REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 296 OF 2010

FAPPYTON MUTUKU NGUI…..……………………….APPELLANT

VERSUS

REPUBLIC……………………………………….…..RESPONDENT

(Being an appeal from the original conviction and sentence in Kithimani Senior Resident Magistrate's Court Criminal Case No. 32/2009 by Hon. A.W. Mwangi, SRM on 31.08.2010)

JUDGMENT

1. The Appellant, Fappyton Mutuku Ngui, was charged at the Kithimani Senior Resident Magistrate's Court with the offence of defilement. The Charge Sheet read as follows:

> COUNT: DEFILEMENT CONTRARY TO SECTION 8(1)(2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006
>
> FAPPYTON MUTUKU NGUI: On the 16th day of October, 2009 at Kangode Location in Masinga District within Eastern Province, intentionally and unlawfully caused the penetration of his genital organ (penis) into the genital organ (vagina) of M M, a girl aged 5 years.

2. The Appellant also faced an alternate charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the alternative charge were that on the 16th day of October 2009 at Kangode Location in Masinga District within Eastern Province, he indecently acted with M M, a girl aged 5 years, by touching her private part namely vagina.

3. He was tried before the Senior Resident Magistrate and was found guilty of defilement, and subsequently sentenced to suffer life imprisonment as the law provides.

4. The prosecution produced six witnesses during the trial. The complainant was the second witness (PW2). Being a child, the court conducted a voir dire and determined that although she understood the importance of telling the truth, she could not be sworn. She therefore gave unsworn testimony. She testified on a "certain day" she and M (who testified as PW1) went to look for firewood near a river. While there, the Complainant testified, the Appellant, who was known to her, called her to his house. The Appellant then proceeded to remove her clothes and underpants. According to the Complainant, the Appellant then proceeded to defile her. The words the Complainant used to describe the ordeal is "circumcise." She testified thus: "[Appellant] used the thing he uses to urinate to circumcise me." She also testified that the Appellant had defiled her at least other separate times before.

5. On the material day the complainant was with PW1 who, though being a child, testified on oath

after a voir dire examination revealed that she understood the meaning of an oath. She testified that on the material day the Appellant called her to his house but when she refused to go, he called the Complainant instead. The Complainant went and after a short while she heard the Complainant crying from inside the house. The Complainant later emerged from the house and narrated her ordeal to PW1 who saw blood coming out of the Complainant's genitalia. PW1 then accompanied the complainant to her (PW1) grandmother and reported what had happened.

6. The Complainant's grandmother testified as PW3. Her testimony was that on 16/10/2009 she saw her granddaughter walking with difficulty and, on examining her, saw bruises between her legs - which she massaged with hot water and salt. She also noticed that the complainant's vaginal area looked yellowish and bruised. She suspected the child had been defiled and asked a lady called Anne to examine the child. She was also informed by PW1 that the complainant had been defiled by the Appellant. Anne then took the complainant to the hospital. PW3 was however unable to identify the Appellant in court due to bad eyesight, but insisted that she knew him after the complainant and PW1 told her that it was Mutuku who works for Mita who had defiled the complainant. She knew the Mutuku who works for Mita well.

7. The next witness was A M M who is related to the complainant by virtue of being her mother's aunt. She testified that on 19/10/2009 the complainant's grandmother called her, telling her that they suspected the complainant had been defiled. On examining the complainant she noticed a yellowish substance from her vagina. She reported the matter to the area councilor who organized transport to take the child to Kikumini Police Station. After filing a report she accompanied the girl to Kikumini Dispensary where she was treated, then referred to Matuu District Hospital for further treatment. She identified the Outpatient Card (MF-1); Treatment Card (MF-2); and P3 form (MF-3).

8. The fifth witness (PW5) was Benjamin Maingi, a Clinical Officer who testified on behalf of his colleague Alfred Toronke who had examined and treated the complainant at Matuu District Hospital, but who was unable to attend court. He testified that an examination of the complainant revealed that she had a torn hymen with flesh margins, a foul smell from her vagina, spermatozoa, pus and an infection – all of which confirmed sexual contact and forceful penetration. He further testified that when the Appellant was examined, there were no injuries or abnormalities in his genitalia, a situation which could have been attributed to the fact that he was examined some 9 days after the alleged offence.

9. The final witness was Corporal Desterio Omukaga of Matuu Police Station who received the Appellant at Matuu on being forwarded from Kikumini Police Post, then charged him before the court. He testified, on cross-examination, that he saw no need for conducting an identification parade because the complainant positively identified the Appelant.

10. After considering the charge and the testimony against the Appellant, the trial court found that he had a case to answer and put him on his defence. He chose to give an unsworn testimony with no witnesses.

11. In his defence, the Appellant gave a straightforward denial. He testified that he was not even in the neighborhood on the material day: on 14/10/09 he left for his home to deliver some money to his mother who wished to purchase seeds. He remained in his home and only left on 18/10/09. In the evening of the following day he was "sent" to the market to pick some goods ostensibly for his employer. However, he soon found out it was but a clever ruse to draw him out for arrest. He was arrested as soon as he got to the market. The Appellant complained that he remained in custody of the Poice at Matuu Police Station for five days before he was charged with any offence. He also complained that all this time he was never told what charges he was facing.

12. The learned Magistrate weighed the evidence against the accused vis a vis his defence and found him guilty of defilement. He was sentenced to suffer life imprisonment as the law dictates. Naturally, the Appellant was dissatisfied with the conviction and the sentence, prompting this appeal.

13. The Appellant has enumerated the following grounds of appeal reproduced verbatim as they appear in his filed paper after the Court informally allowed him to amend them:

a. That the pundit magistrate erred in both law and fact while convicting me on reliance to the purported visual identification by recognition of which the circumstances under which the same was made is put in the consideration.

b. That the pundit magistrate erred in both law and fact while being impressed with my mode of arrest enlighten no evidence from the arresting officer to prove the same (sic).

c. That the learned pundit magistrate erred in both law and fact while convicting mean fatally unproved charges (sic).

d. That the pundit magistrate erred in both law and fact while rejecting my defence that wasn't challenged by the prosecution side as per law requires (sic).

14. The appeal was heard on 14/02/2012 when Mr. Mwenda, counsel for the state gave oral arguments whereas the Appellant filed written submissions.

15. Mr. Mwenda narrowed the issues down to three:

a. whether there was penetration:

b. who was responsible for the penetration; and

c. whether the age of the Complainant was established

16. Mr. Mwenda pointed the court to the testimony of the complainant who narrated her "circumcision" ordeal, PW1 who saw blood from her vagina and her aunt and grandmother who examined her and saw bruises and a yellow substance from her vagina – all this testimony pointed to defilement. He also urged the court to consider the evidence of the doctor who examined the complainant and found that the hymen had been forcefully torn, with sperm deposits in her vagina.

17. On identification, Mr. Mwenda reminded the court, first, that the events took place at 2:00pm and secondly, that both the complainant and her companion (PW1) knew the Appellant.

18. On age, he urged the court to consider the age assessment by the clinical officer and the Magistrate, and the testimony of the complainant's aunt and grandmother both of whom testified that she was a child of tender age.

19. Mr. Mwenda dismissed the defence of the Appellant as "mere denial" which was full of untruths. He urged this court to confirm the conviction and the sentence because that is what he deserved after committing such a heinous crime against such a young child.

20. The Appellant maintained his innocence, blaming his troubles on the mother of the complainant who allegedly promised to "fix" her following a shamba dispute. He also complained about being held in custody for five days before being taken for medical examination.

21. This being the first appeal, this court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it never saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See Okeno v R [1972] EA 32 and Kariuki Karanja v R [1986] KLR 190.

22. The main charge which the Appellant faced is defilement. Sections 8(1) and 8(2) of the Sexual Offences Act provide that:

> 8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

> 8. (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

23. Section 2 of the Act defines "penetration" as:

> “the partial or complete insertion of the genital organs of a person into the genital organs of another person;”

24. Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. 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.

25. On the first issue, the complainant testified that she was “circumcised” by the Appellant on 16/10/09. The other child with whom she was fetching firewood saw blood streaming from between her legs. Her aunt and grandmother saw bruises in her vagina, and a yellowish substance therein.

26. A more thorough and professional examination was done by the Clinical Officer whose report revealed that the Complainant’s hymen was forcefully torn, there were sperm deposits in her vagina and she had contracted an infection, all due to being forcefully penetrated. It is incontrovertible that there was penetration of the complainant’s vagina. The Complaint’s own evidence, though not under oath, was quite candid and credible and the Learned Magistrate who heard and saw her believed her. So did she believe the Complainant’s friend (PW1) who testified that he saw the Appellant going into his house with the Complainant, and who heard loud cries from inside the house. She also lifted the Complainant’s dress and saw blood and semen oozing out of the Complainant’s vagina immediately following the incident. Further, there are the immediate reports made to both PW1 and PW3 about the incident. The Learned Magistrate who had an opportunity to hear and observe all these witnesses found them to be candid and straightforward. All these seen together leave no doubt that there was penetration of the Complainant’s vagina. Hence, the first ingredient of the offence of defilement is easily satisfied.

27. The second ingredient for the offence is the age of the Complainant. The Complainant testified that she was five 5 years old at the time of the trial. This was about a year after the incident. Her aunt (PW4) testified that the complainant was born either in 2004 or 2005. The Clinical Officer who examined her also formed the professional opinion that the complainant was approximately 5 years of age. The Learned Magistrate who observed her, performed voire dire, and listened to her in court assessed her age to be less than 10 years. I am aware that our case law requires that the age of a child to be conclusively proved before any conviction can arise from an offence under the Sexual Offences Act. The Courts are strict about this requirement because the penalty once found guilty is dependent on the age of the victim. For this strict approach, see, for example, Hillary Nyongesa v Republic (Eldoret HC Crim. App. No. 129 of 2009 (Mwilu J.)). I would be prepared to clarify that “conclusive” proof of age in cases under Sexual Offences Act does not necessarily mean that there has to be a formal age assessment report or the production of a birth certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases. In this particular case, I am prepared to hold that available evidence shows that the victim was less than eleven years old, which is the threshold for triggering a charge under section 8(2) of the Sexual Offences Act.

28. With the first two elements established, the Court will next address itself to the question of identification. Simply put, the question is: was it the Appellant that committed the offence? The Appellant says it is a case of mistaken identity because he was away visiting his mother when the alleged assault occurred. He reminded the Court in his written submissions that the identification evidence was from minors and therefore it should be treated with a lot of caution. I will return to this shortly.

29. It is true that our case law calls for caution in receiving identification evidence because of the grave possibility of a miscarriage of justice occasioned by misidentification. The predecessor to the Court of Appeal plainly stated in Roria v R [1967] EA 583, that “a conviction resting entirely on identity invariably causes a degree of uneasiness.” And, the Court of Appeal reminded us in Kiarie v Republic that “it is possible for a witness to be honest but mistaken and for a number of witnesses to all be

mistaken." Finally, the famous Charles Maitanyi v R [1986] 1 KLR 198 admonished courts to exercise the greatest caution and circumspection before convicting on testimony of identification especially where the evidence is that of a single identifying witness.

30. To aid in the exercise of this "circumspection" our courts have adopted the guidelines for receiving and considering identification evidence set out in the famous English case of Regina v Turnbull [1976] 3WLR 445 are considered very comprehensive. They are nine in number and they instruct a judicial officer who is considering evidence on identification to ask the following questions:

a. How long did the witnesses have the accused under their observation?

b. What was the distance between the witnesses and the accused person?

c. What was the lighting situation?

d. Was the observation impeded in any way, as for example, by passing traffic or press of the people?

e. Had the witnesses ever seen the accused person?

f. If the witnesses knew the accused prior to the current transaction, how often?

g. If the witnesses had seen the accused only occasionally prior to the current transaction, did the witness have any specific reason for remembering the accused?

h. How long elapsed between the original observation and the subsequent identification to the police?

i. Was there any material discrepancy between the description of the accused given to the Police by the witnesses when first seen by them and his actual appearance?

31. If there was one case where the circumstances were favorable for positive identification, it is this one. The evidence adduced by PW1 and PW2 was evidence of identification by recognition. Both PW1 and PW2 knew the Appellant prior to the incident. They knew his name as Mutuku. They even knew that he worked for a man known as Mati. They both had encountered him before. PW2 testified that he had sexually assaulted her before while both PW1 and PW2 spoke of his ox-drawn cart which the Appellant apparently used to ferry children in. The offence occurred at 2 pm in broad day light. Both PW1 and PW2 had plenty of time to see, decipher and discern the Appellant. They both reported to a third party (the grandmother) who it was who had assaulted PW2. In my view, therefore, the Appellant was positively identified.

32. The Appellant has also questioned the conviction because it was based on the "uncorroborated" evidence of a minor. Indeed courts should be cautious before convicting on the uncorroborated evidence of minors. There are many reasons for this. In J Heydon Evidence: Cases and Materials 2nd ed Butterworths London 1984, 84, the reasons were put thus:

First, a child's powers of observation and memory are less reliable than an adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children. One lying child may influence others to lie; anxious parents may take a child through a story again and again so that it becomes drilled in untruths. Most dangerously, a policeman taking a statement from a child may without ill will use leading questions so that the child tends to confuse what actually happened with the answer suggested implicitly by the question. A fifth danger is that children often have little notion of the duty to speak the truth, and they may fail to realize how important their evidence is in a case and how important it is for it to be accurate.

Finally, children sometimes behave in a way evil beyond their years. They may consent to sexual offences against themselves and then deny consent. They may completely invent sexual offences. Some children know that the adult world regards such matters in a serious and peculiar way, and they enjoy investigating this mystery or revenging themselves by making false accusations.

33. Indeed this paragraph is congruent with the law of evidence in Kenya, except that when it comes to sexual offences, Kenyan people through their Parliament passed Criminal Law (Amendment) Act 2003 in Legal Notice No. 5 of 2003 which amended Section 124 of the Evidence Act. The proviso to that section now states:

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

34. In this particular case the court conducted a voir dire examination and satisfied itself that although the complainant could not be sworn, she understood the need to tell the truth. The court was convinced that the witness was truthful. The learned magistrate rendered herself thus:

Both PW1 and PW2 referred to the accused person as Mutuku who was Mita's employee. They knew him well prior to the incidence. There were no difference between accused person and PW1 or PW2 or any of their family members prior to the incident. None of the two girls had any reason to testify falsely against him. None had a reason to frame him up. The 2 witnesses testified with the innocence of children. Their evidence remained consistent even in cross-examination.

35. After arriving at such a conclusion, there need not be any corroboration of the testimony given by the child. In any event, it seems plainly obvious that there was plenty of corroboration in this case. First of all, PW1 plainly corroborated the evidence of PW2. She saw the Appellant calling out PW2 and walking with her to his house. She stood less than five metres away from the door and heard PW2 screaming in pain. She saw PW2 coming out of the house and immediately noticed blood and a yellow substance oozing out of her vagina. This is, plainly, corroboration of the fact that PW2 was defiled as well as that it was the Appellant who defiled her.

36. If this were not enough, there is also the corroboration provided by the prompt report made by both PW1 and PW2 to PW2's grandmother. In that report which happened shortly after the incident, they both named and described the Appellant. That, too, is corroboration.

37. The Appellant also raised two issues to press the issue that his trial was unfair, and probably, unconstitutional. First he argues that his own wife and daughter should have been called as a material witness in the case and that failure to call her was evidence of subterfuge by the prosecution: keeping away unfavorable evidence from the Court. It is true that the position of our law is that the Prosecution is obliged to call all our witnesses including those that might give adverse testimony. That rule was state by the Court of Appeal in Donald Majiwa Achilwa & 2 Others V Republic [2009] eKLR thus:

The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549).

38. It is not entirely easy to follow the Appellant's arguments in this respect. As I understand it, he is complaining that if his wife and daughter were called to testify for the prosecution, they would somewhat have given information which is contrary to that given by prosecution witnesses. In his written submissions he says that the minor daughter would have testified that PW2 had complained to her earlier

that he (the Appellant) did "bad manners" to her. As I have already stated, it is hard to follow the logic of the Appellant's argument. Suffice it to say the following three things.

39. First, the Appellant has referred to matters which are outside the record and were never raised during trial. It is unavailing for him to try and recreate the Court record at this point.

40. Second, his wife enjoys spousal privilege and the Prosecution would not have been able to compel her to testify against the Appellant anyway.

41. Third, the Appellant mistakes the rule of law on this issue. The Prosecution is not obliged to call witnesses on behalf of the criminal defendant. It is the defendant's obligation to craft his own theory of the case; determine which witnesses he wants to call to marshal his evidence and then enlist the help of the Court to do so. A criminal defendant cannot sit by and not summon witnesses to absolve him and then turn around and make the claim that the Prosecution should have called witnesses who would have established his defence.

42. Finally, the Appellant has also raised a constitutional issue regarding his detention before being taken to the hospital and in court. He was detained for more than the 24 hours required by law, and this fact is not denied by the prosecution. He says he was arrested on 19/10/2009 but was not taken to Court until 26/10/2009 – a delay of 6 days. His written submissions are not comprehensible because he talks of being arrested on 18/03/2007 and being presented to Court on 02/04/2007. He also talks of being arrested by a P.C. Stanley Kipchumba, who is a total stranger to these proceedings. It is possible that the Appellant merely "borrowed" the submissions of another person in this regard. The correct dates, however, are that he was arrested on 19/10/2009 and was presented to Court on 23/09/2009.

43. It is true that there is a delay of at least 4 days from the constitutionally-mandated 24-hours. However, while our previous jurisprudence on the issue was that the trial would be a nullity if the accused was detained beyond the time stipulated in the Constitution, this rigid rule has given way to a more flexible standard. In Julius Kamau Mbugua v Republic [2010] eKLR the Court of Appeal established the flexible rule that that a violation of the constitutional provisions stipulating the time within which an accused must be produced in court does not give rise to an automatic acquittal - because one can be adequately compensated by way of monetary damages. David Njuguna Wairimu v Republic (2010) eKLR is in accord. Our law as it stands now, I believe, is that the Court will scrutinize the conduct of the State to determine if it acted flagrantly to frustrate the rights of fair trial of the accused person. Courts will not excuse a deliberate attempt to delay the presentment of an accused person to the Court with the conscious intention of suppressing his rights or prejudicing his ability to defend himself. Hence, where there is a long delay, the Prosecution has an affirmative duty to offer an explanation for the delay. Where such an explanation is not forthcoming, the Court is entitled to infer that there was a deliberate attempt to frustrate the accused person's right to free trial. However, this does not appear to be the case here. While I do not condone the violation of the Appellant's constitutional rights in light of the above, the violation of the Appellant's right to be produced in court within 24 hours will not automatically result in his acquittal. He is, however, at liberty to seek civil remedies for the violation of his constitutional rights.

44. Before ending, there is one other matter I would like to address. Even though the Appellant did not raise it, there appears to be a technical deficiency in the Charge Sheet. As set out in paragraph 1 of this judgment, the Appellant was charged contrary to section 8(1)(2) of the Sexual Offences Act. In fact, there is no such section in the Sexual Offences Act. The Appellant did not raise this issue but it is important to address it here. For purposes of fairness and completeness the Court must ask whether this error in the charge sheet entitles the Appellant to an acquittal or whether it is a technical one curable because it did not occasion a miscarriage of justice.

45. I have said elsewhere that the answer to this question must begin with section 382 of the Criminal Procedure Code. In material part, it provides that:

…. no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant,

charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

46. The proviso to Section 382 provides that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

47. Next, then, we must ask ourselves when it is appropriate to find that a charge sheet is fatally defective. Our case law has given pointers. Two cases are pertinent: the case of Yosefa v. Uganda [1969] E.A. 236 – a decision of the Court of Appeals – and Sigilani v. Republic [2004] 2 KLR 480 – a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. Sigilani held:

The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

48. As I have previously held, the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? In this case, the Appellant was charged under section 8(1)(2) of the Sexual Offences Act. No such section exists in the Act. Did this prejudice the Appellant and occasion a miscarriage of justice? I have previously said that the answer to that question is provided by seeking to see if the accused person can be said to have understood the charges facing him well enough to understand the ingredients of the crime charged so that he can fashion his defence. This can be tested, for example, by how much or vigorously he participated in the trial process and whether the record shows that he was able to follow the proceedings and ask questions in line with his theory of defence.

49. At the end of the day, therefore, the test is not at all a formalistic one but a substantive one. On my part, I have adopted a test that looks at the trial process in its totality rather than the retail defects separately. The aim is to establish if the trial process could have been said to be fair to the accused person. If the charge sheet has a technical defect but all the other procedures are meticulously followed and the other substantive rights of the accused person are evidently respected in the trial process, it will be easier for a Court to fairly immunize the technical defect in the charge sheet – especially if it is clear that the accused person understood what was facing him and his participation in the trial process vindicates that position. On the other hand, if a defect in the charge is followed by a series of other procedural or substantive mishaps or miscues in the trial process which all affect the rights of the accused person, in my view, the Court should be reluctant to utilize section 382 to cure the charge sheet even if each of the defects in the trial process could, standing on its own, be cured or treated as harmless error. An accumulation of singular streams of procedural defects which would otherwise be harmless errors spew into a river of substantive defect which would entitle an accused person to an acquittal upon appeal.

50. Applying this approach to the facts of the present case, I can confidently say that no miscarriage of justice was occasioned by the technical defect in the charge sheet and I will proceed to "cure" it under section 382. If one needed evidence of that, one would begin with the very fact that the Appellant never raised the objection – including on appeal. That must be because he knew the charges he was facing. Second, a perusal of the Court record shows that the Appellant participated vigorously in the trial process and was well aware of the charges he was facing. All in all, I am certain that the trial process was fair and the Appellant had sufficient notice of the charges facing him.

51. On sentence, the Learned Trial Magistrate sentenced the Appellant to serve life imprisonment in line with Section 8(2) of the Sexual Offences Act. That section provides that:

8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon

conviction be sentenced to imprisonment for life.

52. This is what the law provides. That is what the Appellant got. There is simply no room to maneuver here.

53. The upshot of all this is that the Appellant's appeal fails in its entirety, and is hereby dismissed. He shall remain in custody to serve the sentence which was imposed on him.

DATED and DELIVERED at MACHAKOS this 28TH day of SEPTEMBER, 2012.

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J.M. NGUGI

JUDGE