Mutie v Republic (Criminal Appeal E077 of 2023)
[2024] KEHC 16746 (KLR) (5 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16746 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E077 OF 2023

NIO ADAGI, J

DECEMBER 5, 2024

BETWEEN

JOB NDUNDA MUTIE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. D. N. Sure (SPM) in Kangundo CMC S.O Case. No. E053 of 2021 delivered on 29/11/2023)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006.The particulars of the charge are that on 4th July 2020 in Matungulu location, Matungulu sub-county within Machakos County unlawfully and intentionally caused his penis to penetrate the vagina of JMM (name withheld) a child aged 10 years in violation of Section 8(1)as read with Section 8(4) of the Sexual Offence *Act No. 3 of 2006*.

2. He was charged with an alternative Charge of Committing an indecent Act with a child Contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge are that on 4th July 2020 in Matungulu location, Matungulu sub-county within Machakos County unlawfully and intentionally caused his genital organ namely penis to come into contact with the genital organ namely vagina of JMM a child aged 10 years contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006.

3. The Appellant pleaded not guilty to the main charge and the alternative charge and the matter was set down for hearing. The prosecution called four witnesses in proving its case. The Appellant was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* and sentenced to life imprisonment on 29th November 2023.

4. Being dissatisfied with the decision of the trial court, the Appellant has lodged the instant appeal against both the conviction and sentence. The appellant has filled Eighteen (18) grounds of appeal in his Further amended petition of appeal dated 10th July December 2024.

5. The Respondent has opposed the appeal and argue that the trial court properly evaluated the evidence and came to the right conclusion. The Respondent prays that the appeal be dismissed in its entirety.

Analysis and determination

6. In determining this appeal, this court is fully aware of its duty as the first appellate court as espoused in the case of Okeno Vs R (1972) EA 32 where the court stated:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion".

7. Having carefully and cautiously considered and analysed the trial court's record, the grounds of appeal and the Parties' rival submissions on the appeal, the issue for determination for this court is whether the Appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.

8. It must be appreciated that under Section 107(1) of the *Evidence Act*, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the principle in the cases of Woolmington v DPP (1935) AC 462 and Miller v Minister of Pensions 2 ALL 372-273.

9. This being a criminal case, the prosecution bore the burden of proving the case beyond any reasonable doubt.

10. I will summarize the grounds of appeal into five and determine each as follows:-

    i. whether the Appellant's right under Article 50(2)(g) was violated?

    ii. whether the charge sheet was defective?

    iii. whether the failure to conduct voir dire examination was fatal?

    iv. whether the offence of defilement was proved

    v. whether the sentence imposed was inhumane?

i. whether the Appellant's right under Article 50(2)(g) was violated?

11. The Appellant argues that he was never informed of his right to be represented by an Advocate at the trial court and that this was a breach of his right to fair trial under *the Constitution* of Kenya as an accused person. He has cited Article 50 (2) (g)of *the Constitution* of Kenya which provides that:

> " Every accused person has the right to a fair trial, which includes the right-
>
> (g) to choose, and be represented by an advocate, and to be informed of this right promptly."

Further, Section 43(1)(a) of the *Legal Aid Act* which provides that:

> "(1) A court before which an unrepresented accused person is presented shall-
>
> (a) promptly inform the accused of his or her right to legal representation."

12. That by dint of Article 25 of *the Constitution*, the right to fair trial guaranteed under Article 50 cannot be alienated. The fact that the Appellant's right to representation was never explained to him by the Trial Court was irregular and a serious derogation of his right to fair trial. The Appellant has cited the case of Gitonga v Republic (Criminal Appeal E015 of 2021) [2023] KEHC 2624(KLR) (9 March 2023) (Judgment), it was held:

> "Persuaded by the above decision, I note that the trial court never explained the right to legal representation to the Appellant at any stage. The offence that the Appellant was facing attracts a possible sentence of life imprisonment as per the provisions of Section 234 of the *Penal Code*. As such, it is my view that the trial court failed to comply with the dictates of Article 50(2)(g)(h) of *the Constitution*. The Appellant was hence not accorded a fair trial in line with Article 50(2)(g)(h) of *the Constitution*."

13. That since the provisions of Article 50 (2) (g) are couched in mandatory terms and cannot be derogated by virtue of Article 25 of *the Constitution*, it is the Appellant's humble submissions that their violation renders the entire proceedings, judgment and sentence at the trial court null and void ab initio.

14. To fortify this, the Appellant relied on the following cases:

    a. NMT alias Aunty v Republic [2019] eKLR, where the Court held that:

> "34. Having said so, the inevitable question that now follows is: What is the effect of the derogation of the right under Article 50(2)(g) of *the Constitution* in the circumstances of this case?
>
> 35. There are two schools of thought on the issue. The first school fronts the position that once the derogation of the right is confirmed then the entire proceedings, judgment and sentence before the trial court are vitiated and stand null and void ab initio. The other school fronts the position that failure to inform an accused person of his/her right to legal representation does not necessarily have the effect of vitiating the proceedings in a criminal trial unless it is proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned.
>
> 36. In answering the question, I will consider the wording of the Article 50(2)(g) and (h) of *the Constitution*. From the wording of Article 50(2)(h) the right therein is not absolute as the court must first satisfy itself that substantial injustice may result before it enforces the right. However, that is not the position under Article 50(2)(g) where the right is not qualified. Since that is what the People of Kenya wanted and so settled it in *the Constitution* then it remains the unwavering duty of this Court to enforce the provisions of *the Constitution*.

37. I therefore fully associate myself with the school which fronts the position that upon proof of derogation of the right under Article 50(2)(g) of *the Constitution* then the trial is rendered a nullity. Qualifying the provisions of Article 50(2)(g) of *the Constitution* will be tantamount to amending *the Constitution* through a back door, an act which this Court must frown at. It may appear like the position is harsh and is likely to fan multiple applications and appeals, but I must say that unless Courts, as custodians of justice and the Rule of Law, are prepared to enforce *the Constitution* as it is the intentions of the People of Kenya as expressed in *the Constitution* will never be realized. I therefore find and hold that the entire proceedings, judgment and sentence before the trial court are a nullity and cannot stand in law."

b. Gitonga v Republic (Criminal Appeal E015 of 2021) [2023] KEHC 2624 (supra) in which the court stated that:

> " I am persuaded by this finding. In my view, a trial should be rendered a nullity upon proof of derogation of the right under Article 50(2)(g) of *the Constitution*. In this case, the record shows that at no point was the Appellant informed of his right to choose or be represented by an Advocate which is his right to a fair hearing. He represented himself throughout the trial and it is notable from the record that when the Appellant was given a chance to cross-examine the prosecution witnesses, his response was constantly that he had no questions save for the very few questions he asked the investigating officer (PW4). Further, when he was given a chance to submit his mitigation, the Appellant once again chose not to say anything. Considering that the offence committed carries a possible sentence of life imprisonment, I am satisfied that the Appellant was bound to suffer substantial injustice and as such his right under Article 50(2) (g)(h) of *the Constitution* ought to have been explained to him at the earliest opportunity of the trial."

15. The Appellant submitted that in light of the foregoing, the trial court violated his right guaranteed under Article 50 (2) (g) of *the Constitution* which renders those proceedings null and void.

16. In opposing this ground, the Respondent submitted that the Appellant took plea on 9/08/2021 before the Learned Magistrate at Kangundo. The first witness testified on 19/9/2022. From the record, the Appellant was able to properly cross-examine all the witnesses after giving their examination in chief. The Appellant understood the proceedings and the workings of the court. The Appellant had ample time during the trial to employ the services of an advocate.

    Further that the Appellant did not mention that he had in anyway been disadvantaged or needed an advocate during the trial. He was not forced to proceed at any one time. The law further allows persons to act in person. They submitted that the Appellant was accorded a fair trial according to Article 50 and that this argument by the Appellant is an afterthought and lacks basis. He fully participated in the trial, was able to properly cross-examine the prosecution witnesses and offered a proper defence.

17. By dint of Article 25(c), the right under Article 50 (2) (g) cannot be abrogated. Under the said Sub Article, the court is required to inform an accused of his right to be represented by counsel of his own choice, promptly. This is to enable an accused to make an informed decision whether or not he needs counsel to defend him. The court must record that it has informed an accused of the said right so that in the event the court is challenged, the record can speak for itself.

In Criminal Appeal 44 of 2019 N. M. T. alias Aunty v Republic, J. Mrima in considering Article 50 (2) (g) said in part at paragraph *12*:-

> " In light of the foregoing provision a consideration of the record is necessary .."In Republic v Karisa Chengo & A2 others (2017) eKLR the supreme court said:- "...the right to legal representation under the said Article, is a fundamental ingredient of the right to a fair trial and is to be engaged pursuant to the constitutional edict without more."

18. While emphasising the duty to inform an accused person squarely lies on the court, the South African court in S v Daniels and Another (1983) (3) 275 (A) at 299 G-H said:-

> " ... the accused rights were explained to him, must appear from the record in such a manner as and with sufficient particularity, to enable a judgment to be made as to the adequacy of the explanation".

In South African case of Mphukwa v S (CA& R369 / 2014 (2012), the court said:-

> " ... A general duty is on the part of the Judicial Officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding, a fair and just trial may not take place. It is therefore the duty of a magistrate to inform the Accused of the said right and in some cases where necessary, the accused may need to apply to the Legal Aid Board for assistance to get free legal Aid".

See also Joseph Kiema Philip v Republic (2014) eKLR.

As to when the right should be explained to an accused, J. Nyakundi in the Kiema case, said:-

> " I must emphasize that the accused person must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether the plea would be taken at that point on time or later. Of importance is the emphasis that since the court speaks through the record then the record must be as clear as possible and ought to capture the entire conversation between the onset and an accused person. A court should therefore not be in a hurry to take plea before ascertaining that it was fully complied with Article 50(2) (g) ..."

19. Having considered all the above decisions, it is clear from the court record that on 09/08/2021, when the Appellant was arraigned before the court, before plea was taken, the court did not explain Article 50(2) (g) of *the Constitution* to the Appellant. I am satisfied that the court failed to comply with Article 50(2) (g) of *the Constitution*. Article 50 (2) (h) requires that an accused be informed of the right to be assigned counsel at the State expense if substantial injustice would otherwise result. He is also supposed to be informed of this right promptly. From the record, the Appellant was not informed of the said right. However, the said right is not absolute. One has to demonstrate that substantial injustice would result to him if the right is not complied with.

20. The Supreme court in Karisa Chengo considered the said Article 50 (2) (h). The court stated as follows at paragraph 94 :-

> " In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not

be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a court ought to consider, in addition to the relevant provisions of the *Legal Aid Act*, various other factors which include:

i) the seriousness of the offence;

(ii) the severity of the sentence;

(iii) the ability of the accused person to pay for his own legal representation;

(iv) whether the accused is a minor;

(v) the literacy of the accused

(vi) the complexity of the charge against the accused;

21. It therefore means that the said right is not in automatic one and an accused has to demonstrate that they will suffer substantial injustice as expressed in the Karisa Chengo case. In Kenya today only persons charged with murder or children in conflict with the law are entitled to automatic legal representation at State expense. Other people have to prove that they will suffer substantial injustice. In David Njoroge Macharia (2011) eKLR, the Court of Appeal expounded on what substantial injustice entails when it said:-

> " Article 50 of *the Constitution* sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence. We are of the considered view that in addition to situations where "substantial injustice would otherwise result". Persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expenses."

22. In this case the Appellant has not demonstrated that substantial injustice was occasioned to him due to the fact that he was not informed of the right and that no counsel was assigned to him at State expense. In fact, the record shows that the Appellant in mitigation stated that he had gone to NYS and had been taught about law. This ground of appeal must fail.

ii. whether the charge sheet was defective?

23. The Appellant submitted that he was charged with the offence of defilement contrary to Section 8(1) as read with section 8(2) of the *Sexual Offences Act* as Count 1 and committing indecent act with a minor contrary to Section 11 (1) of the *Sexual Offences Act* as Count 2 , however, the trial Learned Magistrate erred in law and in fact in her judgement by holding that committing indecent act with a minor contrary to Section 11 (1) of the *Sexual Offences Act* was an alternative charge to Count 1 and not an independent charge on itself as clearly captured in the charge sheet as Count 2.

24. That Count 1 in the charge sheet involves an offence whereby there must have been penile penetration while under Count 2 the offence mandates that there must not have been penile penetration.

25. The charge sheet, therefore, was confusing, contradictory, ambiguous and defective as it did not clearly inform the Appellant to answer as to whether there was penetration or not as the two counts are totally conflicting. The Appellant was consequently unable to properly answer to the charges in the charge sheet. That one of the tenets of a fair trial as codified in Article 50 of *the Constitution* is that an accused person should be informed of the charge with sufficient detail to answer to it.

26. That courts have on numerous occasions discharged convictions and sentences where it emerged that the charge sheet was defective if its independent counts were contradictory. The Appellant cited the case of AMM v Republic (Criminal Appeal E013 of 2022) [2023] KEHC 25436 (KLR) (17 November 2023) (Judgment) where Lady Justice Mumbua T. Matheka at the High Court in Makueni held that:

> " 35. On the face of it, the charge sheet was confusing because an accused person faced with such charges would wonder whether to defend himself against the attempt to touch or the actual touching. One of the tenets of a fair trial as codified in Article 50 of *the Constitution* is that an accused person should be informed of the charge with sufficient detail to answer to it. In my view, the charge sheet was ambiguous and does not meet the Constitutional threshold. In S-vs- Ndlovu; 2017 (2) SACR 305 (CC), the Constitutional Court of South Africa pointed out that the prosecutor's failure to draft an accurate charge was unacceptable."

27. Thus, the Appellant submitted that the defect was incurable and prayed that the conviction and sentence be set aside and the Appeal allowed as the Trial Magistrate erred in law and in fact in relying on that charge sheet.

28. In opposing this ground of appeal, the Respondent cited Section 134 of the *Criminal Procedure Code* provides for the necessary particulars that are to include in a charge. It provides that:

> " every charge.....shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of offence charged."

29. That Section 137 of the *Criminal Procedure Code* further provides for the rules for framing of charges. The Respondent submitted that the charge sheet was properly drafted as according to the law. The charges were properly drafted and gave reasonable information as to the nature of offence that the Appellant was facing. On the date of taking plea on 9/08/2021 it is recorded that the Appellant pleaded not guilty to Count 1 and the alternative charge. In delivering the judgment on 23rd November 2023 the learned magistrate did refer to the main charge and the alternative charge. That the mention of the count on the charge sheet as Count 2 is a technicality and the Appellant did not suffer any prejudice during the trial.

The Respondent relied on the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017)eKLR where the court cited with approval the Ugandan case of Twahangane Alfred vs Uganda CR. Appeal no. 139 of 2002 92003) UGCA, 6 where it was held that:

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

30. The Respondent submitted that the charge sheet was properly drafted and such technicality cannot discount the fact that the prosecution proved its case by proving the ingredients of the offence against the Appellant. That such error does not affect the main substance of the prosecution's case.

31. A perusal of the Charge Sheet showed that it contained all the necessary information to inform the Appellant of the offences that he had been charged with. It specifically explained what offences were committed, how the offences were committed. It also set out the date and place of the incident and further mentioned the name and age of the person who was defiled, indecently assaulted and assaulted. He pleaded "Not guilty" and the case proceeded to full trial. This was evidence of the fact that he was aware of what charges he was facing before the Trial Court.

Article 50 of *the Constitution* requiring an accused person to be informed of the charge with sufficient detail to answer to it was complied with.

I don't agree with the Appellant's submission that he did not properly understand the Charges made against him and that the Charge Sheet was defective. Similarly, this ground of appeal must fail.

iii. whether the failure to conduct voir dire examination was fatal?

32. The Appellant submitted that it is trite that a child under the age of 13 years is considered of tender age as was explained by the Court in the case of Kibangeny Arap Korir v Republic [1951] EA 92.

Consequently, voir dire examination ought to have been conducted on the minor in order to establish if her testimony was safe for reliance by the Court as mandated by Section 19 of the *Oaths and Statutory Declarations Act*.

The principles that have been applicable when it comes to a child of tender years are summarized at pages 54-57 of the Judiciary Bench Book for Magistrates in Criminal Proceedings. The first principle is that where a child of tender years is called as a witness, the court must first conduct a voir dire examination before allowing the child to testify. This is meant to find our whether the child understands the meaning of an oath.

The Appellant submitted that this was however, never conducted as evidenced by the proceedings of 19.09.2022 when the she testified under oath at the Trial Court. The conviction of the Appellant was, therefore, not safe as it was based on the sole evidence of a victim of tender age who had not been subjected to voir dire examination.

The Appellant cited the case of Abdi Abdiraham & another v Republic (2013) eKLR in which the Appellant's conviction and sentence was set aside on account of failure on the part of the Trial Magistrate to conduct voir dire examination of the child who was aged 13 years at the time she gave evidence. The Court in that case stated:

> " Having reached the above conclusion, it follows that the acceptance of the evidence of the complainant by the trial magistrate without conducting a voir dire examination on the witness was fatal to the prosecution case. The child testified that he was 13 years old and, in our view, the said child was one of "tender years" and voir dire examination ought to have been administered on the witness."

33. It was the Appellant's submissions that the fact that the victim's evidence was not directly corroborated by any witness during the trial further creates serious doubts as to its reliability. It is trite that where voir dire examination is not conducted, the evidence of the minor cannot be used as the basis of a conviction on unless there is some other independent evidence to support the charge.

34. That in the instant case, there was no direct and or independent evidence linking the Appellant to the charges levied against him at the Trial Court. The evidence of the doctor only demonstrated that the minor's genitals had injuries but did not in any way link the Appellant to them. The Appellant relied on the case of Haji v Republic (Criminal Appeal E020 of 2023) [2023] KEHC 26498(KLR) (15 December 2023) (Judgment), the Court held that:

> " 36. In the instant case, there was no independent evidence to support that the appellant committed the offence. The evidence of the clinical officer was to the effect that the complainant had injuries in the anus but not that the appellant is the one who committed the offence. The evidence of the clinical officer thus was not independent corroborative evidence that the appellant committed the offence. His evidence could not corroborate the defective evidence of the child, PW2. The conviction of the appellant on the basis of the evidence of the child, PW2, was therefore not safe.
>
> 37. The state conceded the appeal on the ground that the conviction was not safe for lack of voir dire examination on the key witness for the prosecution. I find that they were right in conceding to the appeal.
>
> 38. The upshot is that the appeal is allowed and the conviction and the sentence are hereby set aside."

35. The Appellant submitted that the failure to conduct voir dire examination was fatal and thus Appellant's appeal ought to be allowed.

36. The Respondent in rebuttal to this ground of appeal submitted that the Complainant (child) first testified on 19/9/2022 and she testified under oath. When the Magistrate went on transfer the Learned Magistrate who took over the trial on 10/7/2023 while undertaking directions under Section 200 of the *Criminal Procedure Code*, noted it was not clear whether a voir dire was conducted and she proceeded to order that the Complainant should be recalled to testify on this basis. On 21/9/2023, the Complainant was recalled and a voir dire was conducted. The Learned Magistrate made his finding based on this evidence as presented by the Complainant the second time she testified.

37. That the Appellant was present on the 21/9/2023 when the voir dire was conducted in his presence. The Appellant did not raise any issue during the proceedings of the trial on the trial Magistrate's orders to recall the witness. The Respondent submitted that the Appellant was selective in submitting on this appeal and is misguiding this honourable court on the proceedings of the trial. They submitted that this ground ought to fail as it holds no merit in this appeal.

38. I have again perused the record and in particular, on the issue of vior dire evidence and I observed that the Complaint (child) testified under oath on 19/9/2022 and on 10/7/2023 directions were given for the matter to proceed from where it reached the initial Magistrate having been transferred. The trial Magistrate stated that she had looked at the proceedings and it was not clear if voir dire was done. That even though the matter would proceed from where it had reached, PW1 must be recalled to testify afresh and on 17/8/2023 the Child PW1 was recalled and voir dire conducted as follows:-

Q: Sasa

A: Poa

Q: How old are you

A: I am 13 years

Q: Do you go to school

A: Kamburu Junior School

Q: You are in what Grade

A: I am in Grade 7

Q: What is your preferred profession

A: Maths teacher

Q: What is your preferred subject

A: Maths

Q: Have you testified before

A: Yes

Q: Were you sworn to give evidence

A: Yes

Q: What is your understanding of swearing

A: It is to speak the truth

Q: Would you like to take oath

A: I would

The trial Magistrate then directed PW1 to give sworn evidence.

39. On the foregoing, it is clear that voir dire was conducted before PW1 testified contrary to the allegations made by the Appellant that it was not done. I therefore find that this ground of appeal has no merit and it is dismissed.

iv. whether the offence of defilement was proved

40. Although the Appellant under ground 6 of the Further amended Petition stated that the trial court erred in law and fact by holding that the prosecution had proved its case against the Appellant beyond reasonable doubt, he however did not address this ground in his submissions. I will not hesitate to consider the same in this judgment.

41. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with 8 (2) of the *Sexual Offences Act* number 3 of 2006. Section 8 (1) provides as follows:

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

42. The ingredients of the offence of defilement were reiterated by the High Court in the case of George Opondo Olunga Vs Republic [2016] eKLR, which are:

i. Proof of age of the complainant

ii. Proof of penetration

iii. Proof that the accused person was the perpetrator (identification).

43. The question which needs to be answered is whether the above ingredients were proved to the required standards?

44. It is not in dispute that the Complainant (PW1) at the time of the commission of the offence, was 10 years old as the same could be determined from the evidence produced in the trial court Pext.1, (Child Health Card); and the age of the Complainant has not been a subject of the instant appeal.

45. On the ingredient for proof of penetration, penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organs of a person into the genital organs of another person."

46. The Complainant testified as PW1. She first testified on 19/9/2022. She stated that on the material day she was at her grandmother's home where she had gone to visit. She further stated that the Appellant asked her to go wash the dishes. Her grandmother agreed and she did wash the dishes. The Complainant stated that the Appellant took her to his bed and did bad things to her. She stated that he took off her pant and did bad manners. She screamed and told him to open the door. The Complainant stated she saw blood coming out of her private part. She did not inform anyone.

When her parents came, her mother saw blood stains on her cloth and that is when she informed them that the Appellant had defiled her. She was taken to hospita1 in Kangundo and was admitted in hospital for several days. The Complainant was later recalled on 21/9/23 where she further stated that the Appellant they laid on his bed with her stomach up and the Appellant was on top of her. He had removed his trouser and inner wear. She stated he was using his thing found here-"pointing to the genitalia".

PW 2 confirmed that she saw blood stains on PW1's trouser and she told her and the grandmother that the Appellant defiled her. PW2 further stated that she was taken to theatre at the hospital and she was admitted for a week. PW 3 corroborated the Complainant's evidence. He stated that he saw the Complainant when she came to hospital. He confirmed she came with bloody and soiled clothes; she was in pain and walking with her legs apart. Upon examination he noted that she had blood-stained hands, thighs, legs and foot, she was taken to the theatre where an abrasion was noted at 6 O'clock at the perineum area with bleeding, the hymen was freshly torn, abrasion 3 cm extending to the wall of the vagina, a lot of blood oozing out of the genitalia and reddish vaginal wall with swelling with a lot of blood clots. The P3 Form and Post Care Rape Form were produced as PExt.1 and PExt.2 respectively. PW 4 further produced the bloody trouser as PExt.4. The Evidence of PW3 corroborated the evidence of PW1. PW1was further examined on the same night that the said incident happened.

PW1's evidence at all times was consistent and the same was corroborated. I find that penetration was proved.

47. Finally, on the ingredient of proof that the accused person was the perpetrator (identification). The Complainant stated that on the material day she was at her grandmother's home where she had gone to visit. She further stated that the Appellant asked her to go wash the dishes. Her grandmother agreed and she did wash the dishes. The Complainant stated that the Appellant took her to his bed and did bad things to her. She stated that he took off her pant and did bad manners. She screamed and told him to open the door. The Complainant stated she saw blood coming out of her private part. When her parents came, her mother saw blood stains on her cloth and that is when she informed them that the Appellant had defiled her.

48. The Appellant was a first cousin to the Complainant and well known to her. This was a case of recognition as opposed to identification.

49. In the case of Reuben Taabu Anjononi & 2 others Vs Republic the Court of Appeal in Nairobi held:-

> " ....recognition not identification of assailants is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.

50. I therefore find that the Appellant was positively identified as the perpetrator or the defiler of the Complainant herein. In weighing the testimony of the Complainant as corroborated by the Complainant's mother and the Doctor, I find that the Complainant's account of events of the material day was cogent and positively linked the Appellant with the offence. An offence of such nature could be proved by way of oral or circumstantial evidence of the Complainant and in the instant case, the oral evidence was credible. The prosecution thus proved the offence of defilement against the Appellant beyond reasonable doubt.

v. Whether the sentence imposed was inhumane?

51. The Appellant submitted that his sentencing to life imprisonment was harsh, inhumane and a violation of the right to human dignity.

52. That the indeterminate life sentence was inhumane treatment and violated the Appellant's right to dignity under Article 28 of *the Constitution*. This sentence, without any prospect of release or a possibility of review, was degrading and inhuman punishment.

53. That it is a principle in international law that all prisoners, including those serving life sentences be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

54. It was further submitted by the Appellant that there is an emerging international consensus that the evolving standards of human rights to which Kenya ought to adhere to subject to Article 2 (5) and Article 2 (6) of *the Constitution* that an indeterminate life imprisonment is cruel and violates the core principles of human rights.

55. The Appellant cited the case of the Court of Appeal of the United Kingdom in R v Bieber [2009] 1 WLR 223 held as follows :-

> " 40. The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...".

56. It was also submitted that back at home, the Court of Appeal at Malindi in the case of Manyeso *v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) unanimously held that:

> " We are of the view that the reasoning in Francis Karioko Muruatetu & Another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence,

namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09,130/10 and 3896/10)[2016]III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

57. The Appellant was aged 27 years at the time of his conviction and sentencing and had just cleared his training at the National Youth Service and had high prospects of the future. It was therefore the Appellant's submissions that the imposition of life imprisonment upon him was inhumane as he will not have another chance with life notwithstanding the fact that he will reform and that he had high hopes for the future.

58. On this ground of appeal, the Respondent submitted that the Appellant was sentenced to life imprisonment on 29th November 2023. He was given a chance to mitigate and but he did not seem remorseful. The prosecution informed the court that the Appellant was a first offender. The life imprisonment imposed on the Appellant was the minimum and lawful sentence at the time.

59. The Respondent cited the Supreme Court of Kenya's decision in Francis Karioko Muruatetu & Another v Republic SC Petition No. 15 as consolidated with Petition No. 16 of 2015 (the Muruatetu decision) in which the Supreme Court held that"

> "the mandatory death penalty as provided under Section 204 of the *Penal Code* is unconstitutional as it deprives the courts discretion to impose an appropriate sentence depending on the particular circumstances of each case".

60. That the Supreme Court of Kenya has further held in Republic v Joshua Gichuki Mwangi SC Petition No. E018 of 2023 that the judgment in the Muruatetu case does not apply to the Sexual Offence Act. The Supreme Court reiterates that the judgment in the Muruatetu case applies to Section 204 of the Pedal Code which relates to the offence of murder and the death sentence. The Muruatetu judgment will not apply to the minimum mandatory sentence provisions in the Sexual Offence Act. The sentence meted out was lawful. That in the instant case, the minor Complainant was 10 years old. It is evident that the Appellant abused the trust that was bestowed upon him by the society. He took advantage of a child of tender years and committed a heinous crime which occasioned severe trauma and suffering to the Complainant. PW2 stated in her testimony that the Complainant would not give birth to a child. Exhibits PExt.1, 2 and 3 show that the Complainant underwent a surgery after the defilement. The Respondent submitted that looking at the circumstances of this case, life imprisonment imposed by the trial court is a sufficient and deterrent sentence and urged this court to confirm the same.

61. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with 8 (2) of the *Sexual Offences Act* No. 3 of 2006. Section 8 (2) provides as follows:-

> (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."

62. The trial court found the Appellant guilty of having committed an offence of defilement with a child aged 10 years and upon conviction sentenced him to life imprisonment as provided for under the law. The Appellant has appealed to this court to reduce the life sentence imposed upon him to a reasonable number of years while taking into account his age and life aspirations should his conviction be upheld.

63. I have established that the circumstances leading to the Appellant's conviction were that: the Appellant who was the Complainant's cousin turned into a beast and sexually devoured the Complainant who was only 10 years old to the extend that the Complainant was put in a life-threatening condition. The defilement left the Complainant in horrible pains, bleeding, severely traumatized and scared. The Complainant is said to have had blood-stained hands, thighs, legs and foot, she was taken to the theatre where an abrasion was noted at the perineum area with bleeding, the hymen was freshly torn, abrasion of 3 cm extending to the wall of the vagina, a lot of blood was oozing out of her genitalia and reddish vaginal wall with swelling and with a lot of blood clots. The Complainant underwent a surgery following the defilement and her reproduction system has been greatly affected with chances of her not being able to give birth in future.

64. In sentencing the Appellant to life imprisonment, the trial magistrate noted that she had considered the nature of the offence and the mitigation by the Appellant, but there was only one mandatory sentence which was life imprisonment. This means that the trial magistrate did not exercise her discretion as she felt obligated to impose the mandatory sentence of life imprisonment.

65. The court of appeal in the case of MB v Republic (Criminal Appeal 219 *of 2019*) [2024] KECA 324 (KLR) (15 March 2024) (Judgment) held as follows:-

> "..In addition, the emerging jurisprudence in the High Court and in this Court is that mandatory minimum sentences provided under the *Sexual Offences Act* are unconstitutional as they inhibit the exercise of discretion by the trial court. This is reflected in Maingi & 5 others v. Director of Public Prosecution and Another)Petition E017 of 2021 [2022] KEHC 13118; Joshua Gichuki Mwangi v Republic NYR (Court of Appeal) Criminal Appeal No. 84 of 2015 (unreported); and Julius Kitsao Manyeso v Republic - Malindi (Court of Appeal) Criminal Appeal No. 12 of 2021. In addition, the Court in the Julius Kitsao Manyeso case (supra); and Evans Nyamari Ayako v. Republic (Court of Appeal at Kisumu) Criminal Appeal No. 22 of 2018, has held that the sentence of indefinite life imprisonment is unconstitutional.
>
> 11. For the afore stated reasons, we allow the appellant's appeal against sentence to the extent of finding that the mandatory nature of the sentence of life imprisonment provided under Section 8(2) of the *Sexual Offences Act* is unconstitutional, as is the indeterminate term of the life imprisonment.
>
> 12. Given the circumstances in which the offence was committed, the complainant being a young girl whom the appellant as the stepfather ought to have protected but instead violated, the appellant deserved a deterrent sentence. The sentence of life imprisonment was an option which was available in the exercise of discretion in sentencing and would in our view have been appropriate.
>
> 13. In accordance with our decision in Evans Nyamari Ayako v Republic (supra), translating life imprisonment to a term sentence of 30 years' imprisonment, we allow the appellant's appeal; on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the appellant with a

term sentence of 30 years' imprisonment. The sentence of 30 years shall be calculated from the date the appellant was first arraigned in court in accordance with Section 333(2) of the *Criminal Procedure Code*.

66. Guided by the above decision, I allow the Appellant's appeal; on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the Appellant with a term sentence of Thirty (30) years' imprisonment. The sentence of Thirty (30) years shall be calculated less any period the Appellant was in custody pending the trial in accordance with Section 333(2) of the *Criminal Procedure Code*.

67. It is hereby so ordered.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 5TH DECEMBER 2024

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 5TH DECEMBER 2024

In the presence of :

Kilonzi..... for Appellant

Agatha..... for Respondent

MillyGrace..... Court Assistant