Kilonzo v Republic (Criminal Appeal E046 of 2021) [2023] KEHC 18434 (KLR) (22 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18434 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E046 OF 2021

FR OLEL, J

MAY 22, 2023

BETWEEN

JOSEPH KILONZO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2008. The particulars of the offence were that on March 31, 2019 in Athi-river sub county within Machakos county intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of one LWM a child aged 15 years.
2. In the alternative charge the appellant was charged with committing and indecent act with a child contrary to section 11(1) of the *Sexual Offence Act* No 3 of 2008. The particulars of the offence were that on 31st day of March 2019 in Athi-river sub county within Machakos County, intentionally and unlawfully committed an indecent act by touching the breast and buttocks of one LWM a child aged 15 years.
3. The prosecution called four (4) witnesses in support of their case and at the close of the prosecution case the appellant was put on his defence. He opted to give sworn testimony. The trial magistrate in her considered judgment convicted the appellant and sentenced him to serve 15 years imprisonment.
4. Being aggrieved and dissatisfied by the conviction and sentence imposed, the appellant filed twelve (12) grounds of appeal namely that;
    i. That the learned trial magistrate erred in both law and facts on whereby the case was not proved beyond reasonable doubt.

ii. That the learned trial magistrate erred in law and facts on whereby penetration and medical report was not established.

iii. That the learned trial magistrate erred in both law and facts on whereby age was doubtful.

iv. That the learned trial magistrate erred in both law and facts on whereby identification of the appellant was doubtful.

v. That the learned trial magistrate erred in law and facts on whereby the complainant was not truthful.

vi. That the learned trial magistrate erred in both law and facts on failing to observe that PW1 did not proceed with the case on her own volition whereby malice and fabrication could not be ruled out.

vii. That the learned trial magistrate erred in both law and facts on whereby the entire prosecution evidence was grossly married with illegalities, irregularities, discrepancies, inconsistency, incredibility and contradictory evidence.

viii. That the learned trial magistrate erred in both law and fats on whereby investigation was shoddy, shallow and incompetent.

ix. That the learned trial magistrate erred in both law and facts on whereby the entire rule was based on circumstantial evidence.

x. That the learned trial magistrate erred in both law and facts in ignoring the appellant's defence.

xi. That the learned trail magistrate erred in both law and facts on the issue of judgment whereby there was not point or points of determination.

xii. That the learned trial magistrate erred in both law and facts on whereby the judicial sentencing policy guidelines were not put into adequate consideration.

Brief Facts

5. PW1 LWM testified that she was 15 years old and went to school at [pariculars withheld]. She was a pupil in class 7. On March 29, 2019 at about 8.00pm she went to church for "kesha" and came back home the following morning at 4.00am. She slept until 6.30am and went to school but was chased away due to none payment of school fees. While back at home she helped her sister do house chores and after lunch she left to play with her friends and did not go back home that evening. The following day was a Sunday. She went to church at 10.00am where she met the appellant.

6. The appellant was a person known to her as they used to go to the same church. The appellant invited her to his house where they went and ate lunch which was cooked by the appellant. After lunch the appellant told her they should sleep together, he removed her clothes and used his penis and placed it on my vagina." She told him to stop but he did not. It was her testimony that the appellant raped her twice. She described the appellant house as a single roomed. It had wooded and metallic seats. There was no bed only a mattress and one blanket. They had slept on the mattress. PW1 stated that she stayed in the appellant's house until Monday at 5.00pm when the appellant told her he wanted to leave and gave her Kshs 50/- transport. She boarded a motor vehicle and went home, but feared going home thus roamed around in the village.

7. PW1 met her mother (PW2) at about midnight but she ran away. She sent people to catch her but they did not manage to do so. Later her sister and her two friends caught up with her and they took her

home, where she took dinner, showered and went to bed. The following day she was taken to the police station and then to the children's officers. She was beaten and told to confess where she was. She told them that she was with the appellant and took them to the appellant's house, where the appellant was arrested. She identified her birth certificate serial No 3xxx7 , P3 and PRC forms. The rape incident had happened on March 31, 2019 but she had known the appellant since 2018. She identified the appellant before court.

8. In cross examination she testified that the rape incident happened during the weekend but could not recall the exact date. It was the 1st time she spent a night outside as the PW2 wanted to beat her as she had been told/prohibited from going that specific church. She has slept out of their home and had not changed clothes. On Sunday she had gone to her friend Carol place but did not stay for long. On the same day she went to church and met the appellant. She knew the appellant as her friend from church. She stayed away from home for 3 days since she was afraid, she would be beaten by PW2. Finally, she stated that there was no enmity between her and the appellant. In re-examination she explained that she slept at the appellant's house on Sunday March 31, 2019, that was the day he raped her.

9. PW2 Lucy Nyokabi testified that PW1 went for "church kesha" on March 29, 2019 at 9.00pm. she returned at 4.00am. She slept a bit before waking up to go to school. At the school she was chased away due to tuition fee problem. She directed PW1 to assist her sister do house chores and left for work. when she came back in the evening, she did not find PW1 at home and she spent out for three nights. On Tuesday she was found by the roadside by her sister who brought her home at midnight. She fed her and told her to bath and sleep. The following day they went to the police station to report that the missing child, had been found. They were sent to the children's officer and that is where PW1 stated where she had been. She confessed to have been at the house of a person they fellowship with called Kilonzo. Accompanied by the children's officer they went to the appellant house and found him. They all went back to the children's office.

10. At the appellant house they found him alone and when asked if he knew PW1 he replied in affirmative. PW1 had confessed to the children officer what had transpired on Sunday. She has stated that on the said day she had visited the appellant, washed his clothes and, in the evening, as she was about to leave the appellant held her from behind placed her on the mattress, removed her clothes and had sex with her. PW2 stated she had not known the appellant before and identified him in court.

11. In cross examination she stated that PW1 was 15 years old and was born on April 12, 2005. she had advised PW1 not to go for "kesha" on March 29, 2019 but she went as against her advice. PW1 attended Ebenezer church. Further PW2 testified that she did not see her child for 3 days until Tuesday night when her sister brought her back home. For the three nights, they had anxiety and would spend time to look for her. She also reported her disappearance to the police and was given and OB number. When PW1 retuned, she went again to the police station and reported that she had been found. It was PW1 who stated that the appellant had defiled her. she has no evidence that the appellant was found with PW1, but it was PW1 who led them to where the appellant resided and they found him in his house. PW1 had confessed that she was with the appellant at his house for all those days, but she had no witness who saw them together.

12. PW3 John Njuguna testified that he was an outpatient clinician at Nairobi Women Hospital and held a diploma in clinical medicine and surgery and pharmaceutical technology from MKU. He was not the doctor who treated the complainant and did not fill in the PRC form. It was filled by Stephen Otieno his colleague. He was conversant with his handwriting and signature. He was allowed to produce the P3 and PRC form on his behalf pursuant to provision of section 77 of the *Evidence Act* Cap 80.

13. PW3 had a P3 and PRC form of PW1 who was brought to hospital April 2, 2019. She had disappeared from home and had reportedly stayed with the appellant and engaged in sexual intercourse. On examination, she had injuries on her private parts. There were fresh bruises at 3 and 9 o'clock at the hymen. The laboratory results were all negative and did not reveal anything significant. He produced P3 and PR forms as exhibits. In cross examination, he stated that the injuries were evidence of penetration, but hymen could rapture due to genital injury eg. accidental motor vehicle or bicycle accidents. From the history presented they ruled out accidental injuries and concluded that she had sex. PW1 was sent for trauma counselling. PW1 age too was indicated at being born on December 4, 2005. In re-examination PW3 stated that the history was given by the complainant and it was consistent with the injuries found by examining her.

14. PW4 corporal Caroline Seet testified that she was attached to Athi river police station and was the investigating officer. One March 31, 2019 PW2 came to the police station and reported that her daughter was missing and they could not trace her. On April 1, 2019 PW2 found her daughter and took her to the children's officer in Athi river. PW1 confessed to the children officer that she had slept at the appellant's house. On April 2, 2019 PW2 came to the police station and reported that her child had been found and PW4 wrote a report before sending them to Nairobi Women hospital, Kitengela for medical examination. When they came back she wrote their statement's and sought PW1 birth certificate which she got. She produced it as exhibit 1. The appellant was arrested on April 5, 2019 and brought to the police station at about 10.52pm.

15. In cross examination PW4 stated that it was PW2 who reported that her child was missing on March 31, 2019 and it was PW1 who confessed that she had been defiled, and it happened in the appellant's house which she did not have an opportunity to visit. PW4 also confirmed she was not present when the appellant was arrested. She also did not believe that the case was a fabrication as the minor had no reasons to lie. Finally, she testified that the appellant was not sent to the hospital and no DNA was carried out on him since it was not necessary. It was only the doctor who could tell if the complainant was bruised or had blood clots in any part of her body.

16. The appellant was placed on his defence and gave sworn evidence. He stated that he worked at the slaughter house in Athi river and went to Ebenezer church Devki. On March 31, 2019 he went to church and stayed until the church service was complete at around 1.30pm. He went home and returned to church for youth programs and left church at 5.00pm. The same evening, he went to work as he was working on night shift and until the following morning on April 1, 2019 when he returned home and slept until 1.00pm. That on the second day he repeated his routine and went to work until the following morning on April 2, 2019.

17. After work on April 2, 2019, he decide to go visit his friend called Njuguna but did not find him at his house and went back to his house. After a while he heard a knock on the door and when he opened the door, he saw the complainant, one officer and the complainant mother. The man identified himself as a police officer. He was asked to accompany them to the children office where he was told that he was being arrested for defiling PW1. He denied the charged and was told to be reporting to the children's office every 3 days. On April 6, 2019, he requested the children's officer that he be taken for DNA examination, but his request was declined. On April 8, 2019 he was arraigned in court and charged. He denied committing the offence and stated that the allegations were not true. The only reason why he was being framed was the he and PW1 were attending the same church and she mentioned him to escape punishment but she had lied that she spent a night in his house on that Sunday night.

Appellants Submissions

18. The appellant field his submissions on November 8, 2022 and stated that the prosecution case was not proved beyond reasonable doubt. He relied on a passage by Brannan J of United States but did not give the citation. The medical evidence given to prove penetration was doubtful and could not be used to safely convict him. According to the appellant the way the medial evidence was produced in court was completely contrary to the stipulated law as PW4 is not the one who examined PW1. Further, a government doctor would have been most preferred expert witness and by allowing PW4 to produce the P3 and PRC form there was mischief and evidence fabricated to implicate him. Reliance was placed on Sibo v Republic CR Appeal No 39/1996.

19. The appellant also submitted that in absence of DNA test, there were serious discrepancies not established by the medical report and the medial evidence presented did not prove penetration and/or establish evidence, beyond reasonable doubt giving rise to his conviction. The appellant also challenged the age of PW1 and further stated that there was no proof that PW1 was still a school going child. Although the birth certificate was produced, it would have been best produced by registrar of persons. The appellant also submitted that his identification was not proper and he was not identified as the perpetrator of the act. The appellant relied on *Kariuki Njiru and 7 others v Republic* CR Appeal No 6 of 2001 and Supreme court of India *Jagir Singh v State of Punjab* 22.

20. The other issue raised by the appellant was that PW1 was not a truthful witness and her evidence had a lot of material contradiction inconsistences and incredible testimony. The appellant relied on *John Muoki* (2016)eKLR. The PW1 was also coarsed to confess under pressure from her mother and the children officer. She was beaten and her confession was not out of her own volition. Reliance was placed on the citation of *Paul Giteri v Republic*.

21. The final issue raised by the appellant was that the investigations done was shoddy and shallow. The trial magistrate erroneously ignored the appellant's defence and he was wrongly convicted him based on circumstantial evidence and that there were not point of determination in the judgement rendered. The appellant placed reliance one *Sewe v Republic* (2003)KLR 364 *Dinkeral Pandya v Republic* EACA and *John Njuguna v Republic* (2019) eKLR.

22. On Sentencing the appellant faulted the magistrate for failing to consider the sentencing policy guidelines during the sentencing exercise and provision of Section 333(2) of the CPC to give him benefit of time spent in custody.

23. The appellant prayed that his appeal be allowed in the entity the conviction be quashed and sentence set aside.

Analysis and Determination

24. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See *Okeno v Republic* 91972)EA 32 & *Pandya v. Republic* (1975) EA 366.

25. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala v R* (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court 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 made the advantage of hearing and seeing the witnesses.

26. Also, in *Peter's v Sunday Post* (1958) EA 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

27. The main issues raised in this appeal by the appellant can be summarized as follows;

    a. Did the prosecution discharge the burden of proof to the required standard? {Grounds 1-6 & 9 of the Grounds of appeal}

    b. Was the Evidence presented by the prosecution full of contradiction, inconsistencies and uncorroborated?

       {Ground 7 & 8 of the Grounds of appeal}

    c. Did the trial magistrate fail to analyze the appellants defence and issued a judgment without points of determination? {Ground 10 & 11 of the Grounds of Appeal}

    d. Was the sentence passed harsh and failed to consider the judicial sentencing policy and should this court interfere with the same.

Burden of Proof

28. It is trite law that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller v. Ministry of Pensions* (1947) 2 All ER, 372 stated as follows:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

29. The conceptual framework for burden of proof to be discharged by the prosecutors consists of two components i.e the burden of proof and evidential burden which duty is clearly enunciated by Fidelis in his book *Modern Nigerian Law of Evidence*, University of Lagos Press, Lagos (1999) 379 when he stated that;

> "The term burden of proof is used in two different sense. In the first sense, it means the burden or obligation to establish a case. This is the obligation which lies on a party to persuade court either by preponderance of evidence or beyond reasonable doubt, that the material facts which constitutes his whole case are true, and consequently to have the case established and judgment given in his favour. The other meaning of the expression burden of proof is the obligation to adduce evidence on a particular fact of issue. This evidence in some cases, must be sufficient to prove the fact or issue to justify a finding on that fact or issue, in favour of the party on whom the burden lies. It is called the evidential burden. This is the sense in which the expression is more generally used.

30. The enormous task of proof beyond reasonable doubt by way of directing or circumstantial evidence rests with the prosecution and the fact the accused is put on his defence does not shift that burden and standard of proof in any way.

31. The ingredient's provided for under section 8(1) of the *Sexual Offences Act* No.3 of 2006 and which must be proved for a conviction to ensue are Age of the victim (must be a minor), penetration and proper identification of the perpetrator. (see *George Opondo Olunga v. Republic* (2016)eKLR) .

32. Section 8 (1) and (3) of the *Sexual Offences Act* provides as follows:

> (1)A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liabale upon conviction to imprisonment for a term of not less than twenty years.

33. The ingredients for the offence of defilement can be summarized as follows;

    a. Age of the victim (must be a minor),

    b. penetration and

    c. proper identification of the perpetrator.

    (See *Wamukoya Karani v Republic* Criminal Appeal No 72 of 2013 and *George Opondo Olunga v Republic* [2016] eKLR)

a.Was the Age of the complainant proved

34. The Court of Appeal in *Edwin Nyambogo Onsongo v. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added).

35. PW1 testified that she was aged 15 years old. she was a class 7 student at St Paul primary school.PW2 Lucy Nyokabi testified that PW1 was born on 12th April 2005 and was thus 15 years old.PW4 Copr Caroline Seet produced PW1 birth certificate as Exhibit 1. A review of the birth certificate serial No 37432 showed that PW1 was born on 4.12.2004. The age of the complainant was thus adequately proved. She was approximately 15 years of age as at March 2019 when the incident occurred.

b.Was Penetration proved

36. Section 2 of the *Sexual Offences Act* defines penetration as follows;

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

37. PW1 did testify that on 29/03/2019 she went to church for "kesha" but did not enter inside the church, she stayed within the church precinct but outside the church until 4am before she went home. She slept until 6.30am and went school. At school she was sent back home for lack of school fee's. she helped her sister do house chores and later went to play with her friends. On the said night which was a Saturday she did not go back to their home and stayed outside until the following morning. On Sunday she went to church at 10.00pm, where she meets the appellant, who suggested that they go to his house. When they got there the appellant cooked for her and after eating the appellant told her that they should sleep together. Her evidence was that;

> " I went to church at 10.00am. I meet kilonzo. He told me that we go to his house. When we got there. I sat as he cooked and we ate. He told me that we sleep. We slept. He removed my cloths. He did to me acts of adults. He raped me. He removed my Cloths. He removed his trouser. He used his penis and placed it on my vagina. I told him to leave. He did not. I felt pain. He raped me twice.'

38. PW1 testified that she stayed in the appellant house until Monday evening, when the appellant told her that he wanted to leave. That was at about 5.00pm. She showered and the appellant gave her Ksh.50/= which she used to board a motor vehicle to go home. On the same night she was found by her sister and her friends who chased after her and caught her. They returned her home where she showered and slept. The following day PW2 took the complainant to the police station to report that she had been found and they were directed to the children's office. At the children's office PW1 confessed to have been at the appellant's house, and lead them to his house. They found the appellant and he was requested to accompany them back to the children's office.

39. PW3 John Njuguna produced the P3 form and PRC form on behalf of his colleague Stephen Otieno who treated PW1 on 02/04/2019. She had disappeared from home and it was reported that she had meet a male person, a church mate known as "Kilonzo" and she had gone to his house and they had had sex. On examination she had injuries to her private part. It was noted that she had fresh bruises at 3 and 9 O' clock at the hymen. Laboratory tests for pregnancy, HIV and STI were done but they were all negative. PW3 noted that the injury on her private parts indeed proved that there was penetration.

40. The evidence of PW1 was thus adequately corroborated by the medical evidence produced by PW3. PW1 knew the person she was with and was clear in her testimony that she spent a night at the appellants house. He cooked for her and thereafter engaged in sexual intercourse with her. The fresh injuries in her private parts as seen by the doctor also confirmed that indeed there had been penetration. This element was thus proved.

c.Positive identification of the Perpetrator

41. PW1 knew the appellant very well and described him as a church mate. She stated that; " I went to church at 10.00am. I met Kilonzo. He told me that we go to his house. We used to go to the same church with Kilonzo." When the appellant was cross examined by the prosecutor while giving his defence he also admitted knowing PW1 as a fellow church member. He testified that; "I knew the complainant is a fellow church member". Given the facts herein the identification of the appellant was not in doubt as the two knew each other from church. This was a case of recognition and thus the identification was free from error. The appellant also testified that they went to the appellant's house at 10.00am in the morning and she stayed in his house until the following day in the evening. She knew the person she was with and even after confessing her transgressions she led the children's officer, her mother and the police directly to the appellant's house, which could not be a coincidence. The identification was thus free from error; See *Wamunga v Republic* (1989) KLR 424

42. All the ingredients of the offence were fully established by the prosecution and thus burden of proof was thus sufficiently established contrary to the appellants submissions. There was a clear demonstration of what transpired and PW1 evidence was further corroborated by the medical evidence produced. The appellants submissions that the case was perpetuated by malice and/or fabrication too has no basis. He did not raise such issues before the trial court nor did he ask the witnesses questions regarding the malice they had towards him, He also has not laid any basis of what caused the malice as between him and PW1 or her mother PW2 to warrant laying fabricated charges as against him. The said grounds of appeal thus have no basis and is dismissed.

d.Was the Evidence presented by the prosecution full of contradiction, inconsistencies and uncorroborated

43. The law as regards the issues of contradiction and discrepancies is very clear. It is trite law that inconsistencies unless satisfactorily explained would usually, but not necessarily result in the evidence of a witness being rejected. (see *Uganda v Rutaro* (1976) HCB ; *Uganda v George w. Yiga* (1979) HCB 217). In trying to shade light as to why there might be minor discrepancies between two witnesses testifying on the same case, the high court of Kenya in *Philip Nzaka watu v Republic* (2016) CR App 29 of 2015, had this to say:

> "The first question in this appeal is whether the prosecution case was riddled with contradiction and in consistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gain said that 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 version 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 recognized in many decisions of this court, some inconsistencies 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 mature and extent of the discrepancies' and inconsistencies' in question.

44. In the case of *Jospeph Maina Mwangi v Republic* Criminal Appeal No 73 of 1993 it was held, *inter alia* that;

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz, whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences.

45. Finally, it is also important to examine the nature and meaning of the word contradiction. In the decision of court of appeal of Nigeria the case of *David ojeabuo v Federal Republic of Nigeria* (2014) LPELR-22555(CA) Adamu JA; Orji-Abadua JA; & Abiru JA had this to say;

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece when it says the opposite of what the other piece of evidence has stated and where there are mere discrepancies in details between them. Two pieces of evidence contradict, one another when they are inconsistent on material facts while discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains

46. The appellant submitted that PW1 was the sole witness and her evidence was inconsistent as she could not clearly state where she was for 4 days she spent away from home. crucial witnessed were not summoned and the medical evidence not correctly produced in accordance with the stipulated law.

47. Unfortunate for the appellant this ground of appeal is weak and has no basis. The evidence of PW1, was cogent and believable. She confessed that she had been defiled by a person known to her immediately and the medical evidence supported that conclusion. There was no inconsistency which this court picked out nor did the appellant identify any major inconsistency in her evidence to warrant a review of the findings of the trial court.

48. The evidence of where she was when she was defiled was clearly presented in court, and she lead the investigations team directly to the appellants house, which under normal circumstances she would not have known. PW1 was clear when the defilement occurred and thus even if she did not clarify where she was on the other two nights that would not affect the evidence on record. Finally, before PW3 introduced the P3 and PRC form under section 77 of the *Evidence Act*, the appellant was asked if he had any objection, he stated that he had no objection. There is therefore no basis of raising it as an issue at this stage.

    The learned magistrate did not consider the defence of the appellant and her judgment did not have points of determination.

49. The trial court did specifically consider the appellants defence at page 5 of the trial court judgment and further proceeded to analyze the same as she considered all issues at page 7 and 8 of the said in the judgment. Therefore, there is no basis upon which the appellant can state that he's defence was not considered as the contrary holds true. The other ground raised that the judgment had no points of determination also holds no water as the contrary is true. The said judgment has concise grounds of determination the basis upon which the appellant was convicted This ground appeal to fails.

    Was the sentence passed harsh and should this court interfere with the same.

50. The appellant was sentenced to 15 years imprisonment .The minimum mandatory minimum sentence as provided under section 8(3) of the *Sexual offences Act* No 3 of 2006, is twenty (20 years). The Appellant urged the court to reconsider the sentence imposed as it was harsh, excessive.

51. The provision of section 8(3) of the *Sexual Offences Act* No 3 2006 and legislation that was in force before commencement of the *Constitution* of Kenya 2010 must be considered with adaptation, qualification and exception when it comes to the mandatory minimum sentence and in particular when the said sentences do not take into account the dignity of the individual as mandated under article 27 of the *Constitution* and as appreciated in the Francis Muruatetu case.& In *Maingi & 5 others v. Director of Public Prosecution & Another* (Petition No.E117 of 2021) (2022) KEHC 13118 (KLR)

52. This court does appreciate the gravity and nature of the offence committed and does not condone offences against minors and vulnerable persons. This was appreciated by Madan J as he was then in *Yasmin v. Mohammed* (1973) EA 370 –

> " The High Court is specially endowed with jurisdiction to safeguard interest of infants, as the court is the parent of all infants. The welfare of the infant 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 infant in Kenya of whatever community tribe, sect fall within the ambit of guardianship of Infant Act and the court is charged with the sacred duty to ensure that their interest remain paramount and can duly preserve."

53. In the case *R v. Scott* (2005) NSWCCA 152 Howle J. Grove & Baar JJ then stated –

> " There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and then must be a reasonable proportionately between the sentence passed in the circumstance of the crime committed...one of the purposes of punishment is to ensure that the offender is adequately punished... a further purpose of punishment is to denounce the conduct of the offender."

54. In this case the appellant unlawfully violated an innocent girl who was obviously in need of care and protection. This court notes that the trial magistrate took into consideration the appellants mitigation and also factored in the fact that the appellant had been in remand for a period of time hence sentenced him to 15 years imprisonment.

55. Unless irregularity, error of law or mistake has been shown this court will ordinarily not interfere with the sentence as passed. In the particular circumstance of this case there was need for the trial court to consider the judiciary sentencing policy guidelines. Especially section 23.7 note that there were no aggravating circumstances and the court to consider a rehabilitative sentence and punishment which is proportional to circumstances of the crime.

Conclusion

56. Having considered all factors in this case, considering the gravity of the offence against an innocent minor and Appellants mitigation and also bearing in mind the persuasive finding in. In *Maingi & 5 others v. Director of Public Prosecution & Another* (Petition No.E117 of 2021) (2022) KEHC 13118 (KLR) as well as the dicta in Francis Muruatetu case and the judiciary sentencing policy I do hereby set aside the sentence of 15 years imposed on the Appellant in Mavoko Chief Magistrate court Criminal Case SOA No.11 of 2019 vide judgment / sentence dated 26th February 2019 and substitute it therefor with a sentence of ten (10) years imprisonment to run from the date he has been in custody to wit 8th April 2019.

57. For avoidance of doubt the appeal on conviction is dismissed.

58. Right to Appeal 14 days.

Judgement accordingly

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 22nd day of May 2023.

In the presence of;

Appellant

……………………………….ODPP

……………………………….Court Assistant