REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 92 OF 2017

RAPHAEL MUTUNGA MUTINDA.....APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case 1299 of 2013, C. K. Kisiangani, RM on 21st December, 2017)

REPUBLIC...PROSECUTOR

VERSUS

RAPHAEL MUTUNGA MUTINDA........ACCUSED

JUDGEMENT

1. The appellant, **Raphael Mutunga Mutinda**, was charged before the Chief Magistrate's Court at Machakos in Criminal Case 1299 of 2013 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 were that the appellant on the 25th day of October, 2013 in Machakos Town within Machakos County intentionally caused his penis to penetrate the vagina of **BMK**, a girl aged 14 years. Alternatively, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, he unlawfully and intentionally caused his penis to touch the vagina of **BMK**, a girl aged 14 years.

2. Upon being found guilty, the appellant was convicted of the alternative charge of committing an indecent act with a child and was sentenced to 10 years in prison. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

> **1) That the trial court erred both in law and in fact by convicting the appellant on the alternative count on the basis of evidence which the court had already impugned.**
>
> **2) The trial court erred both in of law and fact by convicting the appellant on contradictory and doubtful evidence.**
>
> **3) The trial court erred both in of law and fact by convicting the appellant when the alternative count had not been proved beyond reasonable doubt.**
>
> **4) The appellant's constitutional rights to a fair trial were violated when the trial court proceeded to hear PW1 and PW2 in the absence of the Appellant's Counsel who was still on record and whose services had not been terminated by the Appellant.**

3. In support of the prosecution's case the prosecution called 4 witnesses.

4. The first witness was the complainant in this case. After voir dire examination, she was sworn in and testified that she was 14 years old in class 7. According to her she knew the appellant who was working at a car wash near a *kinyozi* that the complainant used to go to. The complainant's mother also used to work in a lodging near the car wash hence the complainant knew the appellant well.

5. On 25th October, 2013 at 5pm when the complainant was leaving school for home, she was called by the appellant who told her to go for a success card in the evening. After changing her uniform, the complaint in the company of her brother went to a shed and then proceeded to the car wash but the appellant was not there. She however waited for him till he turned up and told the complainant to follow him to a store near the car wash used for keeping the machine for washing the cars. Once inside the appellant closed the door, forcefully removed the complainant's clothes, forced her to lie down since there was no bed, held her tightly, and inserted his penis in her vagina. As a result, she did not scream. According to the complainant she felt something pouring on her. After that the complainant put on her clothes and was escorted by the appellant through the back door and proceeded to her mother's stall nearby which was separated from the store by a road. When she went to the stall she found her mother and brother there and though she did not immediately disclose what had happened to her, she eventually the same day and was beaten by her mother. It was her evidence that the appellant had threatened her not to disclose the same. She was then taken to the Machakos general Hospital and the matter reported to the police where she was provided with P3 form. She identified the P3 form, Post Rape Form and her Birth Certificate.

6. According to the complainant the store was behind the bar and though there was a bar attendant in the bar, he did not see them going to the store.

7. The accused however did not cross-examine the complainant despite being asked to confirm whether he had any questions.

8. PW2, **MN**, was the mother of the complainant. According to her the, the complainant was born in 1997. On 26th October, 2013, at around 7 pm she went to her Kiosk at Cool Pub where she was selling vegetables and found her two children, the complainant and another one who had opened the kiosk and joined them. She then saw someone buying vegetables and called the complainant to give her the vegetables. She however realised that the complainant was not there when she wanted her to go to the house to get her some water. The complainant returned at around 8.30 pm through the back gate and found PW2 at the kiosk and upon being asked where she was, the complainant informed her that she had been at the car wash where the appellant had told her to go back for a success card.

9. After beating the complainant, PW2 then left with the complainant back to the car wash, which was near her place of work, where the appellant confirmed that he had been with the complainant. At this point she noticed that the complainant was scared and had had soil on her head. Upon inquiring where the soil came from, the complainant informed her that the appellant had forced her to lie on the floor. The complainant then revealed to her that she had been defiled.

10. PW2 then took the complainant to Machakso Level 5 Hospital that evening and they were given a P3 form.

11. Once again the appellant did not cross-examine this witness.

12. PW3, **Dr John Mutunga**, testified on behalf of **Dr Bargwasi**, who filled in the p3 form but who had since left Machakos Level 5 Hospital and was in private practice though his whereabouts were unknown. According to PW3, he was familiar with **Dr Bargwasi's** handwriting and signature. He was also in possession of the Post Rape Care Form. According to PW3, The P3 form was filled on 31st October, 2013 and it was in respect of the complainant who was aged 14. It was alleged that the complainant was sexually assaulted by a known person. Upon examination, no external injuries were noticed. On external genitalia there were no obvious injuries. However, the hymen was broken but no discharge was noted. The witness proceeded to produce both the P3 form and the Post Rape Care Form as exhibits.

13. In cross-, PW3 testified that no abnormality was detected in Part B and that the age of the injury was not stated. However, the rapture of the hymen was noted. PW3 could however not confirm if the complainant was sexually abused since in section B paragraph 3 stated that the probable weapon not applicable. He however stated that a male sexual organ is a blunt object. From the history, he however testified that the injuries sustained by indicate sexual abuse. According to him if there is forceful penetration, injuries ought to be observed on the external genitalia which is the vagina – *labia majora* and *minora* and the hymen. In this case, no injuries were observed. He could not therefore tell what caused the rapture of the hymen.

14. He however testified that sperms last 72 hours in the vagina. In this case since the assault was on 25th October, 2013 while the examination was on 31st October, 2013, it could not be detected.

15. According to the witness, in 2013 the approximate age of the complainant was 14 years. However, in the PRC Form it was indicated that she was born on 27/11/98 meaning that she was 15 years old. The age was however an estimate which could be higher or lower than the real age of the complainant. The Birth Certificate however indicated her date of birth as 15/9/93 hence in 2013, the complainant would have been 16 years.

16. PW4. **PC Ibrahim Gedi**, was on 26th October, 2013 assigned to investigate the case which occurred on 25th October, 2013. According to him, the victim was sent to the Hospital for treatment. He was informed by the complainant that she was working next to her mother's grocery when she was tricked by the appellant into defiling her. After that the appellant disappeared and only reappeared on 1/11/13 when he was arrested and charged with the offence. According to him, the incident took place at around 5pm though there were no eye witnesses. He confirmed the age of the complainant as 14 years at the time of the incident. He then produced the Birth Certificate as exhibit.

17. At the close of the prosecution case, the appellant was placed on his defence and he opted to give an unsworn statement and had no witness to call. In his defence, the appellant stated that he was working for Safaricom in Voi. He however denied the charge since no one saw him enter the kiosk. It was his case that the evidence was a lie and that he did not commit the offence.

18. In her judgement the Learned Trial Magistrate found that the complainant was aged 16 years at the time of the offence based on the birth certificate. As regards penetration, the learned trial magistrate found that since there were no injuries on the external genitalia, and in the absence of the evidence that the hymen was freshly broken despite the PRC Form having been filled the same day of the incident, the court found that the medical evidence did not corroborate that of the complainant hence the prosecution failed to prove penetration. As a result, the learned trial magistrate did not deal with the issue whether or not it was the accused who penetrated the complainant. She proceeded to

dismiss count I.

19. As regards the alternative charge the court found that from the evidence there was evidence that the body of the complainant and the appellant were in contact and that the appellant inserted his penis into the complainant's vagina. The court also found that the complainant could not have mistaken the appellant since the appellant worked in a car wash near her mother's place of work and that the appellant had talked to her when she was coming from school around 5 pm. Later she also talked to him and she described the scene of the incident which took place during daylight. The Court therefore found that the genital organs of the appellant and the complainant were in contact. Accordingly, the court found the complainant a truthful witness since her evidence was consistent and clear. It was on this basis that the appellant was convicted.

20. In this appeal, it was submitted by **Mr Ngolya**, learned counsel for the appellant that the age of the complainant was not proved as required by law since the evidence on record gave various ages. Having found that all the three ingredients of the offence of defilement were not proved, it was submitted that the trial court ought to have acquitted the appellant on the alternative charge as well.

21. It was submitted that the learned trial magistrate having impugned the evidence of the accused genital organs coming into contact with that of the complainant, the learned trial magistrate used the wrong scale of justice to weigh the evidence of the defence and the prosecution.

22. On behalf of the Respondent it was submitted that in light of clear evidence that the appellant did insert his penis either partially or completely into the vagina of the complainant, the trial court was correct in drawing the conclusion that the prosecution case pointed at the alternative charge. It was submitted that the evidence of the appellant was a mere denial that did not shake the prosecution evidence. It was submitted by **Miss Mogoi**, learned counsel for the prosecution/respondent that the age of the complainant was proved by the birth certificate. It was therefore submitted that the learned trial magistrate analysed the prosecution and defence evidence and was satisfied that the appellant committed the alternative charge and the said decision ought to be upheld.

<u>Determination</u>

23. 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 **<u>Okeno vs. Republic [1972] EA 32</u>** 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."**

24. Similarly, in **<u>Kiilu & Another vs. Republic [2005]1 KLR 174</u>,** 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.**

25. 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.

26. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013,** where it was stated that:

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

27. In the case of **Kaingu Elias Kasomo vs. Republic** Malindi the Court of Appeal in criminal appeal No. 504 of 2010 stated as follows:

"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

28. The importance of proving the age of the complainant in sexual offences was emphasized in **Alfayo Gombe Okello vs. Republic (2010) eKLR** where the Court stated that:

"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)…proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."

29. In **Dominic Kibet vs. Republic Criminal Appeal No. 155 of 2011** it was held that:

"…while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."

30. In this case, it is true that there was contradiction between oral evidence and documentary evidence regarding the age of the complainant, there was evidence both orally and documentary that the complainant was aged 9 years at the time of the commission of the offence. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

31. In **Chipala vs. Rep. [1993] 16 (2) MLR 498** the Malawian High Court held at 499 that:

"It seems to me that other than a certificate of a medical practitioner, or his oral testimony, to the effect that, in his opinion, such a person has or has not attained a specified age, or other documentary proof, or the testimony of a person who has personal knowledge gained at the time of such person's birth, such as parents, no other evidence is receivable as proof of the age of such a person."

32. In this case in light of the contradictions in the evidence relating to the age of the complainant the learned trial magistrate was justified in taking the age most favourable to the appellant as the age of the complainant. However, the decision to do so did not prejudice the appellant in any way. I therefore find that the learned trial magistrate's finding that the complainant was 16 years at the time of the offence cannot be faulted.

33. As regards penetration, it is clear that the evidence was inconclusive. The medical evidence did not support the allegation of penetration. Section 2 of the ***Sexual Offences Act*** defines "penetration" as:

the partial or complete insertion of the genital organs of a person into the genital organs of another person.

34. Therefore, for the offence of defilement to be proved evidence must show that the appellant inserted his penis into the vagina of the complainant. It is not sufficient that the said organs came into contact. However partial insertion suffices for the purposes of penetration as the said insertion need not be complete.

35. In this case there was evidence that the genitals of the complainant came into contact with those of the appellant. What was not clear was

whether the appellant did in fact insert his penis into the complainant's vagina since the evidence did not show that the broken hymen was fresh and there were no injuries on the external genitalia of the complainant. Nevertheless, for the purposes of the alternative charge, it does not matter whether in doing so, the appellant used his penis or any part of his body. I therefore agree with the learned trial magistrate's finding that penetration was not proved.

36. As the law requires that all the three ingredients of defilement be proved beyond reasonable doubt, the learned trial magistrate was justified in not convicting the appellant of the offence of defilement.

37. As was held by the Court of Appeal with respect to heavy minimum sentences in the case of **Hamisi Bakari & Another vs. Republic [1987] eKLR**:

> **"We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear."**

38. Section 2 of the ***Sexual Offences Act*** provides inter alia as follows:

> ***"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;***

39. Section 11(1) of the ***Sexual Offences Act*** 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.***

40. What the said section provides for is a prima facie mandatory minimum sentence. However, in the current constitutional dispensation the constitutionality of such sentences is highly doubtful since in my view they do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances. Whereas the Court is given the leeway to impose any sentence over and above the minimum sentence, the section like any other sections prescribing for minimum sentences does not permit the Court the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates. This is my understanding of the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic**, **Petition No. 15 of 2015,** where it expressed itself as hereunder:

> **"47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.**
>
> **[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.**
>
> **[49] With regard to murder convicts, mitigation is an important facet of fair trial. In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.**
>
> **[50] We consider *Reyes* and *Woodson* persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.**
>
> **[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.**
>
> **[52] We are in agreement and affirm the Court of Appeal decision in *Mutiso* that whilst the Constitution recognizes the death**

penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in *Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."

41. Similarly, in **S vs. Mchunu and Another (AR24/11) [2012] ZAKZPHC 6** Kwa Zulu Natal High Court held that:

"It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35:

'Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.'

The judgment continues:

'. . . [i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.'

42. The Courts have always frowned on mandatory sentences that place a limitation judicial discretion. In **S vs. Toms 1990 (2) SA 802 (A) at 806(h)-807(b),** the South African Court of Appeal (**Corbett, CJ)** held that:

"the infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant."

43. In **S vs. Mofokeng 1999(1) SACR 502 (W) at 506 (d)**, **Stegmann, J** opined that:

"For the Legislature to have imposed minimum sentences severely curtailing the discretion of the Courts, offends against the fundamental constitutional principles of separation of powers of the Legislature and the Judiciary. It tends to undermine the independence of the courts and to make them mere cat's paws for the implementation by the legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases."

44. Also in **S vs. Jansen 1999 (2) SACR 368 (C) at 373 (g)-(h), Davis, J** held that:

"mandatory minimum sentences disregard all individual characteristics and each case is treated in a factual vacuum, leaving no room for an examination of the prospect of rehabilitation and of the incarceration method to be adopted. Such a system can result in a gross disregard of the right to dignity of the accused."

45. In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences. My view is in fact supported by the ***Kenya Judiciary Sentencing Policy Guidelines*** where it is appreciated that:

Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.

46. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in **S vs. Malgas 2001 (2) SA 1222 SCA 1235** paragraph 25 as follows:

"What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."

47. Whereas I appreciate that there is a view held by some jurists that in minimum mandatory sentences the Court has no discretion, in our case clause 7 of the ***Transitional and Consequential Provisions*** provide as follows:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with conformity with this Constitution.

48. Therefore, the provisions of a legislation that was in force before the Constitution of Kenya, 2010 such as the ***Sexual Offences Act, No. 3 of 2006*** must be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences to not take into account the dignity of the individuals as mandated under Article 28 of the Constitution as appreciated in the ***Muruatetu Case***.

49. Having said that in this appeal, the complainant was 16 years old. While I appreciate the fact that where the law provides that a person is, as a result of his or her vulnerability incapable of giving a consent, it is no defence to state that the person did actually consent, the circumstances of the offence must be considered when it comes to sentencing. The Court of Appeal in **Thomas Mwambu Wenyi vs. Republic [2017] eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira vs. State of Maharashtra** at paragraphs 70-71 where it was held on sentencing that: -

> **"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."**

50. In this case however, while meting out the sentence, the trial court expressed itself as hereunder:

> **"I have considered the nature of the offence which is rampant and therefore the need for a deterrent sentence. I have also considered the mitigation and the fact that the accused is a first offender. Even though I sympathise with accused, this offence bears a minimum sentence of 10 years. Therefore, the accused is hereby sentenced to serve 10 (ten) years imprisonment."**

51. Therefore, apart from the issue of the said rampancy of the crime, the decision to mete out the said sentence was due to the fact that the hands of the learned trial magistrate were tied by the apparent mandatory minimum sentence. In this case, the appellant's age was regrettably not disclosed. It was however submitted that he was married with a wife and two children aged 8 and 4 years, was remorseful and was a first offender.

52. This court is aware that following the decision in ***Muruatetu Case,*** some of the capital convicts have had their sentences reduced from death to even 15 years.

53. In this case while appreciating the gravity of sexual offences and their effect on the victims thereof, it is my view that the justice of this case would be better served by sentencing the appellant to 5 years. This does not mean that in appropriate cases sexual offenders cannot be sentenced to 10 years or even more. It is simply that each case must be considered on its peculiar circumstances.

54. In the premises while I find the conviction of the appellant on the alternative charge safe and ought not to be disturbed, I quash the sentence of ten (10) imposed on him and substitute therefore 5 years which sentence will take into account the period already served.

55. Right of appeal 14 days.

56. Judgement accordingly.

Judgement read, signed and delivered in open court at Machakos this 25th day of February, 2019.

G V ODUNGA

JUDGE

In the presence of:

Mr Ngolys for the appellant

Miss Mogoi for the Respondent

CA Josephine