisumu).***

133. The appellant's defence was to the effect that he was being set up by the complainant's brother who owed him money and that he did not defile the complainant. In this case, the complainant was about 10 years old as at the time of her testimony. She was obviously of tender age. She gave sworn testimony after voire dire examination and she was subjected to cross-examination. The trial magistrate who saw and heard the witness testify stated:

> ***"I did not note anything that would suggest that she was not saying the truth. Based on the foregoing, I am of the opinion that the testimony of PW1 sufficiently demonstrates that it was the accused person who caused the penetration."***

134. From the evidence on record, the appellant was well known to the complainant and the appellant claimed that the complainant's brother who was PW2 had borrowed money from the appellant but refused to pay and when the appellant went to claim for the money and failed to get it, he took the cow of PW2 and later he was arrested for allegedly defiling the complainant herein.

135. Having re assessed the evidence on record as a whole, I'm unable to find that the complainant's brother framed the appellant for the offence in a bid to silence the appellant from claiming for his debt of Kshs 20,000. Kshs 20,000 is not a pence. It is substantial amount of money and if at all the appellant had lend the money to the PW2 nothing prevented him from stating to court whether he gave him cash money or through Mpesa or by any other means and or whether there was an agreement in writing or oral understanding for refund of such money. There was also no evidence to show that PW1 was coached by PW2 to frame the offence against the appellant. Accordingly, the ground of appeal and submission fails and is dismissed.

136. From the above analysis and findings, it is clear that the prosecution proved that the complainant was a minor aged about 10 years at the time of the incident and further that there was penetration of the complainant's genitalia caused by the appellant. However, the question is whether the manner in which the penetration was achieved amounts to defilement.

137. Section 2 of the Sexual Offences Act 2006 defined "penetration" to mean: ***"The partial or complete insertion of the genital organs of a person into the genital organ of another person."***

138. In this case, the complainant stated that the accused person touched her genital organ with his hand. A hand or finger is not a genital organ as contemplated in the definition above.

139. Accordingly, it is my considered opinion that the circumstances of this case do not amount to defilement and as such the prosecution failed to prove the offence of defilement against the accused person beyond reasonable doubt as required by Law.

140. However, the appellant was charged with the alternative offence of committing indecent act with a child. Section 2(1)(a) of the Sexual Offences Act No.3 of 2006 defines an "indecent act" to mean: -

> ***"Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration".***

141. In this case, the complainant explained that the appellant touched her genital organ using his finger. Accordingly, it is my considered opinion, and I am in agreement with the trial magistrate, that the evidence proved that the appellant committed an indecent act with the complainant child.

142. I therefore find and hold that prosecution proved the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act and as such the appellant was rightly convicted.

6) Whether the sentence imposed upon the appellant was harsh.

143. The appellant has impugned the judgment of the trial court in imposing a sentence of 10 years imprisonment. He argues that the sentence is manifestly harsh and excessive and that the trial magistrate imposed on him minimum mandatory sentence hence he failed to apply himself to the jurisprudential developments espoused in the Francis Muruatetu case where the Supreme Court held that mandatory sentences are unconstitutional. The appellant faulted the trial magistrate for failure to exercise discretion in sentencing him.

144. The role of this court in an appeal is not to interfere with the discretion of the trial court on the sole ground that the sentence meted out is severe, unless it was manifestly excessive. The Court of Appeal of East Africa stated in **Wanjema v Republic [1971] EA 494** that:

> ***"An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case."***

145. Section 11(1) provides a mandatory minimum sentence of 10 years for anyone convicted under the section. The appellant submitted that the sentence limited the trial magistrate's ability to exercise her discretion in sentencing contrary to the findings of the court in the cases of Evans Wanjala Wanyonyi (supra), Jared Koita Injiri (supra) and that of Francis Karioko Muruatetu (supra).

146. The Supreme Court decision in Muruatetu (supra) and subsequent decisions by the Court of Appeal have ruled that the mandatory minimum sentences no longer have a place in our jurisdiction because they deprive the trial court of its discretion to mete out a sentence that is commensurate with the gravity of the circumstances surrounding the commission of the offence. The Supreme Court held that a trial court ought to consider the following before passing sentence: -

> ***a) Age of the offender,***
>
> ***b) Whether or not the offender is a first offender,***
>
> ***c) Whether the offender pleaded guilty,***
>
> ***d) The character and record of the offender,***
>
> ***e) Commission of the offence in response to gender-based violence,***
>
> ***f) Remorsefulness of the offender,***
>
> ***g) The possibility of reform and social re-adaptation of the offender,***
>
> ***h) Any other factor that the court considers relevant.***

147.The Court of Appeal has also recently applied the same principle in **Evans Wanjala Wanyonyi v Republic [2019] eKLR**, **Christopher Ochieng v Republic [2018] eKLR** in holding that the mandatory minimum sentences deprive courts of their legitimate jurisdiction to exercise discretion not to impose these sentences where circumstances dictate otherwise. The only caution to be taken by the court is that such discretion must be exercised judiciously and not capriciously. The trial court must subject its mind to sound legal principles and take account of all relevant factors while eschewing extraneous or irrelevant factors. An appellate court will therefore only interfere with sentence where it is shown that the sentence imposed is either illegal or is either too harsh or too lenient in the circumstances of the case. See **Francis Muthee Mwangi v Republic [2016] eKLR**.

In **Fatuma Hassan Sato v Republic [2006] eKLR,** Makhandia-J. (as he then was) observed: -

> ***"Sentencing is a matter for the discretion of the trial court. The discretion must however be exercised judiciously. The trial court must be guided by evidence and sound legal principles. It must take into account all relevant factors and exclude all extraneous factors……."***

149.The Sentencing Policy Guidelines for the judiciary stipulate that: -

> ***"…… The sentencing process, which entails the exercise of judicial discretion, must be in accord with the Constitution, as embodied in the judiciary's overall mandate of ensuring access to justice for all. These guidelines are in recognition of the fact that while judicial discretion remains sacrosanct, and a necessary tool, it needs to be guided and applied in alignment with recognized principles, particularly fairness, non-arbitrariness in decision making, clarity and certainty of decisions. The guidelines are therefore an important reference tool for Judges and Magistrates that will enable them to be more accountable for***

their sentencing decision."

150.In **Michael Kathewa Laichena & Another v Republic [2018] eKLR**, a case expounding on the sentencing guidelines, the court stated: -

> ***"The sentencing policy guidelines, 2016 ("The Guidelines") published by the Kenya judiciary provided a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the guidelines did not take into account the fact the death penalty would be declared unconstitutional, the court in the Muruatetu Case (Supra para. 71), held considered mitigating factors that would be applicable in re-sentencing in a case of murder as follows; (a) age of the offender; (b) being a first offender; (c) whether the offender pleaded guilty; (d) character and record of the offender; (e) commission of the offence in response to gender-based violence; (f) remorsefulness of the offender; (g) the possibility of reform and social re-adaptation of the offender; (h) any other factor that the court considers relevant."***

151.The Sentencing Guidelines thus provide a framework within which the courts can exercise their discretion in a manner that is objective impartial, accountable, transparent and intended to enhance the delivery of justice and public confidence in the judiciary.

152. Under section 216 of the Criminal Procedure Code, the court may before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.

153. Under section 329 of the Criminal Procedure Code:

> ***"The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence."***

154. In brief, the objective of sentencing as provided under the Judiciary of Kenya sentencing Policy Guidelines at paragraph 4.1 is:-

a) ***Retribution: to punish the offender for his/her Criminal conduct in a just manner.***

b) ***Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences;***

c) ***Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person;***

d) ***Restorative justice; to address the needs arising from the criminal conduct such as loss and damages,***

e) ***Community protection: to protect the community by incapacitating the offender:***

f) ***Denunciation: to communicate the community's' condemnation of the criminal conduct.***

155. In the instant case, the learned trial magistrate imposed the least sentence permissible as provided under section 11 (1) of the Sexual Offences Act, 2006. The sentence was lawful. However, as stated above, the Court of Appeal has since held that the minimum mandatory sentences stipulated by the Sexual Offences Act should no longer be allowed to stand. This means that courts now have the liberty to consider factors such as but not limited to mitigation from accused person while following the guidelines set by the Supreme Court of Kenya in the Francis Muruatetu Case (supra) and any pre-sentencing reports/statements from victims in deciding the appropriate sentences to the imposed on accused persons convicted of sexual offences.

156. In the present case, after conviction, the appellant did not express any remorse for the physical pain and damage he caused to the victim and only prayed for leniency. Considering the circumstances of the case and the mitigation of the appellant, I find no reason why I should interfere with the appellant's sentence as a deterrent and further as it would be sufficient punishment to enable the appellant learn his lesson, be rehabilitated, and possibly be readapted into the community, for preying on a young child**.** ***However, as the appellant was given a minimum mandatory sentence, I exercise discretion and reduce the 10 year prison term to seven years imprisonment to be calculated from the date of arrest***.

> ***Accordingly, I find this appeal against conviction devoid of merit and I proceed to dismiss it. I uphold the conviction and allow the appeal on sentence as stated above***.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 22nd Day of July 2020

via Microsoft teams ***appellant present in prison but online.***

R.E.ABURILI

JUDGE

Mr Okachi SPPC for Respondent present

Modestar and Ishmael Court Assistants present