WMN v Republic (Criminal Appeal 50 of 2021)
[2023] KEHC 17263 (KLR) (5 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17263 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL 50 OF 2021

FR OLEL, J

MAY 5, 2023

BETWEEN

WMN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being appeal against judgment on conviction delivered on 14th July 2021 an sentencing delivered on 16th July 2021 in Nanyuki CMCR SO case no 86 of 2019 before Hon V.M. Masivo (RM).)

JUDGMENT

Background

1. The appellant herein WMN was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offence Act* no.3 of 2006. The particulars of the offence were that on 26th November 2019 at Nanyuki Township of Laikipia County within the Republic of Kenya he intentionally and unlawfully caused his penis to penetrate the vagina of CMK a girl aged 16 years.

2. The appellant also faced a second count of committing an indecent with a child contrary to section 11(1) of the *Sexual Offence Act* no. 3 of 2006. The particulars of the offence were that on 26th November 2019 at Nanyuki Township of Laikipia County within the Republic of Kenya, he intentionally and unlawfully committed an indecent act with a child by touching the vagina of CMK a girl aged 16 years using his penis.

3. The appellant pleaded not guilty. The prosecution called five (5) witnesses and after close of their case the appellant gave unsworn evidence and called two witnesses. The trial magistrate did consider all the evidence tendered and found the appellant guilty of defilement. The court proceeded to sentenced the appellant to serve 25 years imprisonment. Being dissatisfied with the judgement, conviction and sentence, the appellant filed this appeal setting out the following amended grounds of appeal.

a. That the learned magistrate erred in matters law and fact by failing to note that the prosecution failed in their duty to prove their case beyond reasonable doubt.

b. That the prosecution evidence was full of contradiction, inconsistencies and uncorroborated.

c. That the learned trial magistrate erred in matters on law and fact in failing to appreciate that no DNA was conducted on the appellant to prove the semen found in the genitalia of the complainant matched.

d. That the learned trial magistrate erred in matters of law and fact by failing to note that the evidence tendered by the prosecution was insufficient to sustain a secure conviction.

e. That the learned trial magistrate erred in matters of law and fact by failing to note that the medical examination result did not link the appellant to the alleged crime in any way.

f. That the learned trial magistrate erred in matters of law and fact by rejecting the appellant defence without any convincing reason.

He prayed that the conviction and sentence imposed be set aside.

Facts at trial

4. PW1 Alexander Marishoi testified that he was the Nyumba Kumi elder of Bahati area. On 26.11.2021 at about 9.30pm he was called by his neighbour, who was a village elder. He went to meet him and found, the village elder with PW3, who claimed she had been defiled by one "W" who was at his home and she further described him as her "cousin". They mounted a search for the appellant. He was arrested at about 11.00pm and was taken to Nanyuki police station. PW1 identified the appellant on the dock and stated that the held no grudge as against the appellant.

5. PW2 Abshiro Abdi Ali testified that on 26.11.2019 at about 10.53pm he was asleep in his house, when he received a call from the area chief, one Patrick Mahinda, who told him there was a case of defilement which had been reported and requested him to go assist the elder in charge of Nyumba Kumi within the said Area. He went and found PW1 alone with the victim of defilement. There were people who had been sent to bring the appellant, and they waited together until the appellant was brought and they took him to Nanyuki police station. He did not speak to the victim, though he recognised her as she was a person who resided within that area. She was commonly known as "N". He also testified that he had no grudge with the appellant. In cross examination he stated he was not aware if the persons who arrested the appellant had a grudge with him or if they are the people who defiled the minor.

6. PW1 CMK undertook voire dire examination and gave sworn testimony. She testified that she was a student at [Particulars withheld] primary school and was in class 7. She stayed with her grandmother who was commonly knowns as, "[Particulars Withheld]". She recalled that on 26.11.2019 at about 8.00pm she went to visit her cousin, who was the accused person on the dock. When she arrived at his house, she inquired if his wife was at home as she wanted the appellant's wife to lend her some shoes. The appellant replied that the wife was not there but asked her to come in as he would assist her in looking for the shoes. She stated that the appellant opened the door to the house which was two roomed, one room had a bed and the second room too had a bed for the appellant and his wife.

7. PW3 further testified that the appellant put on a torch to enable them see where the shoes were located. When she entered the bedroom to search for the shoes, the appellant removed a knife and told her he would like to sleep with her. She tried to scream for help, but he grabbed her by her plaited hair *{piece}* and gave her several blows to her face. The appellant then threw her to the ground, removed

her biker and lifted up her dress. He the switched off the torch and increased the volume of the Radio. He proceeded to do *"tabia mbaya".*

She stated that,

> "*akafanya tabia mbaya. Akalalal na mimi.* He used the front parts to have sex with me. *Alintoa nguo akanilalia na anifanyia tabia mbaya. Alifanya sex by force.* I am not aware if he used protection."

8. The witness further testified that she was traumatised and when she tried to escape the appellant hit her. When he was done, they left together with the appellant and when she got to her grandmother's house, she told P what had transpired. He in turn reported the incident to the area sub chief. PW3 also stated that when the appellant was having sex with her, he groped her breasts and private parts and after the incident she felt pain while walking. The accused was arrested and brought to PW3 grandmothers' home. Later they were taken to Nanyuki police station and she was treated at Nanyuki General hospital. She identified the birth certificate, PRC form and P3 form. She also finalised by stating that she had know the appellant for along time and did not have a grudge or conflict with him. She had also forgiven the appellant. In cross examination she reiterated that the appellant raped her at about 8.00pm. The accused was not at work and his wife was also away from home. The appellants house also had two beds and not three beds as alleged by the appellant.

9. PW4 Steve Mugo stated that he was a clinician at Nanyuki teaching and referral hospital. He held a diploma in clinical medicine and surgery from KMTC and had seven years' experience.PW3 had visited the hospital on 26.11.2019 and the history was that she had been defiled by a person known to her on the same date at about 8.00pm. she had a blood stained pant/torn panty and on physical examination he noted that , she had a bruised neck, pain on top of her head, the external genitalia was normal but there was tenderness in the vaginal opening. The hymen was broken and on high vagina swap there were few inactive sperm cells. HIV and pregnancy test were negative. There was evidence of penetration due to the presence of sperms and pain in the valva. He filled both the P3 form and PRC form and present them as Exhibits. In cross examination he testified that he could not tell if PW3 was 17 years old, and could also not tell whose sperms were found within the complainant when examined. He also denied having an affair with the complainant.

10. PW5 PC Anne Wangare testified that she was not the initial investigating officer and took over the file from her college who had been transferred. She had the investigation diary which she introduced as an Exhibit. The complainant was born on 15/02/2002. She had been defiled by the appellant, who was subsequently arrested by the villagers. In cross examination she confirmed that the doctor confirmed after examination that the complainant had been defiled.

11. The appellant was placed on his defence and gave unsworn evidence. He stated that he stays in Ruai and sells small products. On the material day he was not present as he had taken money to his grandmother and later when he returned was arrested and taken to the police station.DW2 MN she stated that the appellant usually assists her and heard that the appellant had been arrested. She did not know anything else. The final witness DW3 JM testified that the complainant was from their family. She had left home and gone to the lower part. They heard screams and when they went to see what was happening, they found the appellant being beaten over allegations that he had attempted to defile the girl. There was no evidence in support of the said allegation.

12. The trial magistrate analysed all the facts and convicted the appellant of the offence of defilement. He was sentenced to fifteen (25) years imprisonment. It is as against this conviction and sentence that the appellant filed this appeal.

Appellants Submissions

13. The appellant submitted that the evidence tendered was not enough to prove that he was guilty of defiling the complainant, and the evidence adduced left a lot to be desired. The two critical elements being age and penetration were not clearly proved. PW3 told court that the appellant did *"tabia mbaya"* while not defining what *"tabia mbaya"* was. There was nowhere in evidence where PW3 mention the appellants penile penetration which was an important component to be proved. It was further his submission that there was no proof that both the culprits' body and the victim's body were involved and therefor the trial court had to be satisfied beyond any reasonable grounds that their organs were engaged, which was not the case.

14. The appellant further submitted that the trial magistrate failed to consider his evidence and that of his witnesses and did not analyse the same thereby causing a miscarriage of justice. Had the trial court considered the same the court would have definitely made a decision in his favour. He urged this court to note that the burden of proof always lies with the prosecution and since he had pointed out a few doubts present in the prosecution case, he ought to have been given a benefit of doubt. He prayed that this appeal be allowed.

Respondents Submissions

15. The state filed their submissions on 23.1.2023. They submitted that they had proved their case beyond reasonable doubt as there was overwhelming evidence presented to secure a conviction. All the ingredients of defilement were met to the required standard and finally there was enough corroborative evidence to support the case presented.

16. They further submitted that PW3 knew the appellant and her evidence of defilement was corroborated by the evidence of PW4, the clinical officer who examined her and confirmed that indeed there was penetration. Further by dint of provisions of section 124 of the *Evidence Act* the court could safely convict the appellant if satisfied for reasons to be recorded that she was a truthful witness. As to identification, the appellant was known to the complainant and finally the age of the complainant too was proved by production her birth certificate. The the evidence presented was reliable corroborated and consistent and thus the conviction was safe. As regards sentence, the state conceded that the imprisonment of 25 years was harsh and clarified that the mandatory minimum mandatory sentence was 15 years.

Analysis and Determination

17. 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* (1972) EA 32 & *Pandya v Republic* (1975) EA 366.

18. 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 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.

    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.

19. 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?

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

    c. Did the trial magistrate fail to analyze the appellants defence and that of his witnesses?

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

20. For purposes of this appeal this court will merge ground's 1, 3, and 4 of the grounds of appeal as they all relate to whether the prosecution case was proved beyond reasonable doubt and will then consider the other grounds 2 and 6 separately.

Burden of Proof

21. 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."

22. 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) .

23. Section 8 (1) and (4) 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.

    (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liabale upon conviction to imprisonment for a term of not less than fifteen years.

24. 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

25. 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).

26. In the case of *Francis omuroni v Uganda*, court of Appeal criminal Appeal No 2 of 2000, it was held thus

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense"

27. PW3 testified that she was born on 15.02.2003 and was aged 17 years old. she was a class 7 student at [Particulars Withheld] primary school. She identified her birth certificate, which was later produced in evidence by the investigating officer PW5 as Exhibit 3. The age of the complainant was thus adequately proved. She was approximately 17 years of age as at November 2019 when the incident occurred.

B. Was Penetration proved?

28. PW3 did testify that on 26.11.2019 she decided to visit her cousin who was the accused on the dock. While enroute, she met the appellant and she inquired from the appellant if the wife was at home as she need to request her to lend her some shoes. The appellant replied that she was not there but he could assist her in tracing the shoes. They went to his house and while there the appellant lit his torch to enable them see .He directed PW3 to search for the shoes under the bed in the master bedroom. It was while doing so that he appellant suddenly attacked her while holding a knife. The appellant told her he would like to sleep with her, she tried to scream but the appellant struck her severally on the face he then proceeded to defile her. PW3 verbatim evidence was that;

> " He told me he would want to sleep with me. I tried to scream for help. He grabbed me from my plaited hair{piece} and gave me several blows on my face. He threw me on the ground. The accused then removed my inner wear, biker and my dress which he lifted up. He then switched of the torch and increased the volume of the radio. *Akafanya tabia mbaya, Akalala na mimi*.He used the front part to have sex with me. *Alinitoa Nguo akanilalia na akafanya tabia mbya. Alifanya sex* by force. I am not aware if he used protection.
>
> I was traumatized, when I tried to escape, he grabs me and gave me blows. After finishing the act we left with the accused. I ran fast to my grandmothers. I told P what happened, who in turn told the sub chief."

29. The complainant's evidence was corroborated by PW4 the clinical officer who treated the complainant the same night she was defiled. He confirmed that she gave a history of being defiled be a person known to her. She had a torn panty which had blood stains, bruises on the neck and pain on top of her head.

Examination on the genitalia revealed that there was tenderness on the vaginal opening, the hymen was broken, high vaginal swap revealed that there were few active sperm cells and numerous epithelial cells. HIV and pregnancy test were negative. There was evidence of penetration due to presence of the sperms and pain in the valva.

C. Identity of perpetrator

30. PW3 knew the appellant very well. He was her cousin and they lived within in the same area. PW3 also reported the incident immediately after it happened while pointed a finger at the appellant as the person who opened the door of his house and proceeded to forcefully defile her. This was a case of recognition and the identity of the perpetrator was proved beyond a shadow of doubt.

31. The burden of proof was thus sufficiently established contrary to the appellants submissions. The appellants submissions that *"tabia mbaya"* did not connotate sex and/or did not mean he forcefully had sex with the complainant holds no water so to speak. The appellant was clear in her evidence and stated that the appellant

> " *Alinitoa Nguo akanilalia na akafanya tabia mbya, Alifanya sex by force.* I am not aware if he used protection."

This was a clear demonstration of what transpired and was further corroborated by the medical evidence produced.

32. The appellant also raised the issue that it was not scientifically confirmed by DNA that the spermatozoa found on the complainant was his as no medical examination was carried out on him. It has been held time and again that it is not mandatory to prove defilement by medical evidence alone. In the case of *Fappyton Mutuku Ngui v Republic* (2014) eKLR the Court of Appeal stated as follows as regards medical evidence of the accused person;

> " In our view such evidence was not necessary and in any event the trial court found that there was sufficient medical evidence in support of PW-2 testimony which was trustworthy as to the person who had defiled her"

33. This position was fortified by the holding of the court of appeal in *Martin Nyongesa Wanyonyi v Republic* Criminal Appeal No 661 of 2010, {Eldoret} D.K Maraga (as he was then), D, Musinga & A.K. Murgor JJA citing *Kassim Ali v Republic* Criminal Appeal No 84 of 2005 {Mombasa} where the court held that;

> " The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence."

The court of appeal also noted in *Geoffrey Kioji v Republic* NYR Criminal Case No 270 of 2010(UR)

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcomed. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the provision's to section 124 of the *Evidence Act*, cap 80 laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

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

34. 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."

35. 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."

36. 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."

37. Unfortunate for the appellant this ground of appeal is weak and has no basis. The evidence was that PW3, was cogent and believable. She reported that she had been defiled by a person known

to her immediately it happened 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 his submissions to warrant a review of the findings of the trial court.

The Learned Magistrate Did Not Consider the Defence of The Appellant

38. The appellant in his defence stated that on the material day he was away from home selling small products and later took money to his grandmother. On his return, his employer arrested him and he was taken to the police station.DW2 his grandmother also testified that the appellant usually assists her and she only heard that he was arrested. DW3 confirmed that the complainant was from their family and had left to go to the lower part for their home. He heard screams and responded. They found the accused being beaten on allegations that he had attempted to defile the complainant. According to him there was no evidence to support this

39. The trial court did specifically consider the appellants defence at page 3 of the trial court judgment and further proceeded to analyze the same at page 9 and 10 of the considered judgment. Therefore, there is no basis upon which the appellant can state that he's defence was not considered as the contrary holds true. This ground appeal to fails.

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

40. The appellant was sentenced to 25 years imprisonment. Section 8(4) of the *Sexual Offences Act* No 3 of 2006, provides for mandatory minimum sentence of fifteen (15 years). In *Maingi & 5 others v Director of Public Prosecution & Another* (Petition No.E117 of 2021) (2022) KEHC 13118 (KLR) the Petitioners who were convicts serving offences under *Sexual Offences Act* No 3 of 2006 sued the Attorney General and sought for declaration that the mandatory nature of sentence under the *Sexual Offences Act* were unconstitutional as it fettered the discretion of Judges and Magistrates in meting out sentence. Justice G.V Odunga vide his considered judgment dated 17th May, 2022 did find that –

> " to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentence fall foul of article 28 of the *Constitution*. However, the courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be mandatory minimum prescribed sentences."

41. The Appellant urged the court to reconsider the sentence imposed as it was harsh, excessive. The state in their submission also agreed that the sentence imposed was harsh since the minimum sentence was 15 years.

42. The provision of section 8(4) 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*.

43. 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."

44. 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."

45. In this case the appellant unlawfully violated an innocent girl in the most dehumanizing manner. He took advantage of his cousin and turned into a beast, demeaning her dignity with gross sexual acts which have left her with life time psychological trauma. This court though notes that the complainant in conclusion her evidence stated that she had forgiven the appellant and the trial court should have considered this while sentencing the appellant

Conclusion

46. 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 I hereby set aside the sentence of 25 years imposed on the Appellant in Nanyuki Chief Magistrate court Criminal Case SOA No.86 of 2019 vide judgment dated 14th July 2021 and substitute it therefor with a sentence of ten (10) years imprisonment to run from the date he was arraigned in court to wit 28th November 2019.

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

48. Right to Appeal 14 days.

Judgement accordingly

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 5TH DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 5th day of May, 2023.

In the presence of;

Appellant

..... for DPP

..... Court Assistant