**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CRIMINAL APPEAL NO. 75 OF 2016**

**BETWEEN**

**BARAKA SAFARI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the original conviction and sentence of Honourable A Ndung'u- RM*

*dated 29th June, 2016 in Shanzu Criminal Case No. 985 of 2014)*

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BARAKA SAFARI.....ACCUSED**

**JUDGEMENT**

1. The appellant, **Baraka Safari**, was charged in the Senior Principal Magistrate's Court at Shanzu in Criminal Case No. 985 of 2014 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars of the offence were that the appellant on the 14th day of February, 2015 at Mafisini Area in Kisauni Sub County within Mombasa County, he intentionally and unlawfully caused his penis to penetrate into the vagina of **SMM**, a girl aged 8 years.

2. He was alternatively charged with the offence of indecent act with a Child Contrary to Section 11(1) of the same Act the particulars being that on the same day at the same time in the same area, the appellant unlawfully and intentionally caused his penis to touch the vagina of **SMM**, a girl aged 8 years.

3. After hearing, the Learned Trial Magistrate found the appellant guilty of the main offence of defilement, convicted him accordingly and sentenced him to life imprisonment.

4. Being dissatisfied with the conviction and sentence the appellant appeals based on the following grounds that:

> 1. **THAT the Learned Trial Magistrate erred in law and in fact in convicting and sentencing the appellant without considering that the charge of defilement was not proved beyond any reasonable doubt hence the same was unsafe.**
>
> 2. **THAT the Learned Trial magistrate erred in law and in fact in the appellant's conviction and sentence without considering that the case at hand was due to fabrication.**

3. **THAT the Learned Trial magistrate erred in law and in fact in convicting and sentencing the appellant without taking into account that under section 150 of the Criminal Procedure Code was not considered as the mentioned witnesses were never called to testify.**

4. **THAT the Learned Trial magistrate erred in law and in fact by convicting the appellant without considering that the prosecution did not prove its case on the standards required by the law.**

5. **THAT the Learned Trial magistrate erred in failing to consider the appellant's reasonable defence statement.**

5. At the hearing of the case the prosecution called four witnesses.

6. PW1, **Veronica Nthambi Mutunga**, travelled upcountry on 14th February, 2015 when at around 0700 she received a phone call from her husband who informed her that a man had defiled the complainant, aged 8 years having been born on 13th August, 2006 , when she had been sent to the shop. In support of the complainant's age, PW1 relied on her birth certificate. Upon receiving the news, PW1 called her sister, **Damaris Mwende**, PW4, who she informed to proceed to her house and find out what had happened. Upon her return, on 15th February, 2015, she escorted the complainant to Coast General Hospital. It was her evidence that she used to see the appellant where he used to work at a hotel as a waiter but did not know his name.

7. After *voir dire* examination, PW2, he complainant gave an unsworn statement. According to her, she was 8 years old in class 3 though she did not know her date of birth. According to her on 14th February, 2015 at around 6.30 am her father sent her to buy soap and the shop and on her way, the appellant called her, but she instead declined and proceeded on her way home. However before she could reach home, the appellant caught up with her, caught her hand and pushed her into a food kiosk. While in there, the appellant ordered her to remove her pants but upon her refusal, the appellant threw her on the ground, proceeded to remove her pants, removed his own pants, removed his penis and inserted it in her vagina while covering her mouth while the complainant attempted to scream. When the appellant was done he asked the complainant to leave and the complainant did so after putting on her pants. It was the complainant's evidence she felt pain and walked with difficulty till she got home.

8. Upon her arrival at home, the complainant explained the incident to her father who was still asleep and her father inquired from her who the culprit was. They then left with her father to look for the appellant at the food kiosk where the appellant was working, they met with the appellant and his friend with whom the appellant used to work at the food kiosk carrying water *jerricans*. The complainant then pointed him out to her father since she knew the appellant. It was her evidence that the appellant's said friend was in front while the appellant was behind her. After that the appellant was taken to the village elder in the company of the complainant, her father and the accused neighbour, **Mama Mzungu**. From there they proceeded to the police and then to Coast general Hospital in the company of the father, the said neighbour and the complainant's aunt, **Mwende,** PW4. While denying that she was told what to say by the neighbour, the complainant stated that she was informed by **Mama Mzungu** that the person who was with the appellant was working together with the appellant at the food kiosk.

9. PW3, **Dr. Mirfat Shatry**, testified that the P3 form was filed by **Dr Ibrahim** who no longer worked with Cost general Hospital. He was however acquainted with **Dr Ibrahim's** handwriting and signature. According to the P3 form filed by **Dr Ibrahim**, the date of the offence was 14th February and the offence was defilement and the victim was the complainant, an 8 years old girl. The offence was committed by a person known to her and she was treated at Coast general Provincial Hospital. On examination, her physical condition was good and the injury was approximately 1 week old and the probable type of weapon was a stunt object. The vaginal examination revealed abrasion in the labia majora but the hymen was intact. The HIV test, VDRL and Hepatitis B were all negative and there was no spermatozoa. The degree of injury was classified as harm. The said P3 form was filed and signed on 20th February, 2015. Apart from the P3 form the witness also produced the PRC form for the complainant. Apart from confirming the injuries in the P3 form the PRC form revealed that the complainant's vagina orifice was dilated abrasion vestibule. In his evidence, abrasion is caused when a blunt object is inserted inside the vagina by force.

10. PW4 was **Damaris Mwende Mutinga**. According to her on 14th February, 2015 at around 0900 am she was called by her sister, PW1 who told her to proceed to her home in Bamburi because PW1's daughter had been defiled by a man. On her way there she called the complainant's father who informed her that they were at the village elder's. Upon her arrival there she found the complainant's father, the Village Elder, the complainant and the appellant in the company of the members of the community policing officers. The village elder then showed her the person who defiled the complainant and upon asking him his age he said he was 19 years. They then proceeded to Bamburi Police Station to report the matter. It was her evidence that the complainant, who was walking with difficulties, explained to her how the incident took place. Thereafter they proceeded to Coast general Hospital where the complainant was examined and treated at around 10.00pm after which they went home. According to her that was the first time she was seeing the appellant.

11. PW5, **Abdul Kadir Megen Jabir**, the complainant's father was on 14th February 2015 with his children including the complainant as their mother had travelled upcountry to Makueni. The complainant then asked him for money to buy soap for cleaning utensils which he gave her. After a while the one of his children informed him that the complainant was crying but he brushed the issue aside. However the same girl went back and informed him that a neighbour, **Mama Mzungu** was calling him. Upon getting out he found neighbours and the complainant was seated with difficulty on one side while placing her hands in her private parts and was in pain and crying. Upon inquiry, the complainant narrated to him what had happened after which he asked the complainant to take him to the food kiosk. Along the way they met 3 men carrying *jarricans* from the kiosk and the complainant showed him the appellant though the appellant denied. The matter was then reported to the village elder and PW5 then called PW1 and informed her of what had happened. PW1 then called PW4 who went and they then proceeded to the police station and made a report. From there the complainant was taken to Coast General Provincial Hospital. It was PW5's evidence that prior to this incident, he did not know the appellant and only saw him when the complainant identified him.

12. PW6, **Cpl Beatrice Mungeli**, attached to Bamburi Police Station testified that on 14th February 2915 she was at the station when the appellant was taken to the police station by members of the public. By that time the complainant had already been taken to the hospital by PW5 and PW4. She then interrogated the witnesses whose statements she recorded as well as the appellant, took the complainant, who was fearful when brought to the police station, back to the hospital where a P3 form was filed and then preferred charges against the appellant.

PW6 then produced the complainant's birth certificate as exhibit. It was her evidence that prior to this incident she did not know the appellant.

13. According to her later after the report she visited the complainant's home and was showed the kiosk by the complainant.

14. Upon being placed on their defence, the appellant chose to give unsworn statement and called one witness. According to him, on 14th February, 2015, he left home at 0500 am and got to work at 0530 am where he found his employer and staff and worked as usual till 10.00am. when his employer sent him to fetch water. He then picked *jerricans* in order to fetch water and on his way back he found an unknown man, PW5, who ordered him to go where was and when he did so slapped him and ordered him to accompany him to his home where he found two women. PW5 then went into the house and came out with a *kikoi* and called PW2. According to him, he did not know PW2 before the incident. It was then that PW5 asked him what he did to PW2 but since he did not understand, he told PW5 that he had done nothing to PW2 and did not know PW2. They then left for the Village Elder's. In the meantime he asked someone to call his employer and inform him what had transpired. He therefore denied having committed the offence.

15. The appellant called DW1, **David Shadrack**, as his witness. According to DW1, in February, 2015 he was operating a café in Panya Kazandani with his wife and he had two female staff and male one, the appellant. According to him, on a Saturday, he opened work at 5.45 am and the appellant started making *mahamri*. However since there was water problem, at 0800 am he sent the appellant to fetch water and the when the appellant did not return for a period of 30 minutes, at 8.00 am he sent one of the female staff, **Fauzia**, to look for him. The said staff however found the appellant being interrogated at home behind the water point. Upon proceeding there, the complainant was interrogated and said that the person who defiled her was wearing the clothes like those of the appellant. According to him, when the appellant was interrogated by the village elder, it was confirmed that it was not the appellant who had defiled the complainant. According to the witness upon examination the complainant was not found to have been a virgin and the father confirmed that there was an earlier incident which was never reported as the matter was settled out of court. It was DW1's case that it was PW4 who instigated the matter.

16. In cross-examination DW1 having stated that when they opened the kiosk at 5.45 am the appellant was not present but as he opened the kiosk the appellant emerged fr0m the kiosk. It was his evidence that there were neighbouring kiosks which were not locked though his was usually locked. He however denied the possibility that the appellant defiled the complainant between 0545 and 0800 am.

17. Asked by the Court, he said that he was not aware that the appellant was identified along the road by PW2. In his view the appellant would have come from nowhere else but from home to the kiosk. He however admitted that he knew PW2 and her family and that they normally bought things from his café. It was his evidence that the appellant started working for him on 10th August, 2014 and that the complainant knew the appellant. In his evidence he did not know when the appellant arrived at the café and only saw him when he was opening the door and did not know where the appellant was coming from that morning.

18. Upon the close of the case, the Learned Trial Magistrate found, based on the birth certificate and the oral evidence that the complainant was 8 years old. Based on the evidence of the complainant, PW3 (the doctor) PW4 (the aunt) and PW5 (the father) the Court found that there was partial penetration. In the respect the Court relied on **George Owiti Raya vs. Republic [2015] eKLR**, in which it was held that:

> **"It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration."**

19. The Court also found that the complainant knew the appellant and this was confirmed by the evidence of DW2 who testified that the complaint used to buy things from his café where the appellant was working and that the complainant knew the appellant. It was therefore found that the appellant was positively identified as the person who committed the offence.

20. As regards the evidence of DW1, the Court found that it was not truthful as it contradicted that of the appellant.

21. According to the Court the complaint was clear and consistent in her testimony and the evidence of PW1, PW4 and PW5 corroborated her evidence in some material particular. It was therefore the Court's finding that the complainant's evidence was truthful and that she was a credible witness. The court therefore found the appellant guilty of the offence of defilement, convicted him and sentenced to life imprisonment.

22. In his submissions the appellant took issue with the fact that the Learned Trial magistrate, sentenced him to life sentence when under section 7(1) of the ***Criminal Procedure Code*** she had no powers to do so.

23. It was submitted by the appellant that there was no evidence of penetration and there was no spermatozoa found. To the appellant had there been defilement, there would have been other physical injuries. Though in the submissions the appellant conceded that something did take place, he contended that he was not the one. He however submitted that abrasions on the labia could have been caused by other factors such as playing and riding of bicycles by small girls and reliance was placed on **Odhiambo vs. Republic Cr App No. 236 of 2004 [2005] eKLR**.

24. The appellant submitted that his was a mistaken identity since no descriptions were given by the complainant and reliance was placed on **Matianyi vs. Republic** and **Cleophas Otieno Wamunga vs. R [1989] eKLR 424** that visual identification in criminal cases can lead to miscarriage of justice. It was also submitted that there were contradictions in the prosecution case and that the members of the community policing and other witnesses ought to have been called to testify and confirm the testimony of the complainant.

25. The appellant also took issue with the fact that the PRC form was not filed in by the author and the person who produced the same did not state that he knew her or worked with her.

26. It was the appellant's case that his defence was never considered by the trial court that he had no time to defile the complainant.

27. As regards the sentence, the appellant submitted that the mandatory life sentence imposed on him violated his right to fair trial and that the same was harsh and excessive.

28. On behalf of the Respondent, it was submitted vide the submissions drawn by **Berryl Marindah**, Prosecution Counsel and presented through the Learned Prosecution Counsel, **Miss Ogega**, that while the trial courts have a greater deal of discretion when it comes to punishment and meting out the appropriate sentence, the law in some instances provide for minimum mandatory sentences such as in this case. According to the Respondent, the offence against the appellant was proved beyond reasonable doubt as all the three elements of penetration, age of the complainant and identification of the appellant were proved. In her submissions, the defence only amounted to mere denial and hence the alibi cannot be believed.

**Determination**

29. I have considered the submissions of both parties. As regards the legality of the life sentence, section 7(1)(b) of the Criminal Procedure Code provides that a subordinate court of the first class held by a resident magistrate may pass any sentence authorized by law for an offence under section 278, 308 (1) or 322 of the ***Penal Code*** or under the ***Sexual Offences Act, 2006***. It is not contended that under a resident magistrate may pass any sentence authorized by law for an offence under section 278, 308 (1) or 322 of the ***Penal Code*** or under the ***Sexual Offences Act, 2006***, the learned trial magistrate had no power to impose the life sentence on the appellant. Accordingly that ground has no merit.

30. I have considered the material placed before the Court. This is a first appellate court, this court is obliged to analyse and evaluated afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it 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."**

31. 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.**

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

33. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

> **"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:**
>
> > **'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"**

34. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

> **"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of**

**adequacy remains a question of substance."**

35. It is 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."**

36. As regards the age of the complainant, in **Kaingu Elias Kasomo vs Republic criminal appeal No. 504 of 2010**, the Court of Appeal siting in Malindi 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."**

37. The Court quoted with approval its own decision in **Alfayo Gombe Okello vs. Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault in the following terms:

> **"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)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find."**

38. The court concluded that *"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*.

39. How is then the age of the victim to be proved? In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** 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..."**

40. It was therefore held in In **Dominic Kibet vs. Republic Criminal Appeal No. 155 of 2011** 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."**

41. The emphasis is therefore that the onus of proving the age of the Complainant lies on the prosecution and that while, in the absence of any other evidence, medical evidence is paramount in determining the age of the victim, where there is credible evidence other than medical evidence, the conviction will not be overturned simply because of lack of medical evidence. In fact according to the above authorities age may well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words in assessing age a holistic approach must be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other information and circumstances. See **Aroni, J** in **Kevin Kiprotich Amos alias Rotich vs. Republic** - Criminal Appeal No. 89 of 2016.

42. What the Court frowns upon is mere averments of age without any documents in support thereof. In this case PW1, the complainant's mother testified that the complainant was aged 8 years having been born on 13th August, 2006 and in support of the complainant's age, PW1 relied on the complainant's birth certificate. Clearly therefore based on both oral and documentary evidence the complainant was proved to be 8 years old.

43. As regards penetration, section 2 of the ***Sexual Offences Act*** provides that:

> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;***

44. In this case though the hymen was on examination found to have been intact, vaginal examination revealed abrasion in the labia majora and that the complainant's vagina orifice was dilated abrasion vestibule. Although the appellant took issue with the injuries and lack of the evidence of spermatozoa, in **Macharia vs. Republic [1976] KLR 209**, **Kneller & Platt, JJ** held that.

**"Neither of these girls, or the appellants, had any injuries on them or on their private parts; but this is not material for defilement."**

45. Similarly, in In **Mwangi vs. Republic [1984] KLR 595** at 603, the Court rendered itself thus:

**"The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape."**

46. On the same note, in **George Owiti Raya vs. Republic [2015] eKLR**, it was held that:

**"It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration."**

47. In this case since there were abrasions in the labia majora and that the complainant's vagina orifice was dilated, it was clear that there was penetration of the complainant's genitalia. To rule out the possibility that this was as a result of the complainant playing, PW3 formed the view that the probable type of weapon was a stunt object. It is therefore my view that partial penetration of the complainant's genitalia was proved and that sufficed for the purposes of defilement. This is my understanding of the holding in **George Owiti Raya vs. Republic [2013] eKLR** that:

**"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane."**

48. As regards the identity of the appellant, though the appellant denied that the complainant knew him, his own witness DW1 confirmed that the complainant and her family were customers in his café and that the appellant started working for him on 10th August, 2014. He also confirmed that the complainant knew the appellant. That the complainant was able to identify the appellant when the appellant was in the company of his co-worker and when the appellant was in fact behind him, shows that the complainant knew the appellant very well. In his evidence the appellant did not mention that the complainant identified him by his clothes as was alleged by his witness DW1. Nor did he allude to the fact that the village elder found him not to have been the perpetrator as was alleged by DW1. In the circumstances the learned trial magistrate's findings that DW1's evidence was unreliable may well have had some basis. As was held in 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".**

49. See also **Alicandioci Mwangi Wainaina vs. Republic Criminal Appeal No. 628 of 2004** and **David Kariuki Wachira vs. Republic [2006] eKLR.**

50. As regards contradictions in the prosecution case, the law in my view is as set out in **Philip Nzaka Watu vs. Republic [2016] eKLR,** the where the Court of Appeal held that:

**"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."**

51. In **Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

**"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."**

52. In **Erick Onyango Ondeng' vs. Republic [2014] eKLR**, the Court of Appeal held that:

**"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested**

**facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. *(See OKENO VS REPUBLIC (1972) EA 32*). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."**

53. As was noted in **Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:**

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

54. Therefore whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See ***Law of Evidence*** **(10th Ed) Vol. 1 at 46.**

55. As was stated in **John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:**

**"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place and than that one or both suffered from a defective memory."**

56. This was the position in **Willis Ochieng Odero vs. Republic [2006] eKLR,** where the Court of Appeal held:

**"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of *section 382* of the *Criminal Procedure Code*."**

57. In the case of **Njuki vs. Rep 2002 1 KLR 77**, the court said the following in respect of discrepancies in the evidence of witnesses:

**"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused… however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discr0epancies and proceed to convict the accused".**

58. Whereas I appreciate that there were minor discrepancies in the evidence of the witnesses it is my respectful view that such minor discrepancies are common, in my view the contradictions pointed out were not so material as to vitiate the conviction.

59. In this case DW1 seems to have concocted a case which was not even part of the appellant's case. In his evidence, while he earlier on insisted that the appellant could not that morning have come from somewhere else rather than his home, he later admitted that he did not know where the appellant was coming from that morning. In my view DW1 seemed not to have been a witness of truth but one whose evidence was geared towards a particular finding.

60. That brings me to the issue whether there was opportunity by the appellant to defile the complainant. The offence was, according to the complainant, committed on 14th February, 2015 at around 6.30 am. DW1 admitted that when he opened the kiosk at 05.45 am the appellant was not present and that the appellant appeared as he was opening the kiosk. He did not state when exactly the appellant appeared and he admitted that there neighbouring kiosks which were never locked.

61. I associate myself with the sentiments of **Moses Kazibwe Kawumi, J** the in **Uganda vs. Tumusiime (Criminal Case No.034 of 2014) [2017] UGHCCRD** where he expressed himself as follows:

**"I fail to find any justification in my mind as to how and why a six year old girl could be used to consistently tell a lie against a canteen operator and when the Parents could have contrived such a Plot...On the basis of the above evidence and analysis, it is the finding of this Court that a sexual act was performed on the victim on the 2nd August 2014. PW1, the victim was the only person who testified against the accused as the perpetrator of the sexual act. Other witnesses learnt of it on being told by her…It is not disputed that the Accused and the victim knew each other well…I' am fully satisfied by the**

**evidence on record that there could have been no error in the identification of the accused as the perpetrator of the sexual act on the victim."**

62. In **Nelson Julius Irungu –vs- Republic- Criminal Appeal No. 24 of 2008**, the Court of Appeal held:

**"As this Court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses."**

63. I therefore do not agree with the appellant that he had no opportunity at all of committing the offence in question since DW1 could not vouch for his whereabouts at the time when the offence was committed.

64. I appreciate that the only evidence connecting the appellant with the offence was that of the complainant, a child aged 8 years. On the issue of whether the evidence of the complainant, a minor, required 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]

65. 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."**

66. 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."**

67. Therefore what is required of the trial court is to be satisfied that the victim is telling the truth. According to the Court the complaint was clear and consistent in her testimony and the evidence of PW1, PW4 and PW5 corroborated her evidence in some material particular. It was therefore the Court's finding that the complainant's evidence was truthful and that she was a credible witness. That in my view satisfies the requirement of section 124 of the ***Evidence Act***. In my view, there is no set formula for recording the Court's satisfaction with the truthfulness of the complainant's evidence as long as the substance of the finding reveals that the Court believed in the evidence of the complainant. I therefore find that the Learned Trial Magistrate was indeed satisfied with the evidence.

68. In this appeal the appellant also took issue with the failure by the prosecution to call some witnesses. Dealing with that issue the Court in the above case expressed itself as hereunder:

**"The second issue of law raised by the appellant was the failure by the prosecution to call some of its crucial witnesses, namely the investigating officer and the complainants' mothers. Section 143 of Evidence Act provides that:-**

***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the***

***proof of any fact."***

**The principle used to determine the consequences of failure to call witnesses was succinctly stated in Bukenya & Others v Uganda [1972] EA 549; where the Court held that:-**

> **"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
>
> **(ii) That Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.**
>
> **(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

**The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. T*his is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see.* Keter v Republic [2007] 1 EA 135). In this case, the testimony and evidence adduced by the five prosecution witnesses was sufficient to prove that the complainants had been defiled by the appellant. As such, the situation hardly called for the drawing of an adverse inference with regard to the 'missing' witnesses."**

69. I reiterate what the Court of Appeal stated in **Benjamin Mbugua Gitau vs. Republic [2011] eKLR** that:

> **"It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see *section 143* Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys."**

70. In **Mwangi vs. R [1984] KLR 595** the Court of Appeal held that:

> **"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."**

71. As stated elsewhere in this judgement in cases of defilement, the prosecution is only required to prove three elements: the age of the complainant, that there was penetration and identity of the accused as being the culprit. The prosecution is not duty bound to call all persons involved in the transaction and his failure to call them is not necessarily fatal unless the evidence adduced by him is barely sufficient to sustain the charge. In **Keter vs. Republic [2007] 1 EA 135** the court was categorical that:-

> **"The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."**

72. I am therefore satisfied that the failure to call the alleged witnesses did not render the prosecution's case insufficient.

73. Having considered the evidence on record, the fact that the complainant knew the appellant, there was no suggestion of any bad blood between them, it is my view that the Learned Trial Magistrate was entitled to arrive at the finding she did. In **Keter vs. Republic [2007] 1 EA 135**, the Court held *inter alia* that:-

> **"Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not. There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused."**

74. It is therefore my view that all the ingredients of the offence were proved by the prosecution and the appellant's appeal as regards conviction must fail.

75. With respect to sentence, it is clear that the sentence meted on the appellant was the mandatory maximum sentence. In fact it is the only sentence prescribed for such offences. In my view under the current constitutional dispensation, mandatory sentences whether minimum or the only prescribed 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.***

76. 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."**

77. 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.'**

78. 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."**

79. 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."**

80. 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."**

81. 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.***

82. 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."**

83. 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***.

84. 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 other 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 does not presume lack of consent is such offences, it may well be concluded that there was connivance.

85. This Court does not condone offences against minors and vulnerable persons. As was stated by As was appreciated 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.**

86. 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.

87. In this case the trial court appreciated that there was partial penetration. While I appreciate the sexual offences do often leave a trail of psychological trauma on the victims, it is my view that in the circumstances of this case the life sentence imposed on the appellant was excessive in the circumstances. In the premises, I quash the sentence meted on the appellant and substitute therefor a sentence of 15 years, the same to take into account the period he has been in custody.

88. Right of appeal 14 days.

89. It is so ordered.

**Judgement read, signed and delivered in open court at Mombasa this 17th day of December, 2018.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Appellant in person**

**Miss Ogega for the Respondent**

**CA Lavender**