REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 45 OF 2015

BETWEEN

AJM..APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an appeal against conviction and sentence of 20 years imprisonment for the offence

of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences No. 3 of 2006 in

a judgment delivered by Hon. P Achieng, Principal Magistrate on 31st March,2015 in Kakamega Criminal Case No. 32 of 2014)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. This appeal stems from the judgment of the learned trial magistrate aforementioned. The appeal was filed by the appellant on 16th April 2015. The appellant prays that his sentence be set aside and his conviction quashed on following homemade grounds **THAT**:-

> ***a. The trial bench erroneously upheld the findings disregarding the appellants alibi statement that he was a HIV patient and any sexual advance with PW1 would have caused an infection which was not confirmed by the medical practitioner when he met PW1 convicting the appellant and sentencing him was disastrous in law and in facts.***
>
> ***b. The upholding of conviction and sentence notwithstanding that part A and B of the P3 form was suicidal as from evidence on record PW1 was not examined as was to be done to erase any possible doubt of the alleged defilement and convicting and sentencing of the appellant was thus based on hearsay.***
>
> ***c. The trial bench erroneously convicted and sentenced the appellant notwithstanding that the DNA memo exhibit was prepared minus the appellant's participation and security of the samples sent to the laboratory. The appellant is and was unable to confirm any changes in the samples taken for a DNA test.***
>
> ***d. The trial bench erroneously did convict and sentence the appellant in total disregard of the mental status of PW1 as confirmed by part II article 3 on the PW3 form by the medical practitioner and PW1 evidence raises doubt in test and qualification and upholding conviction as was done was in itself unsafe.***
>
> ***e. The trial bench failed in law and facts in failing to note that there wasn't any independent witness right from the home of PW1 and neighbours to corroborate PW1's testimony despite allegations of the offence occurring severally and convicting the appellant was a finding to be thought about which was not.***
>
> ***f. The trial bench did fail to note the defense and the alibi statement of the appellant that they were close relatives and had issues with land a common basis of cases in this Luhya land which meant convicting and sentencing the appellant without any due caution of the same was unfortunate.***

The Charge

2. The Appellant was charged with defilement contrary to ***section 8(1) as read with Section 8(3) of the Sexual Offences Act, No. 3 of 2006*** and an alternative charge of committing an indecent act with a child contrary to ***section 11(1) of the Sexual Offences Act, No. 3 of 2006.*** The particulars are that the appellant on diverse dates between December 2012 and March 2013 at in Kakamega South District within Kakamega County intentionally caused his penis to penetrate the vagina of a girl named MI who was 14years of age.

3. At the conclusion of the trial, the learned trial magistrate convicted the appellant on the main charge of ***defilement contrary to section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006*** and sentenced him to 20 years imprisonment.

Duty of this Court

4. This is the first appellate court and as such it is guided by the principles set out in the case of **DAVID NJUGUNA WAIRIMU V – REPUBLIC [2010] e KLR** where the court of appeal stated:

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

5. In the earlier case of ***Okeno vs. Republic [1972] EA 32*** the court stated that:

> ***"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."***

Issues for Determination

6. From the evidence, the law, and the grounds of appeal and the submissions the issues for determination in this appeal are:-

Whether MI's age was assessed and determined correctly by the trial court

Whether there was improper, intentional and unlawful penetration of the vagina of MI

Whether the Appellant was positively identified.

a. Whether MI's age was assessed and determined correctly by the trial court

7. One of the elements required to prove the offence of defilement is correctly ascertaining the age of the victim. This is in line with the provisions of ***section 8 of the Sexual Offences Act, No. 3 of 2006*** which provides as follows:

> ***8. Defilement***
>
> ***(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 (Cap. 92) and the Children's Act (Cap. 141).

(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."

8. ***Section 11(1) of the Sexual offences Act No. 3 of 2006*** provides as follows:-

11.Indecent act with child or adult

(1)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.

9. The ***Sexual Offences Act*** defines *"Child"* within the meaning of the ***Childrens Act No. 8 of 2001*** which defines a *'**child**'* as ***"….any human being under the age of eighteen years."***

10. ***In the case of Joseph Kieti Seet -VS- Republic [2014] eKLR, H.C. At Machakos, Criminal Appeal No. 91 Of 2011, Mutende J****.* while considering the issue of the age of the victim held as follows*:-*

"It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni -Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, it was held thus:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense …."(See Aburili J in Martin Okello Alogo v Republic [2018] eKLR)***

11. The Court of Appeal in the case of ***Hadson Ali Mwachongo v Republic [2016] eKLR*** stated as follows regarding the issue of age of the victim in a sexual offence case:

"Before we conclude this judgment, it is necessary to say a word on computation of the age of the victim. The Sexual Offences Act provides for punishment for defilement in a graduated scale. The younger the victim, the more severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is life imprisonment, while defilement of a Child of 12 to 15 years attracts 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment. Rarely will the age of the victim be exact, say exactly 8 years, 10 years, 13 years, etc, as at the date defilement to be treated as 11 years old or as more than 11 years old? If the victim is treated as more than 11 years old, to what term is the offender to be sentenced since the victim has not attained 12 years for which a sentence is prescribed. In the same vein, in the present appeal where the victim was aged 15 years and a couple of months old, but was not yet 16 years old, is the Appellant to be sentenced as if the victim was exactly 15 years or as if she was 16 years old? …."

....

"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim."

12. MI's mother, **JI** testified as PW2 and stated that MI was 14 years old when she confirmed the pregnancy and that MI's age was determined at the County Government Hospital. **Nelson Kivaya** testified as PW4 and stated that he was a clinical officer and from the age assessment that was done, MI was found to be 16 years old and that MI had no birth certificate. The age assessment report was produced by PW4 as *Pexhibit 2* and this provides the best evidence as to what MI's age was at the time when she was defiled. The said age assessment report states that MI was assessed on 22nd May 2014 and found to be approximately 16 years whereas the charge sheet indicates that the offence happened between December 2012 and March 2013. Mental calculation of when the age assessment was done and when the offence was committed shows that MI was approximately between 14-15 (fourteen – fifteen) years old at the time of commission of the offence.

13. My conclusion regarding age is that MI was not over the age of eighteen years and that she was most probably around 14-15 years old on the diverse material dates when the alleged defilements took place, and thus any improper and unlawful sexual activity with her falls within the ambit of ***'Defilement' under Section 8(1) and the punishment within Section 8(3) of the Sexual Offences Act or Section 11(1)*** of the same Act if conviction had been on the alternative charge.

b. Whether there was improper, intentional and unlawful penetration of the vagina of MI

14. MI testified as PW1 and stated that the appellant removed his *"dudu ya ndani"* and started *"kunifanya"* and that the appellant had threatened to kill her if she told her mother PW2. MI added that the appellant repeated the same act the following day and that the appellant continued doing that on several other occasions. MI stated that she informed PW2 that she was pregnant as result of the appellant defiling

her. MI added that one Kizito Lumumba witnessed the incident and that the appellant cut his fingers. On cross-examination, MI stated that the appellant had been arrested severally for this offence and that it was not true that the appellant did not defile her.

15. PW2 stated that MI informed her that the appellant had made her pregnant and that the appellant would go into PW2's house in PW2's absence and defile MI and befriend her. PW2 stated that the appellant had denied that MI's pregnancy was his and insisted that a DNA examination had to be done and that the appellant was arrested after the results of the DNA showed that he was the father of the child borne by MI.

16. Kizito Lumumba, testified as PW5 and stated that MI told him that the appellant used to go into PW2's house when PW2 was not present and then give MI Kshs.10/- then defile her. PW5 added that MI informed him that the appellant would threaten to kill her and PW2 if MI told anybody about the incidents.

17. **CPL Ann Aketch,** testified as PW6 and stated that he was the investigating officer in the case and that MI informed her that the appellant went to PW2's house and enticed her with Mandazi before he defiled MI.PW6 added that MI was pregnant at the time and that a DNA examination was conducted after taking samples from the child and the appellant (*PExhibit 4*). The DNA examination revealed that the appellant was the biological father of the child (*PExhibit 5*). On cross-examination, PW6 stated that it was true no one witnessed the appellant defile MI but added blood samples were taken from the child before the child died. The Exhibit Memo PExhibit 4 indicates that the child borne to MI was fathered by appellant.

18. 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"***

19. The Court of Appeal, in the case of **Sahali Omar v Republic [2017] eKLR**, noted that:

> ***'…penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the Sexual Offences Act.'***

20. In the case of **PKW v Republic [2014]eKLR**, the Court of Appeal observed as follows:-

> ***"Hymen also known as vaginal membrane is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen……. There are times when hymen is broken by factors other than sexual intercourse.***
>
> ***………………the evidence of broken ruptured or torn hymen is not automatic proof of penetration through a sexual intercourse. It is upon the prosecution to establish, beyond reasonable doubt that it was ruptured during the alleged rape or defilement….."***

21. Section 36(1) of the *Sexual Offences Act, 2006* provides that:

> ***"36. Evidence of medical, forensic and scientific nature***
>
> ***Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."***

22. The wordings of ***section 36(1)*** above are couched in discretionary, rather than mandatory terms, as affirmed by the Court of Appeal in the case of ***Robert Mutingi Mumbi V R. Criminal Appeal No. 52 of 2014 (Malindi)*** where the appellate court stated:

> ***"Section 36(1) of the Act empowers Courts to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the Accused person and the offence. Clearly that provision is not couched in mandatory terms."***
>
> ***Decisions of this Court abound which affirm the principle that Michael or DNA evidence by not the only evidence of which commission of a Sexual offence may be proved."***

23. The evidence on record clearly shows that there was penetration of MI. The evidence of MI and the fact that she even became pregnant as a result of the defilement adds to the weight of evidence in support of penetration against her.

24. The authorities cited above also indicate that it was not mandatory for a DNA examination to be conducted on the appellant to prove that he was the one who indeed defiled MI. Any other available evidence including that of the victim is sufficient to prove the fact of penetration. In this case however a DNA was conducted as demanded by the appellant and it was established that the child born to MI was the appellant's, a fact that goes to prove that there was fathered by the appellant. There was thus improper, intentional and unlawful penetration of MI's

vagina.

c. **Whether the Appellant was properly and positively identified**

25. MI was able to identify the appellant in court and stated that he was his uncle.

26. The evidence of MI is corroborated by PW2 who stated that the appellant is a brother to her husband thus MI's uncle. The appellant corroborated this evidence in his defence stating that he knew PW2. **Kefa Lusasi,** who testified as PW3 stated that he was the area assistant chief and he had knew the appellant for four years as one of the subjects from his area of jurisdiction.

27. The Court in the case of **Titus Wambua v Republic [2016] eKLR** cited the Court of Appeal in ***Karanja & another V Republic (2004) 2 KLR 140, 147*** (Githinji JA, Onyango Otieno & Deverell Ag JJA) regarding the issue of identification and stated that:-

> ***"The law as regards identification under difficult conditions is now well settled. In the case of Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu, this Court stated as follows:-***
>
> ***"We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude(PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them……… What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of R vs Turnbull [1976]3 All ER 549 at page 552 where he said:-***
>
> ***'Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.'***

28. It is my finding that the appellant in the present case was properly and positively identified by recognition based on the testimony of MI which was corroborated by that of PW2 and PW3. In any event, the alleged defilements all took place during the day, thereby ruling out the possibility of a flawed identification.

Other issues raised by the appellant

29. Both in his grounds of appeal and in his submissions, the appellant contended that the learned trial court should not have convicted him on the basis of the evidence of MI because the said evidence was not corroborated. In this regard, I fall back to the provisions of ***section 124 of the Evidence Act,*** which shed light on the appellant's concerns.

30. ***Section 124 of the Evidence Act*** provides as follows:

> ***124. Corroboration required in criminal cases***
>
> ***Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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.*

31. The above proviso clearly stipulates that the Court can convict an accused person on the evidence of the victim alone in criminal cases involving sexual offences if the court believes the victim is truthful and records the reasons for that belief: (See ***George Kioyi V R Criminal Appeal 270 of 2012 (***Nyeri***)*** and ***Jacob Odhiambo Omumbo V R. Criminal Appeal 80 of 2008*** (Kisumu)**.**

32. The Court in the ***Martin Okello Alogo(supra)*** a persuasive authority goes on to state that:

> ***"The law on the point that the Court can convict on the evidence of a single minor's evidence was settled in the case of CHILA V R [1967] EA 722 at 273 that:***
>
> > ***"The law of East Africa on corroboration in Sexual Offences is as follows:-***
> >
> > > ***The Judge should warn the assessors and himself of the danger of acting on the uncorroborated Evidence***

testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her 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. In this case, as earlier stated, the trial Magistrate after concluding that "I have assessed the minor and I find her fit to proceed with this trial. She can be sworn." In her assessment of the Prosecution's evidence, she stated.***

The witness/minor appeared confident and believable when describing the events and I have no doubt in my mind that she was able to identify the Accused person as the perpetrator of the offence."

33. In the instant case, I find that the witnesses who were produced by the prosecution were even more than enough to satisfy the ingredients of the offence of defilement. In its judgment the learned trial court, which saw and heard MI as she testified stated that it had no reason to doubt the complainant's identification of the appellant. I have also carefully read the record and from it I am satisfied that MI's evidence and the entire prosecution case remained standing on its two feet when placed alongside the appellant's feeble denials. I also find that the appellant's insistence on a DNA test was not an innocent request. He knew what he had done to MI.

34. On the issue of the sentence, I note that s***ection 8(3) of the Sexual Offences Act*** imposes a sentence of not less than twenty years.

35. The Supreme Court of Kenya, in the case of ***Francis Karioko Muruatetu & Another vs. Republic [2017]eKLR,*** held that:

> ***"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.***
>
> **………………………**
>
> ***"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.***
>
> **…………………….**
>
> ***As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:***
>
> ***(a) age of the offender;***
>
> ***(b) being a first offender;***
>
> ***(c) whether the offender pleaded guilty;***
>
> ***(d) character and record of the offender;***
>
> ***(e) commission of the offence in response to gender- based violence;***
>
> ***(f) remorsefulness of the offender;***
>
> ***(g) the possibility of reform and social re-adaptation of the offender;***
>
> ***(h) any other factor that the Court considers relevant.***

36. Recently, the Court of Appeal, in the case of ***Evans Wanjala Wanyonyi v Republic [2019] eKLR,*** held that:

> ***"On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 considered the legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the***

mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution...........”.

37. The Court of Appeal in the ***Evans Wanjala Wanyonyi case*** (above) went on to say:

> ***“In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015.”***

38. In ***Michael Kathewa Laichena & Another v Republic (2018) eKLR***, a case expounding on the sentencing Guidelines it was stated:

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

39. In the instant case, the learned trial magistrate imposed the least sentence permissible as per the aforementioned s***ection 8(4) of the Sexual Offences Act, No. 3 of 2006***. As stated before, the Court of Appeal has since held that the minimum mandatory sentences stipulated by the Sexual Offences Act are unconstitutional. This means that courts will now have to consider factors such as but not limited to mitigation from accused persons while following the guidelines set by the Supreme Court of Kenya in ***Francis Karioko Muruatetu & Another Case (supra)*** above together with pre-sentencing reports/statements from victims, if any, in deciding the appropriate sentences to be imposed on accused persons convicted of sexual offences.

40. In this case after conviction, the respondent stated that the appellant had no previous record and could be treated as a first offender. In mitigation, the appellant stated that *‘**he was very unwell when he arrested and that he has a young child who depends on him and that his wife was killed….. '***

41. I note that the appellant and was not remorseful and never really had a reckoning of the consequences of his actions towards the victim, MI and other people who were affected. Further, the appellant intruded into the sexual privacy of MI whom he knew was his brother's daughter, and shamelessly made her pregnant. The appellant and others who are like minded are a social menace who should be kept away from society in an effort to make life easier and safer for growing up children. I therefore find no reason to interfere with the sentence imposed by the learned trial court. If the appellant had been convicted of incest, he would have been jailed for life.

Conclusion

42. In light of all the foregoing, I find no merit in the appellant's appeal on both conviction and sentence and dismiss it in its entirety. Right of Appeal within 14 days from the date of this judgment

43. Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned at Kakamega in open court on this 25th day of October, 2019

WILLIAM M. MUSYOKA

JUDGE

In the Presence of:-

Appellant present in person

Ms Rotich for Respondent

Eric - Court Assistant