



**REPUBLIC OF KENYA**

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

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CRIMINAL APPEAL NO. 118 OF 2017**

**BETWEEN**

**JOHN NJUGUNA MBURU.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the conviction and sentence of Honourable L Kassan- SPM dated 6<sup>th</sup> November, 2017 in Mavoko SO No. 6 of 2017)*

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOHN NJUGUNA MBURU.....ACCUSED**

**JUDGEMENT**

1. The appellant, **John Njuguna Mburu**, was charged before Mavoko PM's Court in S. O. 6 of 2015 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 diverse dates between August 2014 and January, 2015 in Athi River District within Machakos County, the appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of **CB**, a girl aged 9 years. He was alternatively charged with the offence of indecent act contrary to section 11(1) of the same Act the particulars being that during the same period in the same area, the appellant intentionally and unlawfully caused his male genital organ (penis) to come into contact with the female genital organ (vagina) of **CB**, a girl aged 9 years.

2. After hearing, the Learned Trial Magistrate found the complainant was defiled as supported by the medical evidence adduced and that the person who defiled the complainant was the appellant. Accordingly, he convicted the appellant and sentenced to life imprisonment.

3. Being dissatisfied with the conviction and sentence the appellant now appeals to this court relying on the following grounds:

**1. THAT the Learned Trial Magistrate erred in law and fact in finding that penetration was proved beyond reasonable doubt when there was no sufficient evidence to establish it.**

**2. THAT the Learned Trial Magistrate erred in law and fact in convicting the appellant solely on the basis of the Complainant's testimony when there was evidence that she was of doubtful character.**

**3. THAT the Learned Trial Magistrate erred in law and in fact in shifting the burden of proof to the appellant.**

**4. THAT the Learned Trial Magistrate erred in law and in fact in ignoring the evidence of the appellant and his four witnesses.**

**5. THAT the Learned Trial Magistrate erred in law in denying the appellant an opportunity to mitigate before imposing the**

sentence.

**6. THAT the Learned Trial Magistrate erred in law and fact in finding and believing the allegation that the appellant would lure the complainant with money and sweets, shoes and new textbooks purportedly bought with the money not produced as exhibits.**

**7. THAT the Learned Trial Magistrate erred in law and fact in relying on speculations and irrelevant considerations to find the appellant guilty.**

**8. THAT the Learned Trial Magistrate erred in law and in fact in finding the complainant's frequent visits to the toilet was evidence of penetration when there was no expert opinion on that and when the evidence of frequently visiting the toilet was itself very weak.**

**9. THAT the Learned Trial Magistrate erred in law and in fact in finding that the complainant had been threatened by the appellant without any evidence to support that finding.**

**10. THAT the Learned Trial Magistrate erred in law and in fact in finding that there was no evidence to show that the complainant had stolen Kshs 2,600.00 from DW3, when the complainant herself admitted it in her testimony.**

**11. THAT the conviction was entirely against the weight of evidence.**

4. At the *de novo* hearing of the case following the transfer of the initial Magistrate, the prosecution called seven witnesses.

5. PW1, the complainant's evidence was that one Saturday in 2015 the appellant called her to his house at about 4.00pm and laid her on a seat, removed her panty and did bad manners to her by pushing his thing into hers and told her not to disclose the same to anyone then gave her 10.00 and 20.00 and crunchy to eat. According to the complaint, she felt pain. The following Monday she disclosed the same to her teacher, PW3 who took her to the school dispensary. After her father was called, she was taken to Athi River Hospital, the same day.

6. According to the complainant they her just moved into the area and the appellant was their neighbour and she had seen the appellant many times before the day of the incident though she had not spoken to him. It was however her evidence that prior to this day, she had in the company of her friends gone to the appellant's house where they found the appellant with his wife, DW4 and his daughter, DW5, the appellant gave them sweets but on that day the appellant did nothing to her. She however testified that the said incident was not the first time the appellant did the same to her though she could not recall the occasions but on those occasions, the appellant gave her sweets thereafter. Though the appellant lived with his wife and 2 children, the complainant testified that on that Saturday, the appellant was alone.

7. In cross-examination she disclosed that she used to assist one DW3, a neighbour to baby-sit and that the said lady alleged that she stole her money. She admitted that in her earlier evidence she admitted having stolen money from the said lady to buy a book. She testified that upon a complainant by a teacher that she was buying bytes for other children, she was called by PW3 who interrogated her.

8. In re-examination she disclosed that the appellant defiled her on Saturdays and during the school holidays. According to her on some occasions the appellant's family members were there while on other occasions they were not.

9. PW2, **DI**, the complainant's father testified that the complaint was 10 years old at the time of his testimony and produced her birth certificate showing that she was born on 16<sup>th</sup> April, 2005. According to him on 5<sup>th</sup> February, 2015 at 6.00 pm he was in his house when he got a letter from the complainant's school urging him to urgently see the head teacher which he did the following day. On the said day, he met the head teacher, PW3 who informed him that the complainant had been seen on several occasions with crams and a new text book which she shared with other children. Upon interrogation the complainant disclosed that she had been defiled by the appellant who gave her the said items after which the complainant was taken to a dispensary where her allegations were confirmed. Thereafter, the complainant was taken to Mavoko Health Centre. According to PW2, the complainant's mother passed away a year before. When PW2 asked the complainant, the complainant informed him that the defilement occurred mostly on Saturdays and that the appellant used to call her to his house and defile her.

10. After taking the complainant to Mavoko Health Centre, PW2 reported the matter at Athi River Police Station where he recorded his statement and later the doctor confirmed that the complainant had been infected with STI. He was told to buy drugs and was issued with a duly filled P3 form. He identified both the P3 form and the PRC Form. According to PW2, the complainant had no cases of indiscipline and before he discovered the incident, the complainant had informed him that she had chest pains in January, 2015 but PW2 did not suspect anything and apart from buying her drugs did not take her to the Hospital.

11. According to PW2, he did not know the appellant who moved into the neighbourhood in August, 2014 though he was informed by the complainant that she knew him by appearance and location of his house. Based on the information given by the complainant, PW2 alerted the police and the appellant was arrested.

12. PW3, **JN**, was at the time of the incident the complainant's school head teacher. On 5<sup>th</sup> February, 2015 a teacher by the name **S** informed him that the complainant was in the habit of buying other children snacks against the school rules. Upon calling the complainant, the complainant stated that she had picked the money on her way from church. Upon further interrogation, the complainant divulged that she was given the money by the appellant who was defiling her. PW3 then instructed another teacher, **Mrs M** to take the complainant to a nearby clinic after which he called the complainant's father and informed him of what had transpired and advised him to take the complainant to Athi River Health Centre. In his evidence, the complainant was bright and respectful.

13. In cross-examination, PW3 stated that at first the complainant stated that she had been given 1,000.00 but later stated that she was given 2,000.00. In his evidence the snacks that were obtained from the complainant were given to other children though he never saw the textbooks. He however admitted that he did not trust the complainant at first. He however noticed that the complainant would go to the loo many times during the day which was unusual.
14. PW4, **Syego**, was the clinical officer who examined the complainant. According to him the complainant was 9 years at the time of examination on 5<sup>th</sup> February, 2015. Upon examination he noticed that there were no tears though the hymen was missing. Her genitalia were no normal with no blood though there was discharge. He then referred her to Athi River since they did not have enough medicine. According to him there had been penetration. In his evidence, he could not tell the age of the injuries which were not fresh. It was his opinion that the discharge could be due to UTI which can be caused by sex or latrine. In his evident hymen can be broken by penetration or other factors such as injuries or cycling though this is not very common. However, a finger can also break it.
15. PW5, **Maurine Martha**, a clinical officer based at Athi River Health Centre examined the complainant on 6<sup>th</sup> February, 2015. According to her the complainant was 9 years old and upon examination she found that the complainant had foul smell, her hymen was missing though she had no fresh. According to her for a child the age of the complainant the infection is common.
16. Based on the history she stated that the examination was a week after the incident hence it was too late to check for spermatozoa. She also confirmed that hymen can be broken by penetration or other causes. Her evidence was supported by PW6, **Mume Musembi**, a clinical officer at the same hospital who produced the P3 form.
17. The investigating officer, **PC Sofia Mumbwoni**, PW7, testified that on 6<sup>th</sup> February, 2015, a report was made at Athi River Police Station by PW2 about the defilement of her daughter, a child aged 9 years. By the time of the said report, the complainant had been examined at the school clinic. PW7 then took the complainant to Mavoko Health Centre and recorded her statement in which the complainant disclosed, upon interrogation, that she had been defiled several times by the appellant. On 14<sup>th</sup> February, 2015 she was led by the complainant to the appellant's house where she found the appellant sleeping and he was arrested. She testified that the offence was discovered when the complainant was buying sweets for other students. The complainant however did not inform her that she picked the money from a church compound or that she had stolen the money from DW3.
18. According to PW7, from her visit to the appellant's house, if one screams in the house, a neighbour could hear though the complainant informed her that the appellant threatened her not to scream.
19. Upon being placed on his defence, the appellant who testified as DW1 stated that he came to know the complainant between October and November, 2014 but just used to see her after they went to live with DW3 as she used to baby sit. According to him, the complainant never used to go to his house as he did not have a small child. According to him the charge was fabricated. He disclosed that he had complained about theft and upon asking the children including the complainant and her brother, they stated that the stolen items had been taken by the complainant's brother, A who admitted to have taken some of the said items. After he slapped the boy, the boy threatened to report to his father. According to him, since the houses were small and had no ceiling screams could be heard nearby.
20. According to him, he was living with his wife who was working for the school from Monday to Friday but was always home on Saturdays while his daughter was a student at NRB College where she used to go on Mondays to Fridays. According to him he never committed the offence and stated that the complainant's father demanded Kshs 200,000.00 from him which he declined to give.
21. In cross-examination he disclosed that sometimes he would get days off though he used to work most Saturdays and that between August 2014 and January, 2015 he was working on Saturdays. According to his evidence, he used to see the complainant though he did not know her father as they were new tenants.
22. The appellant called **Loise Nyambura Waguru**, a neighbour, as his witness who testified as DW2. She confirmed that the houses they occupied did not have ceiling hence one could hear if people were quarrelling as she used to hear those between the appellant and his wife. She however confirmed that the complainant used to visit the appellant's house in company of other children. She however never heard the complainant screaming from the appellant's house though she was always home during weekends.
23. DW3, **Lilian Wangui**, testified that she was a daughter to the landlady and that the said houses had no ceiling hence if one screamed, the same could be heard. She confirmed that the complainant used to go to her house to stay with her baby and that the complainant had stolen her money which she admitted after DW3 confronted her father. The father said he would repay the money. According to her the complainant never complained of defilement. It was her evidence that the appellant's wife was always home during weekends.
24. DW4, **Milka Kabui**, the appellant's wife testified that she was working as a cook in the school between Monday and Friday but was always home during Saturdays. According to her, the complainant never used to visit them as they did not have young children. According to her evidence, due to the proximity between where she stayed and the school, if the complainant had been defiled, it would have been known. Her evidence was corroborated by the evidence of **Ruth Wanjiku**, the appellant's daughter who testified as DW5.
25. It was submitted on behalf of the appellant that penetration was not proved beyond reasonable doubt. According to the appellant, there were several unexplained gaps in the prosecution evidence hence the court ought not to have convicted the appellant based only on the evidence of the complainant without disclosing why he believed the complainant. In this respect reliance was placed on **Mutugi vs. R [2013] eKLR**. It was submitted that having failed to get evidence of penetration, the learned trial magistrate proceeded to shift the burden to the appellant.
26. It was further submitted that the learned trial magistrate did not allow the appellant to mitigate before passing the sentence.
27. In its submissions, **Miss Mogoi**, learned prosecution counsel did not oppose the appeal. According to her the learned trial magistrate

erred in relying on the evidence of the complainant without making a finding as to the truthfulness of the same. Notwithstanding the concession, it is trite that a mere concession by the State does not automatically lead to the decision of the lower court being upset. This 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”.**

### **Determination**

28. I have considered the issues raised in this appeal.

29. In this case, the only evidence connecting the appellant with the offence was that of the complainant, a child aged 9 years. On the issue of whether the evidence of a minor requires corroboration, the law is quite clear: it does. In sexual offences, however, 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]

30. 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.”**

31. 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.”**

32. Therefore, what is required of the trial court is to be satisfied that the victim is telling the truth.

33. In Omuroni vs. Republic (2002) 2 EA 508 it was held:

**“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.”**

34. 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.”**

35. In this case a reading of the judgement of the trial court does not show that the court was alive to the provisions of section 124 of the *Evidence Act* as regards the finding of the truthfulness and believability of the complainant’s evidence. However, being a first appellate court, I am expected to analyse and evaluate afresh all the evidence adduced before the lower court and having done so draw 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.”**

36. 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.**

37. In this case, the complainant did not reveal the act of her defilement to any one and in all probability would not have done so had a complaint not been made to the school authorities regarding her conduct. In **Paul Kanja Gitari vs. Republic [2016] eKLR**, it was held by the Court of Appeal that:

**“What we find troubling about this case is that J.M.K did not on her volition make a complaint that the appellant had defiled her. Her testimony was that after the ‘bad thing’ she went home where she met her aunt (PW2) who beat her up to reveal what transpired. It was the appellant’s contention that J.M.K’s testimony was procured by threats and that it was only given as instructed by PW2. We cannot dismiss this as an afterthought or insubstantial contention...Given the totality of the evidence and the specific circumstances of this case, we are not satisfied that the evidence was tendered that proved the case against the appellant. His conviction was unsafe and this entitles us to interfere.”**

38. Even when when asked the source of the money she was spending in treating her fellow pupils, the complainant first stated that she had picked the same on her way from church. It was only upon further prodding that she changed her story and stated that she was given the same by the appellant. In her evidence in court the complainant testified that the appellant used to give her between Kshs 10.00 and Kshs 20.00. However according to PW3, the complainant initially informed him that she was given Kshs 1,000.00 but changed to Kshs 2,000.00. There is also evidence admitted by the complainant that she once stole money from DW3. It is therefore clear that the conduct of the complainant ought to have put the learned trial magistrate on notice that the complainant’s truthfulness needed to be investigated and a finding made thereon before relying on the same. This was particularly necessary as the date of the alleged defilement could not be ascertained with precision. According to **Warsame, J** (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR**:

**“...it is not difficult for a genuine complainant to be mistaken on the issue of identity and it is not unknown for a complainant to be actuated by malice. Applying these principles and bearing in mind that PW2, PW3 and PW4 took considerable time before making a formal complaint or report, it is possible for them to make a false identification. One could expect that a report was made to the police at a time that was reasonable after the alleged defilement and that at the first opportunity the complainants stated that they had recognized her assailants or persons who assisted them and gave a description of them, which description was a reasonably accurate one of the accused persons. It suffices to say there is no evidence of the surrounding circumstances consistent with the complainants’ evidence either of the alleged defilement or of the identity of the assailants or conspirators.”**

39. By failing to make a finding as regards the truthfulness of the complainant, the learned trial magistrate failed to take into account a statutory requirement hence fell into error. Clearly in the instant case the report, when made involuntarily by the complainant was made after the lapse of a considerably long period of time when even evidence could not be conclusively obtained. Therefore, malice and fabrication in light of the inconsistencies and contradictions noted above cannot be ruled out. As was stated in **Ndung’u Kimanyi vs. Republic [1979] KLR 282**:

**“A witness in Criminal Case upon whose evidence it is proposed to rely should not create an impression in the mind of the**

**Court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”**

40. This court, in the exercise of its judicial mandate is under a duty to point out slips on the part of the trial court. Having so stated, it is not for the court to prop up cases which fail to achieve the statutory threshold for conviction in criminal cases, - proof beyond reasonable doubt. Having so pointed out the gaps in the judgement, the only option for the court is to acquit since the court ought not to base its decision on speculations and conjectures. In the case of Michael Mugo Musyoka vs. Republic [2015] eKLR it was observed by the Court of Appeal that:

**Without the evidence of the said or eye witness we find that the prosecution did not prove that the appellant had intentionally and unlawfully indecently touched the child...we find that the case against the appellant was based on a mere suspicion. In Mary Wanjiku Gichira v Republic, Criminal Appeal No 17 of 1998, this court held that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused’s freedom and at times life”.**

41. See also Joan Chebichii Sawe vs. Republic [2003] eKLR.

42. I also associate myself with the position adopted by the Supreme Court of Indian in the case of State of Punjab vs. Jagir Singh [1974] 3 SCC 277 that: -

**“A criminal trial is not like a fairy tale wherein one is free to give flight to one’s imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged...In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts...”**

43. Therefore, in acquitting the accused, the court does not necessarily make a definite finding that the accused is factually innocent of the offence with which he is charged. It simply makes a finding that the prosecution has failed to prove his guilt and he is therefore constitutionally deemed to be innocent. That is what our law provides. While some people may be unhappy with the presumption of innocence, it is a time tested principle in all jurisdictions which apply democratic principles and unless we opt to go the dictatorship way, we have no option but to endure it.

44. Since the Constitution of Kenya prescribes the rule of law as a binding national value, then the law is paramount and as was appreciated in Dr. Christopher Ndarathi Murungaru vs. AG and another, Civil Application No. Nai. 43 of 2006 (24/2006), at page 12:

**“... the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public...We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy: our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In dictatorship, we could simply round up all these persons we suspect to be involved in corruption and economic crimes and simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court’s decision.”**

45. I associate myself with Bagmall, J in Crowcher vs. Crowcher [1972] 1 WLR 425, 430 that:

**“the only justice that can be attained by mortals, who are fallible and are not omniscient is justice according to the law: the justice that flows from the application of sure and settled principles to proved or admitted facts.”**

46. This was a case where, prima facie, the only sentence provided was that of life. As noted by the Court of Appeal with respect to heavy minimum sentences in the case of Hamisi Bakari & Another vs. Republic [1987] eKLR:

**“...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.”**

47. In my view, considering the sentence to be meted, the Learned Trial Magistrate ought to have ensured that all statutory provisions regarding the offence in question were complied with.

48. With respect to sentence, it is clear that the sentence meted on the appellant was the mandatory minimum sentence. In my view under the current constitutional dispensation, mandatory minimum sentences ought to be looked at in light of Article 27 of the Constitution as read with clause 7 of the *Transitional and Consequential Provisions* which 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.***

49. Such sentences, in my view, 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 as the Court is deprived of 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 [2017] eKLR, 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.”**

50. 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.’**

51. 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.”

52. 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.”

53. 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.”

54. In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional 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.*

55. 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."

56. 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 do not take into account the dignity of the individuals as mandated under Article 27 of the Constitution as appreciated in the *Muruatetu Case*.

57. I associate myself with the opinion of the Court of Appeal in Jared Koita Injiri vs. Republic [2019] eKLR where it held that:

“In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. 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 girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic (supra)*, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”

58. In my view there are several degrees of defilement. The *Sexual Offences Act*, itself recognises so in section 8 when it prescribes different sentences for each set of ages of the victims concerned. In doing so, the Act applies the principle of proportionality and gravity of the offences in prescribing the sentence. However, it fails to take into account the fact that even within a particular set, the gravity of the offences may not be same. Some offences of defilement are committed in very gruesome circumstances while others are committed after occasioning serious bodily injuries to the victim. Others are committed in the very site of other members of the victim’s family while others are committed by persons who are almost the age groups of the victims in circumstances that if the law did not presume lack of consent is such offences, it might well be concluded that there might have been connivance.

59. This Court does not condone offences against minors and vulnerable persons. As was stated by Madan, J (as he then was) in Yasmin vs. Mohamed [1973] EA 370:

“The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved.”

See also Omari vs. Ali [1987] KLR 616.

60. However, to treat offences as the same notwithstanding the aggravating circumstances, clearly violates the right to dignity as the offenders are thereby treated as a bunch rather than as individuals.

61. It is also clear that the learned trial magistrate failed to give the appellant an opportunity to mitigate before meting out the sentence. 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.”***

62. 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.*”**

63. Though the learned trial magistrate may have formed the view that in light of the *prima facie* mandatory sentence, mitigation was irrelevant. However as stated by the Supreme Court in the *Muruatetu Case*, mitigation forms part of the trial and pursuant to Article 50 of the Constitution, an accused is entitled to a fair trial which involves affording him/her an opportunity of being heard at each state of the trial. Therefore, it does not matter whether or not the sentence prescribed appears to be mandatory since the possibility of the sentence being reversed by an appellate court cannot be rules out in which event mitigating circumstances become crucial to the issue of sentencing.

64. In light of my finding that the learned trial magistrate erred in not making a finding as regards the truthfulness of the complainant and my findings thereon, nothing turns, however, on the sentence.

65. It is therefore my view that the conviction of the appellant, based as it was on the failure by the Learned Trial Magistrate to take into account mandatory provisions of the law which in my view had he taken into account would have led to the acquittal of the appellant, the appellant’s conviction was unsatisfactory and is unsafe. It cannot be sustained or supported. The Learned Prosecution Counsel, **Ms Mogoi**, therefore, quite properly in my view, did not support the conviction of the appellant.

66. Consequently, I allow the appeal, set aside the appellant’s conviction and quash the sentence. I direct that the appellant be at liberty forthwith unless otherwise lawfully held.

67. It is so ordered.

**Judgement read, signed and delivered in open court at Machakos this 24<sup>th</sup> day of June, 2019.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**The appellant in person**

**Ms Mogoi for the Respondent**

**CA Geoffrey**