REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 187 OF 2015

BETWEEN

SAMUEL ACHIENG ALEGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from both conviction and sentence of Honourable Ruguru- SRM dated 2nd October, 2015 in Mombasa Criminal Case No. 743 of 2012)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL OCHIENG ALEGO.....ACCUSED

JUDGEMENT

1. The appellant, **Samuel Ochieng Alego**, was charged in the Chief Magistrate's Court at Mombasa in Criminal Case No. 743 of 2012 with two counts of the offence of defilement contrary to section 8(1) as read with section 8(2) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars of the first count were that the appellant, between the months of August, 2011 and January, 2012 at [Particulars Withheld] Village in Mombasa District within Coast Province, unlawfully and intentionally caused his penis to penetrate the vagina of **SW**, a girl aged 9 years old. He was alternatively charged with the offence of indecent act contrary to section 11(1) of the same Act the particulars being that during the same period in the same area, the appellant unlawfully and intentionally caused his penis to rub the vagina of **SW**, a girl aged 9 years.

2. The particulars of the second count were that on the diverse days between the months of August 2011 and January, 2012 at [Particulars Withheld] Village in Mombasa District within Coast Province, unlawfully and intentionally caused his penis to penetrate the vagina of **HW**, a girl aged 7 years old. He was alternatively charged with the offence of indecent act contrary to section 11(1) of the same Act the particulars being that during the same period in the same area, the appellant unlawfully and intentionally caused his penis to rub the vagina of **HW**, a girl aged 7 years.

3. After hearing, the Learned Trial Magistrate found the appellant guilty of the alternative charge in count one and the main charge in count 2, convicted him accordingly and sentenced him to 10 years and 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 fact by convicting and sentencing the appellant on unsubstantiated evidence of the minors.**
>
> **2. THAT the Learned Trial Magistrate erred in law and fact by relying on the evidence of PW2 and failed to consider that her brother who alleged to be present when she was first called by the Appellant was never called as a witness.**

3. THAT the Learned Trial Magistrate erred in law and in fact by failing to consider that the duration in which the act was alleged to have been committed and the time the Appellant was arrested and charged.

4. THAT the Learned Trial Magistrate erred in law and in fact by failing to consider the appellant's defence in that the room where they lived was so close such that nothing in the imagination of the said offence could have been done without the neighbours hearing.

5. THAT the Learned Trial Magistrate erred in law and in fact by failing to consider the contradiction between PW2's evidence and the doctor's evidence.

6. THAT the Learned Trial Magistrate erred in law and fact by relying on just one piece of the law that is section 124 of the Evidence Act without taking into consideration that corroboration is still needful in such circumstances.

7. THAT the Learned Trial Magistrate erred in law and fact by relying on the evidence of PW5 who did not voluntarily give evidence but was coerced to say so by the sister and that there was no nexus between what happened to her and the appellant.

8. THAT the Learned Trial Magistrate erred in law and in fact by not considering that even if there were bruises, they may not have been caused by the appellant because the time duration between the act and the report of the same was long.

9. THAT the Learned Trial Magistrate erred in law by discounting and not considering in detail the defence evidence.

10. THAT the Learned Trial Magistrate erred in law by believing that the Appellant was running away even after the Appellant stated that there was animosity in the compound after the incident was made and it was necessary for him to move out.

11. THAT the Learned Trial Magistrate erred in law by not considering the Appellant's mitigation.

12. THAT the Learned Trial Magistrate erred in law and fact by giving an excessive sentence.

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

6. PW1, **EWM**, the mother of **SW**, who testified as PW2, who according to her was 10 years old at the time of her testimony, was on 22nd February, 2012 in her house at [Particulars Withheld] , when PW2 showed her diary to read. Upon doing so, she found a request by SW's teacher asking her to go to school at 3.00pm a request which she acceded to. When PW1 went to the said school, [Particulars Withheld] Academy, she met the headmaster who asked her if she was aware that someone was defiling her daughter to which PW1 answered in the negative. The headmaster then called PW2's friend, a classmate, in whom she had confided that there was a person in the plot who was defiling her. According to PW1, the said **W** stated that **Baba Eddy**, the appellant herein, who was a neighbour. Upon asking SW she confirmed that the appellant had in 2011 called her in his house, touched her and defiled her. However later when he called her again she refused to go. **SW**, who testified as PW2 disclosed that there was another child called **HW,** PW4 herein**,** who was also defiled by the same person. However when PW1 asked PW4 about it she started crying but later disclosed that the appellant used to call her in to his house, place her on the sofa and defile her.

7. According to PW1, the following day, the took both girls to Coast General Hospital where the doctor confirmed that they had been defiled and the matter was reported at Changamwe Police Station where they were issued with P3 form which was filled at the said Hospital. After recording her statement the appellant was arrested at his house when he was in the process of relocating. According to PW1, the appellant had been their neighbour for 3 years and that even before the incident, PW1 had escorted the appellant's pregnant wife to the hospital but that her child died. In support of her evidence PW1 produced PW2's birth certificate.

8. In cross examination, PW1 stated that the house they were living in was a Swahili house with a corridor separating the houses and that there were nine tenants while the appellant occupied a house in the middle. According to PW1, it is not easy to know what happens in one's house. It was her evidence that she stopped bathing PW2 when she was five years hence she used to bathe on her own. Though she had a house girl, she was never informed whether the house girl had seen any blood on PW2's clothes. It was her evidence that he did not know what the appellant was doing though she knew that he used to go to church. She also stated that PW4 was staying with her mother who was a teacher and they were her neighbours. In her evidence she had neither quarrelled with the appellant nor with his wife and had no grudge against him.

9. After *voir dire* examination, PW2 testified as PW2. According to her, she was at the time 10 years old and was in class 5 at [Particulars Withheld] Junior Academy. On a Saturday but on a date which she could not remember, at around 2.00pm, she was called by the appellant together with her brother, **JK**, to the appellant's house, whom they also called **Baba Eddy**, a neighbour in the same plot. According to her the appellant told them that he would give them an A4 exercise book and a set. According to PW2, the appellant was alone in the house while their mother was at work and E, their child, was playing outside. She however did not know where the appellant's wife was. According to her, there were no other people around. The appellant then sent her to go to the shop to buy for him rice and a match box while her brother went outside to play after being asked to do so by the appellant. When PW2 returned from the shop, the appellant laid her on the sofa on her back, removed his shorts and lay on top of her after removing her pants. The appellant then removed his penis and inserted it in her vagina and told her not to inform any one. Although she felt pain, she neither screamed nor bled. However when she went to school, she disclosed it to her friend and neighbour, **EW,** who disclosed the information to her mother and who in turn informed the teacher. The teacher then summoned PW1 to school using the school diary and upon going to school SW disclosed the incident to PW1. Thereafter she was taken to Makadara Hospital and later they reported the matter to Changamwe Police Station. According to PW2 she was afraid to disclose the incident to her mother because PW1 beats her when she makes mistakes. She however stated later when the appellant beckoned her to his

house, she declined to go.

10. PW2 testified that PW4 is also their neighbour and that their house was at the far end. According to her she disclosed the incident to PW4 and **W**. It was her evidence that this was not her first time to enter the appellant's house. It was her testimony that it was only the appellant who had sexually assaulted her and that he only did it once.

11. PW3, **MBM**, was the mother of PW4, who was 9 years in standard 3. According to her on 22nd February, 2012 she had gone for a fellowship and when she returned in the evening, she found her elder daughter, **S**, beating PW4 and upon asking why, the said **S** informed her that PW4 had done bad manners with the appellant and that she could confirm with their neighbour **Mama Sharon**. Upon asking PW4, the latter confirmed the same which information she confirmed from **Mama Sharon**. According to PW3, PW4 informed her that the appellant called her to his house, removed her underwear and inserted his penis into her vagina. The following day, PW3 took PW4 to Coast General Hospital where she was examined and was found to have been defiled. She then reported the mater to Changamwe Police Station where she was given a P3 form which was filled at Coast General Hospital. Two days later the appellant tried to relocate but was arrested by the police. It was her evidence that the appellant had been their neighbour for 2-3 years. It was her evidence that PW4 had informed her that the appellant had sexually assaulted her on the sofa and though the appellant had a wife and child, both of them were not in the house as the appellant had given his child a bicycle to play outside. In support of her evidence PW3 relied on PW4's birth certificate and disclosed that she had never quarrelled with the appellant.

12. In cross-examination, PW3 stated that she makes food which she delivers to schools and that she always in the house in the morning hours during weekdays. According to her their houses were two-roomed without inner doors. According to her while she was not aware of the appellant's job, his wife was a teacher at Migadini Primary School but used not to work on Saturdays. According to her she never noticed that PW4, who at that time was 7 years, had ben defiled though she had a good relationship with her. According to her, she stated in her statement that PW4 had done bad manners with Eddy's father and not a neighbour's. She was however not aware if Mama Sharon had any grudge against the appellant and she denied that they threatened to beat the appellant. According to her, PW4 informed her that the appellant defiled her two times. She stated that it was possible to have no one in the compound.

13. After carrying out *voir dire* examination, **HW** was sworn in and testified as PW4. According to her, she was in class 3 at [Particulars Withheld] Academy. According to her on the material day, the appellant who was their neighbour, who was standing at his door, called them which he used to do. According to her, the appellant used to remove his penis and insert in her vagina after removing her underwear and that he did this on three different days while his wife was at the hospital for delivery. According to her, the appellant had one child in class 7. It was her evidence that she did not cry and never told anyone. However PW2 informed another child who informed their head teacher. At the time her mother was not at home. She was thereafter taken to Coast general Hospital and to Changamwe Police Station to report. It was her evidence that the appellant used to make her lie on his sofa and put his penis in her vagina.

14. According to her she told her sister, S that the appellant had done bad manners to her. She however denied that **E** did it. It was her evidence that she did not bleed and that she was afraid to tell her mother. During the time when the appellant assaulted her, PW2 was playing outside. While she knew the appellant's wife, it was her evidence that she used to go to church on Saturdays and Sundays. According to her, the appellant was staying with two nieces one of whom was called **Sarah** who witnessed the incident once. According to her she never disclosed to PW2 what the appellant had done to her and neither did PW2 disclose the same to her. She was therefore not aware of who disclosed the same to PW2.

15. **EW**, was sworn as PW5 after a *voir dire* examination was conducted. According to her, she was 11 years in standard 5 and on 18th February, 2012, she had gone to Coco Beach with PW2, and while there PW2 informed her that her male neighbour had defiled her. PW5 then informed her mother and the head teacher and upon being called by the head teacher, PW confirmed the same. Thereafter the head teacher called a lady teacher and they went to Changamwe Police Station where a report was made. At the police station they found PW1. According to her she did not know PW2's defiler though she visited PW2 once in December and PW2 showed her the appellant's house which was locked.

16. PW6, **Dr L Ngone**, produced the P3 forms which were filled by **Dr Wahome** with whom he had worked for 8 years and who had resigned from Coast general Hospital but with whose handwriting he was conversant.

17. According to him, PW2 was 9 years old in 2012 and alleged that she was repeatedly defiled by a known neighbour between August 2011 and January, 2012. She was seen at Coast general Hospital where she was issued with a PRC form. On examination, she was found to have lacerations in her vaginal opening but with no other injury. According to the doctor who carried out the examination, it was difficult to ascertain when the defilement occurred but she assessed the degree of injury as harm. The PRC form however showed that PW2 was still a virgin.

18. As regards PW4, she also alleged that she had been defiled by a neighbour known to her between repeatedly August 2011 and August 2012 and was seen at Coast general Hospital. On examination, her hymen was broken and she had lacerations on her vaginal opening. Apart from that she had no other physical injury. Similarly the doctor found that it was difficult to ascertain when her defilement took place but assessed her injury as harm.

19. **Linda Mikali Kioko**, PW7 was a teacher at [Particulars Withheld] Junior Academy when on 28th February, 2012 at 3.00pm the principal of the said school called her to his office where she found PW2. Upon interviewing PW2, PW2 disclosed to her that there was a person in their plot who was doing bad manners to her by sleeping with her some times on the sofa and sometimes on the bed. According to PW7. PW2 informed her that she was first defiled when she was in class 4 and that the same person also defiled another girl. The witness reported the matter to the police station where she recorded her statement. According to her information PW2 was defiled three times.

20. In her evidence pw2 disclosed the incident first to PW5 who in turn informed her mother and later reported the matter to the head teacher. According to her PW2 is a shy teacher. It was her evidence that when PW2 was in class 3 she noticed that she had a limp but did not think much of it as the limp would have been as a result of anything. According to her when PW1 sought to know who had defiled her, PW2

disclosed that it was **Babake Eddy**.

21. PW8 was **Cpl Ann Chemai,** the investigating officer. On 23rd February, 2012 at 4.00 pm two complaints were reported at Changamwe Police Station where she was stationed by PW2 and PW4 with their mothers that they had ben defiled on different dates between August 2011 and January, 2012 by their neighbour known as baba Eddy. According to her PW2 did not disclose the incident till 18/2/2012 when she confided in PW5. When the matter was reported to the head teacher, PW2 disclosed that she had been defiled with PW4 by the appellant. According to her she arrested the appellant while the appellant was in the process of moving house.

22. Upon being placed on their defence, the appellant chose to give unsworn statement and called one witness. According to him, the allegations made against him were untrue. He however admitted that PW2's house was adjacent to his while PW4's house was near the gate. The house they were staying in was a Swahili house with houses facing each other while there was a path separating the two rows of houses. To him, it was not possible to defile a child whose house was adjacent to his without anyone hearing or seeing and as he was living with his wife and two nieces who were always around save for when they were in school. According to him, PW1 had a grudge with him since she was alleging that they were the people who were killing them while referring to tribalism between them. As for PW4's family, there was no grudge against them but they were poisoned by PW2's family. He however denied that he tried to escape from the scene but had previously heard the neighbours conspire against him and reported the matter at Changamwe Police.

23. The appellant called **Caroline Wanyonyi**, his wife as DW1. According to her, the complainants were their neighbours for a short stint in a Swahili house which had 10 rooms. According to her she lived with the appellant, her child who was in standard 8 and two nieces who however left in December, 2011 when she fell ill. According to her in November, 2011 she was admitted during her pregnancy when she had fibroids which were removed and her twins died. It was her evidence that the corridor separating the houses was tiny and one could hear and see what was happening at the neighbours. It was her evidence that from the end of July, 2011 she was partly bedridden and resumed work in September and that she used to go home for lunch and return home early in the evening.

24. According to her it was not possible for the incident to have happened since her sister in law was in the house when she lost her babies. To her, her relationship with the complainants' parents was not cordial and after the incident they decided to relocate as the house was too small.

25. Upon the close of the case, the Learned Trial Magistrate found, based the evidence that the complainants were aged 9 and 7 years respectively at the time of the incident and that the appellant was arrested after being positively identified by the complainants' parents. Further the appellant was known to the complainants and their parents who were his neighbours. The Court however found that based on the evidence of PW6 and PW2's own evidence that there was no penetration and that what happened was the rubbing of her vagina by the accused as per the alternative charge. The Court however did not believe the appellant's evidence that PW2's mother had a grudge against her due to tribal differences.

26. The Court however found that PW4's evidence was corroborated by PW6. The Learned Trial Magistrate proceeded to find that the prosecution had proved its case beyond reasonable doubt, found the appellant guilty and convict him accordingly on the alternative charge to count I and on the main count in count II.

Determination

27. I have considered the submissions of both parties. It was submitted based on **Peter Korir Ng'etich vs. Republic Criminal Appeal No. 163 of 2002** that the life sentence meted on the appellant was excessive. According to the submissions, in that case though the appellant was convicted of manslaughter a charge that carried life sentence, the Court of Appeal reduced the same to 10 years. With due respect this submission is not entirely correct.

28. In that case the appellant was charged with manslaughter under section 202 as read with section 205 of the ***Penal Code***. Section 205 which is the penal section provides that:

> ***Any person who commits the felony of manslaughter is liable to imprisonment for life.***

29. **Sir Henry Webb C.J.** in **Kichanjele S/O Ndamungu vs. Republic (1941) 8 EACA 64** had this to say on the proper construction of the words "**liable to**":

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

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

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

31. A similar position was adopted in **D W M vs. Republic [2016] eKLR** where the Court held that:

"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "*Shall be liable to imprisonment for life*" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

32. Bearing the totality of the above principles in mind, it is clear that the use of the words *"shall be liable to imprisonment"* gives room for the exercise of judicial discretion.

33. The foregoing principles would apply to section 11(1) of the ***Sexual Offences Act***, the penal section under which the appellant was convicted of the charge in Count I which provides that:

Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

34. On the other hand section 8(2) of the ***Sexual Offences Act***, the penal section under which the appellant was charged provides that:

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.

35. It is therefore clear that section 8(2) on the face of it prescribes a mandatory sentence as opposed to a maximum one. As to the legality of such a sentence, I will deal with that later in this judgement.

36. It was further submitted that whereas the evidence of the complainants required corroboration, the same was not corroborated. According to the appellant whereas the evidence pointed to some lacerations and broken hymen, the evidence did not point out to the appellant as the perpetrator of that broken hymen or the lacerations thus there was no proof of penetration. I appreciate that the only evidence connecting the appellant with the offence was that of the complainants, children aged 7 and 9 years. On the issue of whether the evidence of a minor requires corroboration, the law is quite clear: it does. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the ***Evidence Act*** makes this quite clear:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." [Emphasis added]

37. 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."

38. 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."

39. Therefore what is required of the trial court is to be satisfied that the victim is telling the truth. According to the Court the evidence of PW2 was corroborated with the evidence of PW6. With due respect the evidence of PW6 did not corroborate the evidence of PW2 with respect to the identity of the perpetrator and had there been a mandatory requirement of corroboration, that would have been the end of the matter. The Learned Trial Magistrate however found that being a child of tender years, the evidence of PW2 was credible, consistent and truthful and proceeded to justify her reasons for this finding. 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 truthfulness of the evidence of PW2.

40. However that was not the case for PW4. In her case the Court simply stated that it found no reason to doubt the prosecution's case concerning PW4. While the evidence of the doctor, PW6, supported her evidence that she was defiled, the Court did not make any positive finding that it believed that PW4's evidence concerning the perpetrator of the offence being the appellant, was truthful leave alone giving the reasons for such finding. In the premises the Learned Trial Magistrate's finding as regards PW4, in my view failed to meet the test prescribed in section 124 of the ***Evidence Act***. In **Omuroni vs. Republic (2002) 2 EA 508** it was held:

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

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

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

42. Apart from that PW4's evidence was that she never revealed the act of her defilement to any one and did not know how the incident came to light. This is telling since the information regarding the defilement of PW4 seems to have originated from PW2, one **Sandra** and **Mama Sharon**. While the former did not disclose how she came by the information and PW4 denied ever having disclosed the same to her, neither **Sandra** nor **Mama Sharon** were called to testify as to how and where they received the information. At the time of the defilement, according to PW4, who was aged 7 years, she neither screamed nor bled no one else seems to have noticed anything wrong with her unlike in PW2's case where PW7 stated that she noticed at one time that PW2 had a limp but did not think much of it as the limp would have been as a result of anything. While these may not necessarily be fatal to the prosecution's case, they do go to the credibility of her evidence. **Warsame, J** (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR** held that:

"In this case PW1 Dr. Muhombe informed court that it would be surprising that the girls went shopping in Gikomba after the incident. That must have been a traumatic experience, emotionally and physically. The evidence on record is that the victims walked across town for 14 kilometres and the trial court did not factor the views expressed by the doctor in assessing or determining whether the complainants were truthful witnesses."

43. The appellant on his part said that the defilement of PW4 was simply fabricated. In **Paul Kanja Gitari vs. Republic [2016] eKLR**, it was held by the Court of Appeal that:

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

44. According to **Warsame, J** (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR**:

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

45. Clearly in the instant case the report, if at all it was made by PW4, was made after a considerably long period of time. Therefore malice and fabrication in light of the inconsistencies and contradictions noted above cannot be ruled out. As was held by the Court of Appeal with respect to heavy minimum sentences in the case of **Hamisi Bakari & Another vs. Republic [1987] eKLR**:

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

46. Therefore whereas I agree with the findings of the Learned Trial Magistrate as regards the proof of the offence of indecent act by the appellant, I find that the conviction of the appellant in respect of count II was not safe and cannot be sustained.

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

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

48. 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."**

49. 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.'

50. 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."

51. 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."

52. 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."

53. 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.

54. 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."

55. 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***.

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

57. 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.**

58. 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.

59. In the premises, I set aside the appellant's conviction in respect of Count II and quash the sentence meted upon him therein. I however confirm his conviction on Count I but quash the 10 years imposed on him and substitute therefor imprisonment of 5 years.

60. Right of appeal 14 days.

61. It is so ordered.

Judgement read, signed and delivered in open court at Mombasa this 18th day of December, 2018.

G V ODUNGA

JUDGE

In the presence of:

Mr Shimaka for the Appellant

Miss Ogega for the Respondent

CA Lavender