**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 96 OF 2019**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**BMM.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal from the judgment and sentence of Honourable J Bartoo- SRM dated 9th December, 2019 in Machakos CM's Sexual Offence Case No. 19 of 2018)**

**BETWEEN**

**REPUBLIC.....COMPLAINANT**

**VERSUS**

**BMM.....ACCUSED**

**JUDGEMENT**

1. The appellant, **BMM**, was charged and convicted of 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 were that on the 17th day of June 2018 at around 1700 hours at [Particulars Withheld] in Kathiani Sub-County within Machakos County, he intentionally and unlawfully caused his penis to penetrate the anus of **BN** a boy aged 9 years. In the alternative he was also charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same Act, the particulars being that during the said period at the same place he intentionally and unlawfully touched the anus of the same child with his penis.

2. After hearing the evidence, the learned trial magistrate found the appellant guilty in the said main count and convicted him accordingly. He proceeded to sentence the appellant to life imprisonment.

3. In support of its case, the prosecution called 4 witnesses.

4. After conducting *voir dire* examination, the complainant, who testified as PW3, stated that on the material day during day time, he was at home with both his father, the Appellant. and his mother, PW1, when the Appellant told me to go with him and collect sand using a wheelbarrow. He therefore accompanied the Appellant to the farm which was far from home and upon reaching the farm, the Appellant informed him that there was something the Appellant wanted to show him and he followed the Appellant into the farm where the Appellant told him to remove his trousers. Upon doing so, the Appellant told him to bend after which the Appellant removed his trouser and inserted his penis into his buttocks. When the Appellant was done, he told the Complainant not to disclose his action to anybody. The Complainant then put on his trousers and both of them returned home where the Complainant reported the incident to his mother, PW1. It was the Complainant's action that as a result of the said action he got injured in his buttocks and was taken to Hospital the following day. According to the Complainant, this was not the first time that the Appellant was doing the same thing to him as the Appellant had earlier on done the same thing but he did not report to anybody.

5. It was his evidence that the first time they went to the farm they were with his brother but the 2nd time, he was alone with the Appellant. He stated that though he was able to walk on his own after the said action, he was unable to play when he went to school the following day but he did not report the incident to his teacher.

6. PW1, **MN**, the Complainant's mother testified that in June, 2018 she was staying with the Appellant as her husband together with her two sons and two daughters, including the Complainant, though the Appellant was the biological father of one of her daughters and he stayed with him for 1 year and 4 months. On 17th June, 2018, a Sunday at about 4.00Pm she was with the Appellant in the house when the Appellant called the Complainant and asked him to accompany him to harvest sand from the road near their home. The Appellant then left with the Complainant and returned together after about 45 minutes. When they returned, PW1 saw the Complainant holding onto his waist but he did not respond. It was only after he was threatened by PW1 with caning that he disclosed to PW1 that the Appellant had asked him to enter the farm so that he could show him something and upon doing so, the Appellant asked him to removed his pants and bend over. When he did so, the Appellant the Appellant lowered his pants then inserted his penis into the Complainant's anus after which the Appellant told the Complainant not to reveal the incident to anybody.

7. According to PW1, she did not ask the Appellant about the incident. She however followed the Complainant to School the following day at 400pm as she did not want the Appellant to know that she had taken the Complainant to the hospital and she reported to the Teacher what had happened. She however, did not receive any complaints from the Complainant's teacher. He then took him to Mitaboni Health Centre where the Complainant was examined after which they were referred to Machakos Level 5 Hospital where they proceeded on 19th June, 2018 and the Complainant was treated.

8. It was her evidence that on 20th June, 2018, she was issued with a P3 form which was filled at the hospital and which she identified in Court. She also identified the PRC Form and birth notification. It was her evidence that she had no dispute with the Appellant who usually performed family chores on Sundays. According to her by the time the Appellant left with the Complainant they had not taken lunch though it was 4.00pm. and that they went with a wheelbarrow. It was her evidence that the Appellant brought the sand the sand twice and that it can take 15 minutes to walk from home to the farm where they went. According to PW1, the Appellant went to rest and came out when he heard her voice. She denied that she took a bath with the Complainant and stated that she did not wash the Complainant after the incident. Upon their return, the Complainant was seated on the ground and though his clothes were not blood-stained, he stated that the Appellant had whipped him. It was her testimony that the Complainant walked on his own from home to school and from school to the hospital and that the Complainant had injuries on his anus. According to her she reported the incident to the police before taking the Complainant to the Hospital.

9. According to PW2, **Dr John Mutunga** attached to Machakos Level 5 hospital, the report that was made at the hospital was that the Complainant, aged 9 years, had been defiled on 17th June, 2018. Upon examining him, there was faecal matter around the anus which was widely gapping with loose external spinchem. According to him, the injuries were caused by a blunt object. He filled the P3 form on 5th July, 2018 and produced the same. It was his opinion that the Complainant had been sodomised.

10. The witness also produced the Post Rape Care Form dated 19th June, 2018 which was filled in by his colleague who was no longer at the Hospital but who was known to him and whose signature he was well versed in. According to the said form, on examination, the Complainant had no bodily injuries. However, on the anus and private parts, faeces were noted and the anus was wider than normal though no sperms were noted. The anal splinter had been extended and could not hold faeces well. The same had been widely used and was lose and the anal had been opened. According to the said document, the child was not calm at the time of examination. He proceeded to produce the said form as an exhibit.

11. PW4, **PC Chepkemoi Rono**, the investigating officer was on 21st June, 2018 assigned the case by the OCS Kathiani for investigations. He proceeded to record statements from the complainant and a witness. The day after the incident the Complainant's reported to the AP Post at Mitaboni then took the child to a dispensary at Mitaboni where they were referred to Machakos Level 5 hospital. The matter was reported to Machakos Police Station but they were referred to Kathiani Police Station and a P3 form was issued and it was filled at Machakos Level 5 Hospital as that is where the child was treated. The Appellant was later arrested and was charged with the offence. According to him, the Complainant was 9 years old from the copy of the birth notification which he exhibited. It was his evidence that the Appellant was not the biological father to the complainant and that the mother had the child when she got married to the Appellant.

12. Upon being placed on his defence, the Appellant testified that the case was all about a family grudge since the previous year when he left his family despite his attempts to return back to them. He therefore urged the Court when making a decision look at both sides since he was suffering since he parted with his wife.

13. In her judgement, the learned trial magistrate found as regards the age of the victim, that PW4 the Investigation Officer produced a birth notification as evidence that the victim was aged 9 years old. She also the learned trial magistrate reproduced the prosecution evidence and found that the Complainant knew the Appellant well as his father. In her finding, the doctors evidence was sufficient and though the court could not determine the demeanour of the victim, the learned magistrate was of the view that there was no reason as to why he could lie to court. Furthermore, the victim was cross-examined in court and was steady in his evidence. She therefore found that the medical evidence presented corroborated the injury stated by the victim and that the state has established its case beyond reasonable doubt against the Appellant.

14. Upon conviction, the learned trial magistrate proceeded to sentence the Appellant to life imprisonment stating that her hands were tied.

15. Dissatisfied with the decision of the trial court, the appellant appealed to this court challenging both the conviction and sentence of the trial court on the following grounds;

**1) The trial magistrate erred in law and in fact by not considering that there was a grudge between the appellant and the mother of the complainant.**

**2) The learned trial magistrate erred in law and in fact by not considering his defence.**

**3) The learned trial magistrate erred in law and fact by not considering contradictions and inconsistencies which were in want of merit.**

**4) The trial magistrate erred in law and fact when she directed the matter proceed from where it had reached and failed to explain to the appellant of his rights under section 200 (3) occasioning a miscarriage of justice.**

**5) The trial magistrate erred in law and fact when she believed the medical documents tendered without production of the initial treatment notes which are primary that would dictate her finding and failed, failure to produce them would have been adverse to the prosecution.**

**6) Learned magistrate erred in both law and fact when she failed to appreciate the minor could have been used to frame the appellant due to a family fued.**

**7) The learned trial magistrate erred in both law and fact when she failed to explain to the accused that he had a right to choose and to be represented by an advocate and to be informed of this right promptly making the trial unfair and which led to miscarriage of justice.**

**8) The learned magistrate erred in both law and fact when she failed to appreciate the minor's testimony was couched especially given the set of facts that the complainant had been assaulted several times and yet there were no injuries on the anus therefore the set of facts unbelievable.**

**9) The learned magistrate erred both in law and fact when she sentenced the appellant to life imprisonment.**

**10) The learned magistrate erred in both law and fat when she failed to consider the appellant's mitigation and solely relied on the victim impact assessment report.**

16. In this appeal, it is submitted on behalf of the Appellant by **Mr Kamollo**, that the Learned Magistrate erred in law and fact by not considering that there was a grudge between the appellant and the mother of the complainant and that the learned magistrate erred in law and in fact by not considering the appellants defence which was that the proceedings in the lower court were maliciously instituted by the complainant's mother due to an on-going dispute between the appellant and the complainant's mother.

17. It was also submitted that the learned trial magistrate erred in law and fact by not considering the contradictions and inconsistencies in the prosecution's case which were in want of merit. PW1 testified that the complainant was assaulted by the appellant on the 17th June 2018, that she took him to a health centre on the 18th of June and was referred to the Machakos Level 5 hospital where he was examined on the 19th June. Finally, that she reported the incidence to the police station on the 20th June, 2018 where she was issued with a P3 form that she took to the hospital. However according to the P3 form, the incidence was reported to the police station on the 21st June, 2018 and not the 20th of June. Further, that the complainant was sent to the hospital from the police station on 21st June, 2018 and not on the 20th June. Therefore, failure by the trial magistrate to consider the contradictory material facts in the prosecution's case led to the erroneous conviction and miscarriage of justice.

18. It was further submitted that the learned Magistrate erred in law and fact when she directed the matter to proceed from where it had reached and failed to explain to the appellant of his rights under section 200(3) of the ***Criminal Procedure Code*** and relied on the case of **Director Public Prosecutions vs. Peter Onyango Odongo & 2 Others [2018] eKLR**.

19. According to the Appellant, the Learned Magistrate erred both in facts and law when she believed the medical documents tendered without the production of the initial treatment notes from Mitaboni Health Centre which are primary and very crucial to the prosecution's case in this instance. This coupled with the fact that the p3 form indicates that no injuries were apparent on the complainant during the examination calls into question whether the incidence occurred at all. Failure to resolve these apparent doubts in the prosecution's case by the learned magistrate led to erroneous conviction and sentence.

20. In respect of grounds 6 and 8, it was submitted that the learned magistrate erred both in law and fact when she failed to appreciate that the minor could have been used to frame the appellant due to a family feud and that the learned magistrate erred both in law and fact when she failed to appreciate the minor's testimony was couched especially given the set of facts that the complainant had been assaulted several times and yet there were no injuries on the anus making the set of facts unbelievable. While PW1 testified that the incidence occurred on the 17th June, 2018, the P3 form shows no injuries to the lower limbs and the anus. Further, it gives the approximate age of injuries to be 18 days which again calls into question whether the incidence occurred and strongly suggests that the appellant was framed given the family dispute.

21. It was submitted that **t**he trial magistrate erred both in law and fact when she failed to explain to the accused that he had a right to choose and to be represented by an advocate and to be informed of this right promptly, a right enshrined under Article 50(2)(g) of the Constitution of Kenya 2010 and reliance was sought in **FPP vs. Republic [2020] eKLR** where the court tackled this matter and held that the right to legal representation is a fundamental ingredient of the right to a fair trial. Further, that it is the right of the trial court to promptly inform the accused person of this right and to encourage the accused to exercise the right particularly where the charge is a serious one.

22. The appellant also relied on **Joseph Kiema Philip –vs- Republic [2019] eKLR**.

23. According to the Appellant, the learned magistrate erred both in law and in fact when she sentenced the appellant to life imprisonment and erred both in law and in fact when she failed to consider the appellant's mitigation and solely relied on the victim impact assessment report during sentencing. In support of this submission the Appellant relied on **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR**.

24. The Court was therefore urged to find that the conviction and sentence is an error which led to a grave miscarriage of justice and it be set aside and the appellant be acquitted.

25. While conceding the appeal, it was submitted on behalf of the Respondent by **Mr Ngetich**, Learned Prosecution Counsel, that the Constitution makes it mandatory for an accused to have this right promptly informed to them before the trial commences. In addition, the Legal Aid Act 2016, section 43 on duties of the court when interacting with an unrepresented person states that:

> ***"A Court before which an unrepresented accused person is presented shall:***
>
> ***a) Promptly inform the accused of his or her right to legal representation;***
>
> ***b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and***
>
> ***c) Inform the service to provide legal aid to the accused person"***

26. Going through the court proceedings, it was submitted that the court did not at any point inform the appellant herein of his right to a fair trial and inform him of his rights as an accused person and reliance was sought in ***Joseph Kiema Philip vs. Republic*** *Case (supra) as well as the case of* **Jared Onguti Nyantika vs. Republic [2019] eKLR**.

27. Furthermore, it was submitted that given that the accused was charged with an offence which carries a severe sentence of life imprisonment it was necessary to be accorded his right to legal representation as required by law. In that regard, there is substantial injustice unless represented. According to the Respondent, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a court ought to consider in addition to the relevant provisions of the ***Legal Aid Act***, various other factors which include: the serious or nature of the offence in question thus serious offences may attract public interest to the extent that the public may require some form of representation to be accorded to the accused person to conduct his own defence; the severity of the sentence, thus legal representation is to be provided where the offence carries a death sentence and or life imprisonment ;the ability of the accused person to pay for his own legal representation; whether the accused is a minor, the ability of the court to comprehend the court proceedings thus the literacy of the accused and the complexity of the case which is discernible from the issues of fact and law which may not be comprehend by the accused. Reliance was placed on **D*avid Njoroge Macharia vs. Republic* [2011] eKLR** and ***Karisa Chengo & 2 others vs. Republic* [2015] eKLR**, where it was emphasized that;

> **"one of the factors that makes it critical that the court must inform an accused person of the right to legal representation is the seriousness of the offence or the gravity of the sentence to be imposed upon conviction. The appellant herein faced a charge of defilement of a minor of fourteen, which attracted a penalty of minimum sentence of twenty years imprisonment. The charge was a very serious one, upon being found guilty the appellant faced a minimum of twenty years in jail, and he was indeed sentenced to that exact period. That being the case, the trail should have informed him of his right to legal representation and directed that he be provided with an advocate at state expense."**

28. It was therefore submitted that failure to inform the appellant of that right violated his fair trial rights and amounted to injustice. A trial where fair hearing rights have been violated in this manner cannot possibly stand.

29. On failure to consider mitigation, the Appellant relied on *Sections 216 and 329 of the* ***Criminal Procedure Code****, Chapter 75, Laws of Kenya, and submitted that mitigation is a part of the trial process. However, i*n her judgment, trial magistrate only relied on the victim impact statement and failed to consider the appellant's mitigation.

30. On the sentence, it was submitted that the purpose and objectives of Sentencing as stated in the Judiciary Sentencing Policy should be commensurate and proportionate to the crime committed and the manner it is committed. It should also meet the ends of justice, and the principles of proportionality, deterrence and rehabilitation and reliance was placed on the Court of Appeal decision in **M K vs. Republic [2015] eKLR** where the Court clearly pronounced itself on this matter as follows:

> **"In the instant case, the appellant was charged with an offence under Section 20(1) of the Sexual Offences Act. This Section provides for a minimum term of 10 years' imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment."**

31. The first observation to note is that the phrase "not less than" has not been used in the proviso to Section 20 (1) of the ***Sexual Offences Act***. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life. What does "shall be liable" mean in law" The Court of Appeal for East Africa in the case of ***Opoya -v- Uganda (1967) EA 752*** had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval *the dicta in* **James -v- Young 27 Ch. D. at p.655** where **North J.** said:

> **"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced."**

32. The Respondent contrasted the wordings in Section 8 (2) of the ***Sexual Offences Act*** with the proviso in Section 20 (1) of the said Act and submitted that guided by the decision in ***Opoya -v- Uganda (1967) EA 752*** and the persuasive dicta of ***North J. in James -v- Young 27 Ch.D. at p.655***; the sentence stipulated in the proviso to Section 20 (1) of the ***Sexual Offences Act*** is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in

conjunction with the general provision in Section 20 (1), it was the Respondent's view that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment. Arising from the decision in ***Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015*** where the Supreme Court held that the mandatory death sentence prescribed or the offence of murder by ***section 204*** of the ***Penal Code*** was unconstitutional, it was submitted that if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.

33. In this case, the appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young boy. The Respondent relied on the decision of the Court of Appeal in **Jared Koita Injiri –vs- Republic (2019) eKLR** in similar circumstances reduced a life imprisonment sentence to 30 years imprisonment in 2019. The court applied the reasoning in the ***Mutuateru case*** that the trial court sentenced the appellant to life imprisonment on the basis of the mandatory sentence stipulated under Section 8(1) of the ***Sexual Offences Act*** and submitted that the life sentence was too harsh and excessive.

34. According to the Respondent, there was inconsistency in the evidence in Post Rape Care form (Prc), P3 form and evidence. According to the Respondent, it was the evidence of PW2 when he was recalled that the victim had a history of that the step-father had sodomized him on a Sunday on 17th June, 2018. On examination, the boy had no bodily injuries on the anus and private parts, there was no injury on the anus, no bruises/lacerations on the anal opening, no sperms noted on the body. It was dated on 19th August 2018 and signed together with the stamp on the said date. Further, PW1 did not produce medical treatment notes from Mitaboni Health Centre. PW3 had no difficulties in going back home, he did not have bruises on her private parts or around the anus and no discharge was noted on her innerwear. His clothes were not torn, PW1 further testified that she did not wash PW3 after the incident and took him to the hospital the following day. He stated he put his penis in his buttocks it is unbelievable that no single laceration or bruise or bleeding was caused on his anus or any other part of his body. In addition, the P3 from stated that the age on injury was estimated to be 18 days old while PW1 and PW3 testified that the act had occurred on 17th June 2018 just 2 days before they visited Machakos Level 5 Hospital. The court was invited to take judicial notice of the fact that victims of sexual offences get treatment and treatment cards and records usually accompany the PRC form and the P3. The PRC form itself bears no outpatient number (OP/No.) hence no evidence that the child was treated before the PRC was filled hence questions as to whether PW3 had been treated before in Mitaboni Health Centre as alleged by PW1.

35. Taking into consideration all the above highlighted areas, the Court was invite to make a finding that the proceedings were irregular, the conviction unsafe and sentence irregular and to quash the conviction and sentence meted upon the appellant.

**Determination**

36. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."**

37. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; 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."**

38. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

39. The prosecution's case was that 17th day of June 2018, the Appellant asked the Complainant to accompany him to the farm to collect sand. While there, the Appellant took the Complainant into the farm told him to undress and proceeded to sodomise him. Upon their return home, the Complainant narrated the incident to his mother, PW1 who took him for treatment the following day and the day after and made the report to the police. At the Hospital the Complainant was examined and was found that though there were no injuries on his body, his anal opening was wider than usual and had faeces. Upon the report being made to the police the Appellant was arrested and charged with the instant offence.

40. On his part the Appellant testified that the said charges were due to a grudge between him and his wife, PW1.

41. This appeal has been conceded mainly on the basis of the manner in which the trial was conducted. Even though the State conceded the appeal, it is not automatic that this court must in those circumstances allow the appeal since the court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565,** the court said:

> **"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."**

42. That was the position adopted in **Lamek Omboga vs. R., Kisumu Court of Appeal Criminal Appeal No. 122 of 1982** where the Court of Appeal expressed itself as hereunder:

> **"When the appeal opened before us, Mr Okoth for the appellant began submitting that as State Counsel did not support the conviction in the first appeal in the High Court, the State was in effect withdrawing the charge and the appeal should have been allowed. With respect, we do not agree. An appellate court is not in any way bound by the opinion of State Counsel as to the merits of an appeal."**

43. The trial commenced before **Y.A.Shikanda SRM** who took the evidence of PW1 to PW4. Upon the transfer of the learned magistrate the matter was taken over by **Hon Bartoo SRM** and the proceedings for 5th February, 2019 are as follows:

> **Prosecutor;- Matter is part heard. I pray for directions under section 200(3) of Criminal Procedure Code as Hon Shikanda is now on transfer.**
>
> **Accused;-I do not object to my case proceeding from where it had reached.**
>
> **Court;-Directions are given that matter proceeds from where it had reached under section 200(3) of Criminal Procedure Code. Summons to the Doctor are extended to the 2/4/19. Proceedings of Pw 1-Pw 4 be typed.**

44. Section 200 of the ***Criminal Procedure Code*** provides as hereunder:

> ***(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -***
>
> > ***(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or***
> >
> > ***(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.***
>
> ***(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.***
>
> ***(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.***
>
> ***(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.***

45. The said provisions were extensively dealt with by the *Court of Appeal in* ***Abdi Adan Mohamed vs. Republic [2017] eKLR*** *where it held that:*

> ***"As much as it is practically possible it is highly desirable that the trial magistrate or judge must hear the case to conclusion and ultimately render judgment as it is important for the final arbiter to be in a position to weigh the evidence taken together with his or her observation of the demeanour of witnesses. This was succinctly explained by this Court in Ndegwa v. R (1985) KLR 535 where Madan, (as he then was) Kneller and Nyarangi, JJ.A said that:-***
>
> ***'It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case in our opinion. .....for these reasons we have stated, in our view the trial was unsatisfactory.'***

***In other words Section 200, as was emphasised in Ndegwa (supra) will be resorted sparingly and only in cases where the exigencies of the case dictates. Even where the trial magistrate has been transferred, arrangements ought to be made for him or her to return to the former station to complete the trial, unless in cases where only a few witnesses had testified. In such a case the succeeding magistrate may continue with the trial from the stage it had reached. The provision can also be used where the evidence already recorded is more or less formal or largely uncontroverted.***

***.....***

***Section 200 envisages two situations in a trial that is incomplete at the time the trial magistrate ceases to exercise jurisdiction. The trial magistrate will have either recorded the whole or part of the evidence. Where judgment has been written and signed by the former magistrate, the succeeding magistrate is only required to deliver it. Where all the witnesses have been heard and the trial magistrate is transferred, no issue arises. The succeeding magistrate may act on the recorded evidence. But the succeeding magistrate may also recommence the trial and resummon witnesses. The transition of criminal cases from a magistrate or judge who has ceased to have jurisdiction to the one succeeding him or her remains a matter of concern.***

***Problems are normally encountered in the last scenario where the succeeding magistrate decides to adopt the evidence recorded by the predecessor or altogether recommence the trial. In that case the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right. As we have said earlier where only a handful of witnesses have testified or where the evidence so far recorded is not contested or is only formal in nature, the hearing need not start de novo. The re-summoning of a witness or witnesses and re-hearing of the case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demeanour and credibility of the particular witness or witnesses and to weigh their evidence accordingly. The learned Judges in Ndegwa (supra) emphasised that the court in applying the provisions of section 200 must ensure the accused person is not prejudiced. They said:***

***"…No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration…."***

***……***

***Section 200 therefore entrenches the accused person's rights to a fair trial as provided for today under Article 50(1) of the Constitution. It must, however be remembered that it is the demand by the accused persons to re-summon witnesses, in circumstances that make such demands impossible to grant, particularly in situations where the witnesses cannot be traced or are confirmed dead that has been the single-most challenge to trial courts. To ameliorate this, some of the considerations developed through practice to be borne in mind before invoking Section 200 include, whether it is convenient to commence the trial de novo, how far has the trial reached, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused. See Joseph Kamau Gichuki v. R CR. Appeal No. 523 of 2010, cited in Nyabutu & Another v. R, (2009) KLR 409, where the Court stressed that;***

***"By dint of section 200(1) (b) of the Criminal Procedure Code a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. See Ndegwa v. R. (1985) KLR 535. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started de novo. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded."***

***Was Section 34 aforesaid intended to supply the evidence envisaged by Section 200 so that upon a magistrate who succeeds another who has partly heard a case can rely on the earlier recorded evidence if it is demonstrated that the witness sought to be re-called for the reasons, among others that the witness is dead? Where, in the language of Section 200(3) the accused demands that any witness be "re-summoned and re-heard," the demand must be subject to availability of the witnesses sought to be re-summoned. It, of course, will be impractical where it is demonstrated that the witness sought to be re- summoned is deceased, to insist on calling such a witness. Similarly if a witness cannot be traced and it is demonstrated to the satisfaction of the court that efforts to trace him have failed, the magistrate or judge may adopt and rely on the evidence on record previously recorded by the outgoing magistrate or judge. That is why in demanding the re-summoning of any witness, the accused person must do so in good faith. The language of Section 34 is wide enough to encompass situations where the witness who had already testified is dead, or cannot be found, or is incapable of giving evidence, or is prevented by the accused person from attending court, or where his presence cannot be obtained without an amount of delay or expense which in all fairness would be unreasonable. In such a case the evidence recorded by the previous trial magistrate or judge is admissible in the trial by the succeeding magistrate or judge. To resort to previously recorded evidence under Section 34, the proceeding must be between the same parties as the previous proceeding and in criminal trial the parties are deemed to be the prosecutor and the accused person; the adverse party in the first proceeding had the right and opportunity to cross-examine the witnesses; and the questions in issue were substantially the same in the first as in the second proceeding.***

46. In the said case, the Court explained that:

***"We reiterate what the Court said in Ndegwa v. R. (supra) that the most sacrosanct individual in the system of our legal administration is the accused person. By reviewing his order without first hearing the appellant the magistrate erred and the appellant was thereby prejudiced. It ought to be remembered always that where an accused person demands for the recalling of a witness or witnesses who are said to be unavailable due to death, or cannot be found, or is incapable of giving evidence, or whose presence cannot be obtained without unreasonable or expense, the burden of proving these things is on the prosecution. At no stage did the prosecution avail evidence of which witnesses they were unable to avail and why. Throughout the issue for some time was that the availability of the prosecution. Towards the end, it was generally intimated that the investigating officer had difficulty in tracing some witnesses. What is more telling is the fact that even after the trial magistrate ordered that the trial would proceed from where the last magistrate stopped, the prosecution sought time to establish who in the list of witnesses had not testified. For the reason that the trial magistrate failed to establish why the witnesses could not be called and instead went ahead for review his own order without giving the appellant an opportunity to comment on the prosecution application, there was a mistrial. Though alive to the history of the trial, the learned Judges merely agreed with the course employed by the learned magistrate to adopt the evidence presented before his predecessor but erred for failing to interrogate whether there was any basis for the magistrate to do so without establishing why the witnesses were unavailable…As we conclude we think this appeal demonstrates quite clearly how Section 200 has been applied mechanically in disregard to the implications on the overall administration of justice, even in cases undeserving that ought to proceed without re-calling witnesses or those that should be completed by the outgoing magistrate, for example, in the matter before us, the trial that commenced in 2008 was not concluded until 2012, a period of 4 years due to transfers of trial magistrates...Trial courts ought to comply with the guidance given in the case of Ndegwa v. R [supra] that Section 200 should be used sparingly; that in cases where only a few witnesses have testified and are available, a new trial may be ordered.***

47. In this case, from the proceedings reproduced hereinabove, there is no indication that section 200 of the ***Criminal Procedure Code*** was strictly complied with as there is no indication that before the appellant made his option the said provision was explained to him. In my view section 200 of the ***Criminal Procedure Code*** is meant to advance, promote and give effect to the provisions of Article 50 of the Constitution.

48. In **Director Public Prosecutions vs. Peter Onyango Odongo & 2 Others [2018] eKLR**, the Court held that:

**"It should be noted Section 200(3) of C.P.C. gives an accused person an opportunity to demand to have any witnesses recalled. This Section makes it mandatory for succeeding Magistrate to inform the accused person of his right to have any of the witness recalled for cross-examination or to testify again. It should be noted it is not mandatory to recall the witnesses for either cross-examination or to give evidence as far as this section is concerned with but it is mandatory to explain the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity… In the case of R V. Wellington Lusiri [2014] eKLR the Court emphasized the need for succeeding Magistrate to continue with the proceedings under Section 200 by informing the accused of his rights. In my view Section 200 (3) of the Criminal Procedure Code protects the rights of the accused to a fair trial as guaranteed by the constitution under Article 50(2) of the constitution which states every accused person has the right to a fair trial, which includes other rights as set out thereunder."**

49. It is therefore clear that the failure on the part of the learned trial magistrate to comply with section 200 aforesaid was prejudicial to the rights of the Appellant.

50. Apart from that Article 50 (2) (g)(h) of the Constitution of Kenya 2010 on fair hearing, states that:

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

***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;***
***(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;***

51. The Constitution makes it mandatory for an accused to be promptly informed of this right before the trial commences.

52. In addition, the ***Legal Aid Act 2016***, section 43 on duties of the court when interacting with an unrepresented person states that:

***"A Court before which an unrepresented accused person is presented shall:***

***a) Promptly inform the accused of his or her right to legal representation;***

***b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and***

***c) Inform the service to provide legal aid to the accused person"***

53. In this case the said provisions were not complied with. In **Joseph Kiema Philip –vs- Republic [2019] eKLR** the court with regards to stated that:

**"The right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law. This fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus legal representation is a cardinal principle of fair trial. The criminal justice system in Kenya places the right to fair trial at a much higher pedestal, and in that respect and in the context of this matter; the accused is placed in somewhat advantageous position. Therefore,**

**legal representation is a fundamental constitutional dictate envisaged under article 50 of the Constitution of Kenya 2010…it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation…In this instance the appellant had been charged with defilement which attracts a serious sentence once convicted. From the record of the trial court, the appellant was not informed of his right to legal representation which rendered the trial unfair and led to a grave miscarriage of justice."**

54. Similarly, in *the case of* **Jared Onguti Nyantika vs. Republic [2019] eKLR**, it was stated that it is a fundamental issue in the trial process that an accused person be informed of his right to an advocate of his own choice, and the failure to facilitate it amounts to an injustice. It was emphasized that the accused person ought to be notified of that right at the earliest opportunity, and failure to inform of the right was a denial of a right to fair hearing. In the present case, the Appellant faced a long sentence in prison if convicted. In fact, the learned trial magistrate eventually convicted him and sentenced him to serve life sentence. We shall come to the issue of the sentence shortly. In ***David Njoroge Macharia vs. Republic*** **[2011] eKLR** and ***Karisa Chengo & 2 others vs. Republic*** **[2015] eKLR**, it was emphasized that;

**"one of the factors that makes it critical that the court must inform an accused person of the right to legal representation is the seriousness of the offence or the gravity of the sentence to be imposed upon conviction. The appellant herein faced a charge of defilement of a minor of fourteen, which attracted a penalty of minimum sentence of twenty years imprisonment. The charge was a very serious one, upon being found guilty the appellant faced a minimum of twenty years in jail, and he was indeed sentenced to that exact period. That being the case, the trail should have informed him of his right to legal representation and directed that he be provided with an advocate at state expense."**

55. I therefore, have no hesitation in finding, which I hereby do, that the Appellant's rights under the foregoing provisions were similarly violated and contravened.

56. *Section 216 of the* ***Criminal Procedure Code*** *provides that:*

***"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."***

57. *Section 329 of the* ***Criminal Procedure Code*** *provides:*

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

58. In this case, the trial magistrate before sentencing stated that;

**"I have perused the victim impact statement; the hands of court are tied and I proceed to sentence the accused to life imprisonment."**

59. In her judgment, trial magistrate only relied on the victim impact statement and failed to consider the appellant's mitigation.

60. The importance of mitigation was emphasised by the Court of Appeal in **Henry Katap Kipkeu vs. Republic [2009] eKLR** where the Court expressed itself as follows:

**"Before we conclude this judgment we must say something about the manner the learned Judge dealt with the sentence. We note that the learned Judge sentenced the appellant to death in his main judgment without recording mitigating factors, if any. This was not proper. As we have stated previously, after the judgment is read out and in case of a conviction, the court must taken down mitigating circumstances from the accused person before sentencing him/her. This obtains even in the cases where death penalty is mandatory and the reasons for this requirement are clear. Some of the reasons are first that when the matter goes to appeal as this matter has now come before us, there are chances that the appellate Court may reduce the offence to a lesser charge such as that of manslaughter, grievous harm or assault. In such circumstances, mitigating factors would become relevant in assessing the sentence to be awarded. Secondly, even if the matter does not come to this Court on appeal or if it comes to this Court and the appeal is dismissed, such mitigating factors would still be required when the matter is placed before another body for consideration of clemency. Thirdly, matters such as age, pregnancy in cases of women convicts, may well affect the sentence. It is thus necessary that mitigating factors be recorded even in capital offences. In *JOHN MUOKI MBATHA V. R. – Criminal Appeal No. 72 of 2007* (unreported) this Court stated:-**

***"As we have stated over and over again when considering sentences in respect of murder cases, the sentences should be reserved and pronounced only after mitigating factors are known. This is important because, in mitigation, matters such as age, and pregnancy in cases of women convicts, may affect the sentence even in cases where death sentence is mandatory. In our view, no sentence should be made part of the main judgment. Sentencing should be reserved and be pronounced only after the Court receives mitigating circumstances if any are offered."***

**In conclusion, we are of the view that apart from the error in sentencing the appellant in the main judgment we decipher no other error on the part of the learned Judge. He was right in convicting the appellant since, as we have already stated, the appellant's conviction was inevitable as it was based on very sound evidence. We agree with Mr. Omuletema that this appeal ought to be dismissed."**

61. In **Muruatetu & Another vs. Republic [2017] eKLR, Petition No. 15 of 2015, the Supreme Court** expressed itself as follows:

**"It is generally accepted that both the accused and the State have a right to address the court regarding the appropriate sentence. Although s 274 of the Criminal Procedure Act uses the word 'may' which may suggest that a sentencing court has a discretion whether to afford the parties the opportunity to address it on an appropriate sentence, a salutary judicial practice has developed over many years in terms whereof courts have accepted this to be a right which an accused can insist on and must be allowed to exercise. This is in keeping with the hallowed principle that in order to arrive at a fair and balanced sentence, it is essential that all facts relevant to the sentence be put before the sentencing court. The duty extends to a point where a sentencing court may be obliged, in the interests of justice, to enquire into circumstances, whether aggravating or mitigating which may influence the sentence which the court may impose. This is in line with the principle of a fair trial. It is therefore irregular for a sentencing officer to continue to sentence an accused person, without having offered the accused an opportunity to address the court or as in this case to vary conditions attached to the sentence without having invited the accused to address him on the critical question of whether such conditions ought to be varied or not. See *Commentary on the Criminal Procedure Act at 28-6D*."**

62. Clearly the failure by the learned trial magistrate to give the Appellant the opportunity to mitigate was a denial of his right to fair trial.

63. As regards the sentence, Section 8 of the ***Sexual Offences Act*** provides as follows:

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

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

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

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

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

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

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

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

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

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

64. That section states "***shall be liable to imprisonment for life"***. **Sir Henry Webb C.J.** in **Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64** had this to say on the proper construction of the words "**liable to**":

**"The wording used throughout the code is "*shall be liable to*" but a consideration of the various sections shows in our judgment, that the use of the words "*shall be liable to*" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."**

65. The predecessor of the court went further in **Opoya versus Uganda [1967] EA 752** at page 754 where **Sir Clement DeLestang V.P**. picked up the conversation *inter alia* thus:

**"It seems to us beyond argument that the words "*shall be liable to*" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."**

66. A similar position was adopted in **D W M vs. Republic** (supra) where the Court held that:

**"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "*Shall be liable to imprisonment for life*" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed**

**it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."**

67. That the life sentence is not mandatory appears from the sentence meted in **Tito Kariuki Ngugi vs. Republic [2008] eKLR** where the Court held that:

> **"The appeal against sentence has also no merit. The Appellant defiled his own daughter and caused her trauma which she will have to live with for the rest of her life. The 20 years he was given against life imprisonment provided for by the section under which he was charged cannot in the circumstances of this case be said to be harsh."**

68. Therefore, bearing the totality of the above principles in mind, it is my view that the use of the words "***shall be liable to imprisonment for life***" in section 20(1) of the ***Sexual Offences Act*** gives room for the exercise of judicial discretion. The court below fell into error when it took the words "***liable to***" to mean that only the maximum sentence could be meted out against the appellant. In **Shadrack Kipchoge Kogo vs. Republic Eldoret Criminal Appeal No. 253 of 2003** the Court had this to say:-

> **"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.**

69. Accordingly, the Learned Trial Magistrate applied a wrong principle in her decision on sentencing and hence imposed a sentence that was so harsh that an error of principle must be inferred.

70. In her judgement the learned trial magistrate expressed herself as hereunder:

> **"The Complainant knew the accused well, he was his father, the accused claimed that charges were as a result of a family dispute. The doctors evidence was sufficient. Though this court could not see the demeanor of the victim, there is no reason as to why he could lie to court. Furthermore, the victim was cross-examined in court and was steady in his evidence."**

71. It is not in doubt that the evidence of a minor requires corroboration and in this regard the Court of Appeal in **Bernard Kebiba vs. Republic [2000] eKLR** stated that:

> **"The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result."**

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

> **"The relevant law in Kenya is succinctly set out in Chila vs. The Republic (1967) EA 722 at page 723:**
>
> **'The law of East Africa on corroboration in sexual cases is as follows: the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that here evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.'**
>
> **The decision was applied in Margaret v the Republic (1967) Kenya LR 267. In view of Consolata's evidence, it was necessary for sexual intercourse to be proved by establishing penetration: Halisbury's Statutes of England, Third Edition, Volume 8 page 440 para 44. Be that as it may, the trial magistrate did not warn himself as we have already held. That was a grave misdirection. In the absence of such a warning, the convictions for rape are not for sustaining unless we are satisfied that Consolata's evidence is true. We are not so satisfied and so the convictions cannot stand: Rv Cherap arap Kinei & Another (1936), 3 EACA 124."**

73. I also agree with the opinion of the Court of Appeal in **Moses Kamau Waweru vs. Republic [1988] eKLR** where it expressed itself as hereunder:

> **"In the same authority cited to us, *Kibozo v Uganda* the Court of Appeal for Eastern Africa confirmed the trial judge's finding based on the authorities of *R v Zieliski* (1950) 34 Cr App R 193 and *R v Alan Redpath* (1962) 45 Cr App R 319 to the effect that in sexual offences the distressed condition of the complainant's evidence, but that this would depend upon the circumstances of the case and the evidence. "It seems to this court that the distressed condition of a complainant is quite clearly capable of amounting to corroboration of course, the circumstances will vary enormously, and in some circumstances quite clearly no weight, or little weight, could be attached to such evidence as corroboration. Thus, if a girl goes in distressed condition to her mother and makes a complaint, while the mother's evidence as to the girl's condition may in law be capable**

**of amounting to corroboration, quite clearly the jury should be told that they should attach little, if any weight to that evidence, because it is all part and parcel of the complainant. The girl making it might well put on an act and simulate distress.""**

74. In this case the learned trial magistrate did not rely on corroboration. In sexual offences, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the ***Evidence Act*** makes this quite clear:

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

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

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

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

> **"On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of section 124 of the Evidence Act…The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful…It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)…In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:**
>
> ***"…The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."***
>
> **The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail."**

77. Therefore, what is required of the trial court is to be satisfied that the victim is telling the truth. It was therefore held in **Omuroni vs. Republic (2002) 2 EA 508** that:

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

78. This decision was relied upon by **Warsame, J** (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR** when he stated that:

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

79. In this case the learned trial magistrate did not make a specific finding under section 124 of the ***Evidence Act***. Accordingly, this court cannot state with certainty what the Court would have decided had it addressed that issue.

80. The Appellant in his evidence stated that there was a grudge between him and PW1. Though that evidence was given on oath, the

Appellant was not cross-examined on his evidence at all. In **Macharia vs. Republic [1976] KLR 209**, **Kneller & Platt, JJ** stated that.

> **"Neither of the appellants' statements on oath was tested in cross-examination, which means that the Republic did not challenge it. The magistrate did not touch on this. He did not accept it as true or have any reasonable doubt that it was untrue. We are satisfied that the prosecutor before the magistrate forgot, or did not know, that if the defendant elects to make a statement on oath in his defence he is to be cross-examined on it if it is different from the case for the prosecution and the court may believe the defence or declare that it raises reasonable doubt if it is not so challenged. The unchallenged evidence of each appellant was, however, in the circumstances, clearly untrue and could not raise any doubt about the truth of the girls' stories in view of all the evidence as a whole, including that of the policeman who caught them all in twos in two separate coaches in a railway siding, the reports by the doctor and the analyst, and that of the mothers of the two girls. The failure by the prosecutor to cross-examine and challenge the appellants' denials on oath in this case is not fatal to the conviction. We hope, in future, that the magistrates will ask a prosecutor who does not cross-examine a defendant on his sworn defence statement, if it is different in any material respect from the prosecution case, whether or not the prosecutor's instructions are that the defence is, or might be, true and exculpatory; and if the prosecutor says that they are not so, the magistrate should advise him to cross-examine and challenge it. The defendant has selected this way of making his defence knowing that he might be challenged with searching questions from the prosecutor designed to reveal to the court whether or not the defence is true or results in the prosecution's case failure to prove beyond reasonable doubt the defendant guilty of the offence charged or any other one open to it on the relevant facts adduced and the law."**

81. The learned authors, **W A Joubert et al, in, "LAWSA", 2 ed. Vol. 5, Part 2, para 306,** state:

> **"The defence case must be put to the relevant witnesses. Failure to cross-examine leaves the evidence of the relevant witness unattacked, but the court will not for that reason necessarily accept it. Not too drastic an inference should be drawn from failure to cross-examine. It could be due to ignorance or inexperience. Failure by the prosecutor to cross-examine could, however, lead to an acquittal."**

82. In her judgement, the learned trial magistrate did not deal with the accused's defence at all. In **Ayub Muchele vs. The Republic [1980] KLR 44**, **Trevelyan and Sachdeva, JJ** held that:

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

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

> **"The appellant also claimed that the complaint was made as a result of grudge between the complainant and the appellant's father over a piece of land that was in dispute between the two. The learned trial Magistrate did not consider this defence and never made any finding on it. The superior court dismissed it stating that the issue was introduced by the appellant late and was not afforded an opportunity to be tested and countered.**
>
> **…….**
>
> **The court ended its observation by saying that the trial Magistrate must have seen the issue was of no probative value. It did not make any decision on the issue and in our humble opinion, abdicated its role of analysing that evidence (considering that the appellant was unrepresented, and that the appellant was facing a serious charge which carried death sentence) and making its own conclusion on the same. As it stands, all that the superior court did was to state that the matter was introduced late and as there was no opportunity to cross examine on it, the trial court found it was not of probative value. That evidence was on record and deserved to be fully considered and either dismissed or accepted."**

84. Had the Learned Trial Magistrate considered the Appellant's defence, this Court cannot state with certainty that she would have arrived at the same decision.

85. Apart from the defence, there was some inconsistency in the evidence of the prosecution as rightly pointed out by the Respondent. In her judgement the learned trial magistrate did not reconcile the same. In this regard the appellants relied on **Onubugu vs. State 119741 9 S.C.1 Kem vs. State (1985)1 NWLR** where the court was of the opinion that**:-**

> **"Where prosecution witnesses have given conflicting version of material facts in issue, the trial judge by whom such evidence is led must make specific findings on the point and in so doing must give reasons for rejecting one version and accepting the other. Unless this is done, it will be unsafe for the court to rely on any of the evidence before it."**

86. Having considered the foregoing, I agree with both the Appellant and the Respondent that it would be unsafe to sustain the conviction of the Appellant.

87. In the circumstances, I allow the appeal, set aside the appellant's conviction, quash his sentence and set him at liberty forthwith unless he is otherwise lawfully held.

88. It is so ordered.

89. This Judgement is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic.

**Judgement read, signed and delivered in open Court at Machakos this 28th day of October, 2020.**

**G. V. ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Muema for Mr Kamollo for the Appellant**

**Mr Ngetich for the Respondent**

**CA Geoffrey**