Mule v Republic (Criminal Appeal E009 of 2024)
[2024] KEHC 16836 (KLR) (2 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16836 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E009 OF 2024

NIO ADAGI, J

DECEMBER 2, 2024

BETWEEN

MICAH MUTUA MULE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. D. N. Sure (PM) in Kangundo CMC S.O Case. No. 33 of 2020 delivered on 31/1/2024)

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 were that on the 1st day of July 2020, at [Particulars Withheld] within Machakos County, intentionally caused his penis to penetrate the vagina of JMM (name withheld) a child aged 13 years.

2. The Appellant also faced 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 being that, on the 1st day of July 2020, at [Particulars Withheld] within Machakos County, intentionally touched the vagina of JMM (name withheld) a child aged 13 years.

3. He pleaded not guilty to both the main and the alternative charges and the case proceeded on full trial.

4. The case was heard partly before Hon. Njuguna (RM), who recorded the evidence of the Complainant (PW1) and her aunt (PW2). Directions were then taken under Section 200 of the CPC and the evidence of MK (PW3), VM (PW4) and Corporal Jeremiah Kendagor (PW5) was recorded.

5. The trial court then found that the prosecution had established a prima facie case against the Appellant who had a case to answer.

6. The Appellant (DW1) gave unsworn evidence in his defence case. He did not call the witness he intended to call and thus the defence case was closed.

7. At the close of the defence case, the trial court directed parties to file submissions which it considered and found that the prosecution had established a prima facie case and convicted the Appellant who was sentenced to serve Fifteen (15) years imprisonment.

8. Being aggrieved by the said judgment, the Appellant lodged the appeal herein in a Petition of Appeal filed in court on 07/02/2024 challenging both the conviction and sentence.

Grounds of Appeal

9. The appeal is based on the three grounds contained in the Petition of Appeal that :-

    1. The learned trial magistrate erred both in fact and law by convicting the Appellant on evidence that didn't meet the minimum threshold to uphold a conviction.

    2. The learned trial magistrate erred both in fact and law by not considering the Appellant's defense.

    3. The learned trial magistrate erred in law by sentencing the Appellant by virtue of the minimum mandatory sentence provisions.

Summary of Evidence

10. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. (See Okeno v Republic (1972) EA 32).

Prosecution's Case

11. The prosecution's case can be summarized as follows: On 1/7/2020 at 2.00pm, the Complainant (PW1) was at home when the Appellant came to dispatch a letter to the Complaint's mother. He held her hand by force and took her to the bedroom. He removed her panty. He also undressed her and did "tabia mbaya" with her. He used "sehemu yake ya kukojoa" and inserted it in PW1's "sehemu ya kukojoa". PW1 screamed and a neighbour VM (PW4) came and saved her and took her to her mother. The Appellant rushed out of the house. PWI went with her aunt P (PW2) to her mother's place of work. They then went to the Appellant's place of work where the Appellant was called and he admitted to have committed the act and stated that "nilikuwa nimeingiza kidogo" and he illustrated with a pen lid.

    PW1 was then taken to Kangundo Level 4 hospital where she was examined and treated by MK Obiko (PW3), a clinical officer. PW3 stated that on 1/7/2020 at 10pm, PW1 who was 13 years went to the facility with a history of being assaulted by the Appellant on her mother's bed. This was the 2nd episode. The 1st episode happened in February 2020 at the Appellant's house. On examination PW3 noted the following:-

    i. PW1 was in a yellow dress with no tears, no stains or blood

    ii. Normal external genital with no hymen

    iii. Whitish discharge

    iv. Blood traces with few epitheliac cells in urinalysis

v. Other tests were negative

vi. An impression of defilement was made and she was treated

The Treatment Card was Pext.2. PW1 was having blood in her urine due to an injury. It is not normal to see epithelial cells in children who are not menstruating but it is normal for women.

Vitoria M (PW4) was seated outside her house which was 20 meters away when she heard PW1 crying saying "Micah stop it with me" in Kiswahili. She went to the scene which was in PW's mother's house. She entered the house and found the Appellant and PW1. The house was two bedroomed and they were in the 2nd room. She stood at the door, called out the Appellant and asked him what he was doing and it is when PW1 came out. The Appellant was in the 2nd room, she turned to her house and sat and when the Appellant came out, she confronted him and the Appellant told her he was giving PW1 a letter. PW2 came when she heard her making noise. PW4 denied framing the Appellant or having a dispute with him.

Number 222469, CPL Jeremiah Kendagor (PW5) based at Kinyui police post which is under Tala police station was handed over the case by Investigating Officer, Daniel Kirwa who had been transferred. He stated that a case was reported on 3/7/2020 that a child was defiled by the Appellant who was before court. He called the Appellant on 1/7/2020. The child was taken to Kangundo level 4 hospital the same day where she was treated and discharged. On 3/7/2020, PW1 and her mother went to Kinyui police post and reported the incident. The witnesses recorded their statements and the Appellant was arrested on 6/7/2020 along Kangundo road and charged in court on 7/7/2020. He relied on the Complainant and the witnesses to charge the Appellant. The Complainant identified the Appellant as the perpetrator who was familiar to her because her mother and the Appellant lived in the same place. He produced the Birth Certificate of PWI as PEXT.4. The Appellant had disappeared to Mwala after the incident and only returned to Kangundo where he worked when he heard of the issue. He was arrested when he returned.

12. The Prosecution's case was closed.

Appellant's Case

13. The Appellant (DW1) gave unsworn evidence and stated that he lives in Kinyui and is a farmer. On 1/7/2020, there was a claim that he had defiled PW1. At 2.00pm he had been given notices to give to the tenants. He gave the notices and left for other buildings, that is when he heard people saying he had defiled PW1. He continued with his work and on Saturday, he went to his homestead which was 7Km away and that is when he heard he was required at Tala police post. He went to the said police post and went to the OCS's office where he was arrested, He denied being arrested along Kangundo road. He admitted being examined as well as PW1.

The Appellant/defence case was closed.

Analysis and Determination

14. Upon carefully re-evaluating the evidence on record and considering the parties' respective written submissions on the appeal, I find that the following are the issues for determination:

a. Whether the prosecution proved its case beyond reasonable doubt;

b. Whether the sentence was excessive and illegal?

a. Whether the prosecution proved its case beyond reasonable doubt.

14. Section 8(1) of the *Sexual Offences Act* provides as follows regarding the offence of defilement:"

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

15. In determining this offence, the court is required to consider whether the prosecution proved the following ingredients to the required standard:

    i. age of the victim

    ii. proof of penetration and

    iii. the positive identification of the appellant as the perpetrator of the offence.

Age of the victim

16. As regards the age of the victim, the evidence of PW1, PW3 and PW5 was that PW1 was a child. She was aged 13 years old. From the proceedings before the trial court, on the issue of age, PW5 testified on 25/8/2023 and produced a Birth Certificate as PEXT.4 showing the age of PW1. It appears, he didn't have the Birth Certificate in court and the Trial Magistrate directed that the State Counsel ensures the Birth Certificate is handed to the court by 28/8/2023.

17. In her judgment, the Trial Magistrate noted that it was not clear what happened to the Birth Certificate because she could not trace it in the court file. She further noted that the prosecution had been directed to hand it over to the court by 28/8/2023. That notwithstanding, the Trial Magistrate proceeded to consider the evidence of PW1 who told the court that she was in Class 6 without disclosing her age. That also was the evidence of PW2 who told the court that PW1 was her niece. She also considered the evidence of PW3 who stated that PW1 was 13 years old on 1/7/2020 and the question was whether the court could allow that evidence in the absence of documentary proof. The trial Magistrate cited the case of Edwin Nyambogo Onsongo -vs- Republic (2016) eKLR, where it was stated that:-

    > "...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, baptismal 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"

18. The trial Magistrate concluded that PW3 had the opportunity of seeing PW1 and she found her evidence to be credible.

19. The Appellant submitted that its superficial as to how the age was proved and faulted the Respondent for misleading the court that the Birth Certificate was produced which was a fallacy as an issue that was addressed in the Appellant's submissions. The Appellant invited this court to refresh its mind on the proceedings on page 18 line 3-4, the trial court observed "The state counsel to ensure the birth certificate is handed to court by 28/08/2023" sentiments further corroborated in the judgment as the trial magistrate noted that "it is not clear what happened to the Birth Certificate because I cannot trace it in the court file, I further note the prosecution was directed to hand it over to the court by 28/8/2023" denoting an exercise in futility.

    The Appellant further submitted that the trial magistrate noted that "I have considered the evidence of PWI and she told the court she was in class 6 without disclosing her age" again the Appellant

emphasised this and faulted the prosecution for not proving this vital element. The Appellant submitted that prosecution obfuscated its task of procuring the testimony of the mother who would have demystified this grey area beyond reasonable doubt. Thus, the magistrate misdirected herself on relying on the testimony of PW3 in proving the age of PW1 as indicated in the P3 Form.

20. I have perused through the trial court and this appeal file, and similarly I have not traced the Birth Certificate on record for the Complainant (PWI). However, I note that PWI was categorical that she was in Class 6 at Matungulu primary school. This evidence was not controverted at all. The Clinical officer (PW3), stated that PW1 was 13 years on 1/7/2020. The P3 Form which was filled at Kinyui police patrol base indicated the age of PW1 as 13 years.

21. Section 229 of the *Children Act* No. 29 0f 2022 provides for determination of a child's age as follows: -

If the age of the child is uncertain, the Magistrate shall estimate the child's age based on –

a. A previous determination of age by a magistrate under this Act or any other written law;

b. Statements made by a parent, guardian or any other person likely to have direct knowledge of the age of the child, or a statement made by the child in that regard;

c. A baptismal certificate, school registration form or school report, or other information of similar nature;

d. An estimate of age made by a medical practitioner; or

e. A report of a social worker, children officer or other authorised officer in that regard.

22. I am guided by the above provisions of the *Children Act* and find that the trial magistrate correctly determined the issue of the age of PW1 based on the evidence of PW2 and PW3 pursuant to the provisions of Section 229 (b) and (d) of the *Children Act*.

23. Further, on this question of age, I am content to cite the case of Fappyton Mutuku Ngui vs. Republic [2012] eKLR where it was held:

> "... conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases".

24. I find the Complainant/victim was a child aged 13 years old or thereabout.

Penetration

25. On the ingredient of penetration; Section 2(1) of the *Sexual Offences Act* defines penetration as:

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

26. As regards penetration, the trial magistrate stated that PW1 told the court that she was defiled. PW2 and PW4 responded to her distress calls and when she was taken to the hospital, PW3 established that she was defiled because her hymen was missing and she also saw blood in the urine which was abnormal because PW1 was not menstruating. The magistrate found that the prosecution had established penetration.

27. The Appellant submitted that the Respondent failed to execute its role with regard to proving the vital element of penetration. He noted that PW1 upon examination was in a yellow dress with to tears

and no stains of blood, normal external genitalia with no hymen, whitish discharge and blood traces with few epithelial cells in urinalysis. PW3 stated that an impression to defilement was made and the Appellant emphasised this. The Appellant has faulted the trial magistrate's judgment with regard to establishing penetration. The trail magistrate relied on PW1 testimony by simply stating "PW1 told the court that she was defiled." No explanation was given as to why the trial court believed that the minor was telling the truth irrefutably by dint of Section 124 of the Oaths & Statutory Declarations Act an issue that would have warranted the Appellate court to honour and fault the lower court's mistake and resolve them in favour of the Appellant. In faulting the trial court's mistake the Appellant cited the case of BUKENYA -VS- UGANDA (Supra) in which it was held that :-

> " it is not the duty of the court to stage manage the case for the prosecution, nor is it the duty of the court to endeavour to make a case where there is none to an accused person. The duty of the court is to hold the scale to see that justice is done according to the law on evidence before it".

28. The Appellant has submitted that no explanation was given as to why the trial court believed that the minor was telling the truth irrefutably by dint of Section 124 of the Oaths & Statutory Declarations Act. I wish to inform the Appellant that the cited Section 124 does not exist in the Oaths & Statutory Declaration Act. I presume the Appellant meant Section 124 of the *Evidence Act*.

29. I have considered the provisions of Section 124 of the *Evidence Act* Cap 80 Laws of Kenya which provides that:

> " Notwithstanding the provision of Section 19 of the Oath and Statutory Declaration Act, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in a proceeding against any person for an offence, the accused person shall not be liable to conviction of such evidence unless it is corroborated with other material therefore implicating him.
>
> Further; Section 124 of the *Evidence Act* Cap 80 Laws of Kenya provides that:
>
> Provided that in criminal cases involving a sexual offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.
>
> In light of section 19 of the Oath and Statutory Declaration Act, if the court is receiving the evidence of a child of tender age, it must be of the opinion that she/he possessed of sufficient intelligence to understand the duty of speaking the truth. If such a child wilfully gives false evidence on oath he/she will be guilty of perjury.

30. In the instant case the victim is said to be 13 years of age and thus was not of tender age to under go voir dire evidence.

31. I have perused the proceedings and the evidence on penetration is that on 1/7/2020 at 2.00pm, the victim (PW1) was at home when the Appellant came to dispatch a letter to the victim's mother. He held her hand by force and took her to the bedroom. He removed her panty. He also undressed her and did "tabia mbaya" with her. He used "sehemu yake ya kukojoa" and inserted it in PW1's "sehemu ya kukojoa". PW1 screamed and a neighbour Victoria (PW4) came and saved her and took her to her mother. The Appellant rushed out of the house. PWI went with her aunt P (PW2) to her mother's place of work. They then went to the Appellant's place of work where the Appellant was called and he admitted to have committed the act and stated that "nilikuwa nimeingiza kidogo" and he illustrated with a pen lid. This evidence coupled with the doctor's evidence establish that penetration of the victim

by the Appellant occurred. Guided by the decision in Mark Oiruri Mose v R [2013] eKLR the Court of Appeal stated that:

> "Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ." (Emphasis added).

I find that the prosecution's evidence on penetration to be solid.

Identity of the perpetrator

32. The question as to whether the prosecution proved the identity of the Appellant as the perpetrator.

33. On the ingredient the positive identification of the Appellant as the perpetrator of the offence or rather the involvement of the Appellant in the defilement of PW1 was established by virtue of Section 124 of the *Evidence Act* which empowers a trial court in a sexual offence case to convict an accused person on the sole evidence of the victim if the court is satisfied that the victim is telling the truth. Indeed, it is the trial magistrate who had the benefit of observing PW1's demeanour when recording her evidence. The trial court noted that during hearing, PW1 gave a step-by-step narration of the events and remained firm and consistent even during cross examination. For that reason, the court was satisfied that PW1's testimony was believable and consistent.

34. In any event, it is common sense that sexual offences are generally committed in secrecy hence there would hardly ever be any eye witness save for the victim of the offence. In this case, the Appellant was well known to PW1 and her family as confirmed by PW2 and the Appellant himself in his defence. He was their neighbour. Additionally, the incident is alleged to have taken place during daytime at around 2.00pm. This means that the circumstances prevailing at the time were favourable for positive identification.

35. This court finds that the evidence of PW1 and PW4 on identification of the Appellant as the perpetrator of the defilement herein was beyond reasonable doubt and will not interfere with the trial court's finding on the same.

36. On the ground of appeal that the learned trial magistrate erred both in fact and law by not considering the Appellant's defence, the Appellant submitted that he insinuated to some vendetta and the Respondent shifted the burden of proof to the Appellant as depicted in his submissions contrary to the tenets of a fair trial as PW2 was a potential eye witness whose testimony holds no probative value as she never saw the Appellant and the minor in fragrante delicto position. The Appellant submitted that he took himself to Tala Police Station when he became privy to the alleged charge facing him much as the Appellant made confessions which are generally inadmissible pursuant to Section 26 of the *Evidence Act* which the trial magistrate employed to place culpability to the Appellant. He faulted the Respondent for relying on circumstantial evidence to place culpability on the Appellant.

37. The Respondent submitted that the Appellant gave unsworn defense where he alleged that the charges were false and denied that he defiled PW1. The Appellant did not bring any witness to support his testimony hence the defence was therefore not strong enough to rebut.

38. I have perused through the trial court's judgment in regard to the Appellant's contention that his defense was not considered. The trial Magistrate at page 8-10 of her judgment stated that;

> " PW1 stated that she was in the house when the accused came to deliver a letter and she directed him to her mother. PW2 stated that the mother was a watchman in the factory where the accused works. The issue of redundancy does not apply to PW1's mother and there is no evidence of acrimony between her and the accused.
>
> PW2 was cross-examined and the issue of working with the factory was not asked. The issue of whether her services were terminated was not asked. The issue of her receiving a demand letter to pay rent was not asked. This is the position I hold with PW4. The accused also testified and he never mentioned working with Pw2 and Pw4 who became jealous of him when their services were terminated. The accused never talked about the demand letter for rent payment and it is not clear why PW2 and Pw4 would conspire against him yet he was also employed.
>
> PW1 stated that she was in the house when the accused came and pulled her to the bedroom and proceeded to defile her on the bed. She raised an alarm and this evidence was corroborated by Pw4 who was seated 20 meters away.
>
> Pw4 stated that PW1 came out of the bedroom while crying and left causing her to also leave and that is when she saw the accused leaving the house and confronted him.
>
> PW2 stated that she heard voices and went to the scene where she found the accused had already left. She enquired and PW1 told her the accused had defiled her inside the house. She took PW1 to the factory where they alerted her mother and the office.
>
> PW2 told the court that the accused was questioned and he conceded to partial penetration. This is also the evidence of PW1. I am not convinced the accused is being framed. I have not discerned any bad motive from the recorded evidence of PWl and PW2. PW4 appeared credible in what she heard and saw when she entered the house of PW1".

39. From the above extract of the judgment, this court finds that the Appellant's defense only emerged in his handwritten submissions and not at the trial, therefore the Appellant allegation that his defence was not considered is misplaced and I so find.

40. Lastly on the ground of appeal that the learned trial magistrate erred in law by sentencing the Appellant by virtue of the minimum mandatory sentence provisions. The Appellant submitted that it is a non-rebuttable fact that he was sentenced by virtue of the minimum mandatory sentences as provided for in the *Sexual Offences Act* by dint of Section 8(3) of the Act. He submitted that the Respondent was misleading the court in placing reliance on the Muruatetu Case in the Supreme Court decision in Petition No.15 which was rather discreet that it only referenced persons convicted on the charges of murder contrary to Section 204 of the *Penal Code*. The Appellant contends that he does not rely on the Muruatetu decision but relies on the case of Dismas Wafula Kilwake vs R (2018) eKLR , amongst findings made by this court by Justice G.V. Odunga (as he was then) in Petition No. E017 of 2021 and as such, the Respondent should be privy to the fact that minimum mandatory sentences were declared unconstitutional and he never rebutted this analogy which is in tandem with the judiciary sentencing policy guidelines and Section 216 of the CPC with regard to consideration of the Appellant's mitigation.

41. In a nutshell, its the Appellant's position is that the trial court never exercised discretion during sentencing an issue he warrants this court to fault the lower court findings as it went contrary to the

tenets of a fair trial and the inherent dignity of the Appellant by dint of Article 28 of *the Constitution* and hereby find that the sentence was harsh and manifestly excessive and thus revise it to a more lenient sentence in lieu of an acquittal.

42. The Respondent submitted that the Appellant was sentenced to 20 years imprisonment on 31st January, 2024. He was given a chance to mitigate and he was remorseful. The prosecution informed the court that the Appellant was a first offender.

43. On whether the learned trial magistrate erred in law by sentencing the Appellant by virtue of the minimum mandatory sentence provisions, 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. 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 Offences Act*. The Muruatetu judgment will only apply to the minimum mandatory sentence provisions in the murder cases.

44. The Respondent cited Section 8 (3) of the *Sexual Offences Act* which provides that:-

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years".

45. The Respondent submitted that in the circumstances and the evidence tabled before the learned magistrate, the sentence meted was lawful as per the law and sufficient thus the Respondent urged this court to confirm the same and dismiss the appeal for lack of merit.

46. I have considered the rival submissions of the parties on the issue of sentence and the authorities cited. The Appellant invites this court to be guided by the case of Dismas Wafula Kilwake vs R (2018) eKLR, in determining this issue whereas the Respondent has cited the cases of Francis Karioko Muruatetu &Another v Republic SC Petition No. 15 as consolidated with Petition No. 16 of 2015 (the Muruatetu decision) and Republic v Joshua Gichuki Mwangi SC Petition No. E018 of 2023 as a guide for this court.

47. Basically, the Respondent submission is that the two Supreme court decisions cited by them, only declared the minimum mandatory sentences unconstitutional in murder cases and not in sexual offences cases like in the instant appeal.

48. I have had the opportunity to read the case of Dismas Wafula Kilwake vs R (2019) eKLR, not (2018) cited by the Appellant, more so with regard to minimum mandatory sentence and I establish that the Court of Appeal held as follows:-

> " ...In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing.
>
> Being so persuaded, we hold that the provisions of Section 8 of the *sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those

provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by Section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful

The trial court noted that he was remorseful, but felt constrained to impose upon him the sentence prescribed by the Act, which, like the first appellate court, it found to be mandatory. The defilement must have been a horrifying experience for the victim. In these circumstances, a sentence of imprisonment for 10 years would be adequate.

Accordingly, we allow this appeal as regards sentence alone. We set aside the sentence of 20 years imprisonment and substitute therefor a sentence of fifteen (15) years imprisonment with effect from the date of sentence by the trial court".

49. It is my considered view that the holding in the above case cited by the Appellant, which has not been overturned and which is binding to this court, gave the trial courts discretion in sentencing in minimum mandatory sentences.

50. Guided by the said case and the holding thereof and applying the same to the instant case, the victim JMM was 13 years old. The Appellant was not armed although he used force to push the victim into the room where he defiled her which might have been horrible and scary experience to her. The Appellant was alone in the commission of the offence and was a first offender. He informed the trial court that he was remorseful. In these circumstances, a sentence of imprisonment for 10 years would be adequate.

51. Accordingly, I allow this appeal as regards sentence alone. I set aside the sentence of 20 years imprisonment and substitute therefore a sentence of Ten (10) years imprisonment with effect from the date of sentence by the trial court which was on 8/7/2020.

It is so ordered.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 2ND FEBRUARY 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 2ND FEBRUARY 2025

In the presence of :

In person..... for Appellant

Ms Agatha..... for Respondent

Milly Grace..... Court Assistant