REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 82 OF 2019

(From Original Conviction and Sentence in Vihiga PMCCRC No. 40 of 2018

by Hon. SO Ongeri, Principal Magistrate, of 26th June 2019

and 8th July 2019, respectively)

ENOCK EBWOGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was convicted by Hon. SO Ongeri, Principal Magistrate, of defilement contrary to Section 8(1), as read with section 8(4), of the Sexual Offences Act No. 3 of 2006, and was accordingly sentenced to fifteen (15) years imprisonment. The particulars of the charge were that on 8th September 2018 at Eburanyi Sub-Location, within Vihiga County, he intentionally caused his penis to penetrate the vagina of MA, a child aged 16 years. He had also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the alternative charge were that on the same date and at the same place, as stated in the main count, he had intentionally touched the private parts of the subject child, being her vagina/buttocks.

2. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called five (5) witnesses.

3. MA, the complainant, testified as PW1. She stated that she was born on 1st January 2002, and was 16 years old. She testified that on 8th September 2018, at 5.00 PM, she was out looking for firewood, when she stumbled upon the appellant who had completed bathing. He called her when she was about twenty metres away. She declined to go where he was, and he came to where she was, and pulled her to a banana farm. He removed her skirt and blouse, her biker shorts and underpants. He loosened his trousers, removed his penis and inserted it inside her vagina. She felt pain, but did not bleed. A person she referred to as Fredrick passed by and saw the appellant in action. The appellant ran away, and Fredrick telephoned the father of PW1. Fredrick escorted her to the road, as her father came. She identified her biker shorts and underpants in court, saying that they were muddy as the appellant had pulled her on the ground. Her father escorted her to the police station, and later to hospital. He identified the appellant as his uncle, and Fredrick as a nephew of the appellant. She said that when Fredrick came to the scene, he found the appellant on top of her.

4. Fredrick Muruka Ongonga (PW3) testified that she found PW1 with firewood in a ditch, in a farm between bananas and sugarcane. When he approached her he noted that she was crying. She informed him that the appellant had pulled her to the ditch, and defiled her. He did not see the appellant himself, as the appellant had run away. He saw PW1's skirt and blouse, but not her biker shorts or underpants. He telephoned her father, and they escorted her to hospital. He identified the appellant as his uncle. During cross-examination, he stated that he did not witness the incident. he said that the appellant had raped PW1 and threatened her with a cutlass. He said that the PW1 was a niece of the appellant.

5. AA (PW3) was the father of PW1. He testified that on the said date, PW2 telephoned her with news that PW1 had been defiled by the appellant. He rushed to where they were. He interrogated PW1. He had sent her to fetch firewood after school. She informed him that the appellant had defiled. She explained that she did not scream as the appellant had warned her not to. He escorted her to hospital, and later informed the village elder. They went to the police station. He described the appellant as his cousin.

6. Evans Karege testified as PW4. He was the clinical officer who filled the P3 Form, treatment notes and PRC form for PW1. He explained that she had been sexually assaulted and underwent treatment at Kima Mission Hospital, before she was referred to Emuhaya Sub-County

Hospital, where he worked. He stated that she was treated at Kima Mission Hospital, but he filed the P3 and PRC Forms. He relied on the history from the treatment notes from Kima Mission Hospital to file in the P3 form. PW1 had a whitish discharge, the hymen was torn, and there was a foul smell. There was also presence of spermatozoa. He stated that there were visible injuries on the vagina, but there had been penetration. He stated that there was proof that she had been defiled.

7. PW6, No. 101022 Police Constable Woman Quinter Achieng, was the police officer who investigated the matter. She stated that she started investigations into the matter as soon as the incident was reported to her on 9th September 2018. She said that she did not examine the complainant.

8. The appellant was put on his defence. He gave a sworn statement and did not call witnesses. He said he did not know PW1. He could not remember where he was on 8th September 2018, but he could remember when he was arrested. He said that he did not commit the offence. He said that his niece was injured on 8th September 2018, and he was at home that day. He said that he did not go to the river to bathe on that day. He said that there was a river that passed through their farm. He said that he was arrested on 8th September 2018 at night. He said that he was arrested by villagers.

9. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced him as stated in paragraph 1 of this judgment.

10. Being dissatisfied with the conviction and sentence, the appellant appealed to this court and raised several grounds of appeal. He averred that the alleged age of PW1 was not proved beyond reasonable doubt, the trial had failed to comply with Article 50(2)(j) of the Constitution, the evidence of the prosecution was riddled with contradictions and inconsistencies which made the witnesses unreliable and the court had not considered his defence.

11. The grounds were later amended to include averments that the trial court had failed to appreciate that there was no medical or forensic evidence to link him to the offence, the burden of proof was shifted to the appellant, the contradictions and inconsistencies in the evidence were disregarded by the trial court, the court relied on the testimonies of PW1 and PW4 which were unreliable, the trial court did not investigate the identification of the appellant by PW1 who was a minor, *voire doir* examination was not conducted, the appellant was not subjected to mitigation, the court presided over an unreported case, and the court failed to comply with section 333(2) of the Criminal Procedure Code, Cap 75, Laws of Kenya.

12. The appeal was canvassed by way of written submissions. Only the appellant filed written submissions which I have read through and noted the arguments made.

13. In the said written submissions, the appellant addressed grounds listed in his supplementary grounds of appeal, namely: lack of medical evidence to link him to him to the offence, burden of proof shifted to himself, contradictions and inconsistencies, penetration not proved beyond reasonable doubt, his identification by PW1 being not positive, and that the trial court was biased against him.

14. The first issue relates to lack of medical or forensic evidence. The case by the appellant is that he was not subjected to forensics to connect him to the crime. He submitted that the spermatozoa found on PW1 was not subjected to forensic examination or analysis to establish whether it came from him.

15. It is now well settled that a person charged with a sexual offence need not be tested medically or forensically to ascertain any sexual connection between him and the complainant. The correct legal position is that the court can convict an accused person on basis of other evidence, where forensic evidence is not available. It was held in *Robert Mutungi Muumbi vs. Republic* (2015) eKLR and *Williamson Sowa Mbwanga vs. Republic* (2016) eKLR, by the Court of Appeal, that whereas section 36 of the Sexual Offences Act allowed the court to order samples to be taken from an accused person for forensic examination or deoxyribonucleic acid (DNA) testing, that provision was not mandatory, and that penetration or sexual intercourse could be proved by alternative evidence. It was emphasized that medical or DNA evidence was not the only evidence by which commission of a sexual offence could be proved. That would mean that the mere fact that the appellant was not medically examined to determine that he had had recent sexual connection, and to assess whether he had had any connection with PW1 of a sexual nature, and the spermatozoa from PW1 was not forensically examined to establish if it came from the appellant, was not fatal to the prosecution case. The trial court could determine the matter based on other evidence.

16. The second issue relates to burden of proof being shifted to the appellant. He has not clearly articulated what he means by that, but it would appear that it revolves around the issue raised in the first issue, that spermatozoa was not subjected to forensic analysis. I have dealt with that above. The law does not make it mandatory that a conviction in sexual offences be dependent on forensics, and a court can act on other evidence. A prosecution can present a case which is not founded on forensics, and still secure a conviction. Lack of forensic evidence is not fatal to a prosecution for sexual offences. The fact that there were no forensics in this case did not mean that the prosecution's case had collapsed, and that the court had expected the appellant to present a case to exonerate himself.

17. The other aspect of the second ground is that his defence was not considered. His sworn defence statement was that he did not know PW1, and that he was not at the scene of the crime at the material time. He said that he did not know where he was on the date of the alleged crime, then he later said that he was at home. In the judgment, the trial court stated that the appellant had denied defiling PW1. The court also narrated the other things that the appellant had stated in his defence. In the analysis the trial considered that the appellant had denied meeting PW1, yet PW1 had stated that she had seen him bathing, then he accosted her. The court also considered that during cross-examination the appellant had alluded to PW1 being his girlfriend. From the judgment it is clear to my mind that the trial court did consider the defence proffered by the appellant. It should be stated that the defence does not just constitute the defence statement whether sworn or unsworn, it includes the line of cross-examination adopted, and the answers elicited.

18. The third issue is on contradictions and inconsistencies. The appellant has pointed at the testimonies of PW1 and PW2. PW1 said that PW2 stumbled upon the appellant defiling PW1, while PW2 testified that he did not find the appellant at the scene. According to PW2, PW1

was alone, he did not see the appellant at the scene defiling PW1. The appellant has also pointed at inconsistencies on the dates when the crime was reported to the police. I have looked at the record. It is true that there is inconsistency between the narration by PW1 and PW2 with relation to what transpired at the point PW2 came into the scene. According to PW1, the appellant was at the scene, and PW2 found him in the act. PW2 contradicts that, he said that he did not find him at the scene, and, therefore, in the act. Is this significant?

19. Whether PW2 found the appellant in the act would be significant, as there would be corroboration of the testimony of PW1 that she was defiled by the appellant. There would be evidence from a second person that there was sexual connection between PW1 and the appellant, so that it would be more than the story of PW1 against that of the appellant. The contradiction or inconsistency would be equally significant, for the event allegedly happened on 8th September 2018, while PW1 and PW2 testified thirty days thereafter, on 8th October 2018. One would assume that the events of 8th September 2018 were still very fresh in the minds of both witnesses, since there had not been much lapse of time between the date of the allegedly crime, and the date of the testimonies. The fact of the inconsistency would suggest either that one of the witnesses was not telling the truth, or had embellished their version of the occurrences. Of the two testimonies, I am inclined to go with that of PW2, given that it was under oath. The record is unclear as to whether PW1 testified under oath or not. There is no indication that she was sworn before she testified, neither is it indicated that the trial court had conducted a *voire doir* examination to determine whether PW1, being a child, was intelligent enough to make a sworn statement. The trial record is quite clear, the witness was not sworn, and she was not a child of tender years.

20. The law on how to handle contradictions and inconsistencies in the testimonies of witnesses in criminal matters was stated in *Twehangane Alfred vs. Uganda* [2003] UGCA 6, as follows:

> *'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 witness 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."*

21. The position is that whether contractions or inconsistencies are relevant to the final determination depend on their gravity, and where they are minor, they would only matter if they appear to suggest deliberate untruthfulness on the part of the witness. Grave inconsistencies and contradictions would be fatal to the prosecution's case, although that need not necessarily be the case. The questions that I need to answer is whether the contradictions or inconsistencies in this case were grave, and if so were they fatal to the prosecution case? The second question is whether, in the alternative, the contradictions or inconsistencies were minor, and if they were, were they to be ignored, or did they point to deliberate untruthfulness of the witnesses?

22. Were the inconsistencies herein grave? I believe they were. The two witnesses were describing an occurrence that had allegedly happened in their alleged presence. The critical factor that they disagree on is crucial in determining the guilt or otherwise of the appellant. It would also test the credibility of PW1 as a witness, in terms of whether she was truthful, or was she embellishing her story for some reason, possibly to frame the appellant for a reason that does not clearly come out in the proceedings. It would also go into the credibility of PW2, as to whether he was being truthful, or was deliberately telling a lie for some reason. He stated that he was related to both PW1 and the appellant, was he, in the circumstances, taking a rather neutral posture so that he did not appear to be getting the two sides of the family into a fight? I reiterate what I have stated above, these events had happened just thirty days prior to the testimonies of the two witnesses. I find it hard to be believe that within that very short period the memory of either witness had lapsed so badly that they could not accurately recall what had transpired just thirty days prior. I am not persuaded that the contradictions can be overlooked.

23. The fourth issue raised in the written submissions is about penetration not being proved beyond reasonable doubt. The evidence on penetration came from PW1 and PW4. PW1 testified that she was penetrated by the appellant, while PW4 testified that there was medical proof of such penetration, even though he was not the one who treated her. Whether PW4 treated PW1 or not may not be so critical, for there were treatment records that he presented, eventhough the maker of the notes did not testify, but the appellant did not object to reliance on those records. The fact of penetration was scientifically established through PW4, and PW1 was the victim, who affirmed that indeed she was defiled. Ultimately whether PW1 can be believed still fall or stand depending on whether he unsworn testimony shall be upheld or not.

24. The fifth submission is that the identification of the appellant was not positive. From the material placed on record, it is clear that PW1 and the appellant were relatives, the appellant being an uncle of PW1. That came out clearly from the testimonies of PW1, PW2 and PW3. The appellant in his sworn defence statement attempted to deny knowing PW1. However, in his mitigation statement, he referred to PW3 as his brother, clearly an admission that he was related to PW1, and no doubt knew her. Secondly, the incident happened in broad daylight. PW1 she had just come from school, and was out to fetch firewood at 5.00 PM. PW2 also said it was 5.00 PM. PW3 came into the scene after the event, after he was informed by PW2. He said he received the call at 6.00 PM. Clearly, all these events were happening before sunset, and the circumstances were no doubt favourable for identification. It was not even a case of identification but recognition. There is, therefore, no merit in the argument that the identification was not positive.

25. The final submission is that the trial court was biased against him. He has pointed to several incidents of the alleged bias. I shall discuss each of the issues raised in turn.

26. The appellant points out that PW1 gave an unsworn statement. He submits that PW1 was 16 years old, she gave an unsworn statement, and the court did not conduct a *voire doir* examination. He argues that the court ought to have taken her through that examination to assess her intelligence, in order to decide whether she understood the nature of an oath and whether she should give a sworn statement or not. I have referred to that above, but I have not discussed the law on the matter.

27. In criminal trials evidence ought to be taken on oath. The Criminal Procedure Code, gives guidelines on the taking of evidence from witnesses in criminal trials. At section 151 it requires that evidence be taken in criminal matters on oath, and imposes a bar to unsworn evidence. The provision states as follows:

> *"Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath."*

28. There is an exception where unsworn evidence may be received with respect to a child of tender years who does not understand the nature of the oath but is possessed of sufficient intelligence to justify reception of her evidence. That exception is provided for under section 19 of the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya, which states as follows:

> *"19 (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the duty of the truth …"*

29. The Court of Appeal addressed the issue of the taking of evidence from children of tender years in *Johnson Muiruri vs. R* [1983] KLR 445, when it said:

> *"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which (case) his sworn evidence may be received. if the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him."*

30. The Children Act, No. 8 of 2001, governs matters relating to children, and defines a "a child" and a "child of tender years," in section 2, as follows: *""child" means any human being under the age of eighteen"* and "*child of tender years" means a child under the age of ten years."*

31. Section 14 of the Penal Code, Cap 63, Laws of Kenya, does not deal directly with the matter of children of tender age, but defines immature age with respect to criminal responsibility. It could be a pointer to what tender age could mean in criminal proceedings. It states at section 14:

> *"14. (1) A person under the age of eight years is not criminally responsible for any act or omission.*
>
> *(2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.*
>
> *(3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge."*

32. The provisions above would suggest that a child of tender years would be someone in the age of up to ten years and below, and that ages eleven and twelve should be considered to be transitional or borderline. There is, therefore, a distinction between child and child of tender years. The two terms are not to be used interchangeably. Reference to child does not mean child of tender years, for not every child is of tender years. Going by the provisions above, it would mean, therefore, that a teenager, someone of thirteen years and above, is not a child of tender years. A person of sixteen years, going, again, by the above provisions, is certainly not a person of tender years, and their testimony should not be subjected to section 19 of the Oaths and Statutory Declarations Act. Such a person should not be subjected to a *voire dire* examination. Indeed, *voire doir* examination and unsworn evidence are not reserved for children in general, that is persons under the age of eighteen, they are limited to children of tender years. Consequently, there would be no basis for receipt of the unsworn evidence of such a person, unless there was proof that the person had mental disability. The trial court was, therefore, not justified to receive the unsworn testimony of PW1. Indeed, the trial court did not lay any basis for receiving unsworn evidence from a sixteen-year-old, for no *voire doir* examination was conducted.

33. It is not even clear, in the first place, whether the trial court received unsworn evidence from PW1. The record does not reflect that she was not sworn, it merely states that she gave evidence in Kiswahili. It is not said whether what she stated was sworn or unsworn. She might have been sworn or unsworn, but the court failed to record the fact. Either way, the trial court was in error. It should have indicated, in the record, whether the statement from PW1 was made under oath or not. The fact that the record is silent on that would suggest that the statement taken by the court from PW1 was unsworn. For avoidance of doubt, the record reflects as follows:

> *"Pw1 (minor girl) Christian states in Kiswahili."*

34. Was there justification for PW1 to give an unsworn statement? I have set out the law on the matter above. The Criminal Procedure Code requires that all evidence in criminal proceedings be taken under oath from the witnesses. I reiterate that the said law is in mandatory terms, and that should be the starting point. The exception to that general rule is not stated in the Criminal Procedure Code, but in the Oaths and Statutory Declarations Act, with respect to receipt of evidence from children of tender years. Children of tender years are defined in the Children Act to be children of the age of ten years and below. PW1 was not a child of ten years and below, but of age sixteen. She was a child who was way above the age of tender years, and, therefore, she did not fall within the exception. There was, therefore, no need for the court to take unsworn evidence from her, and to subject her to a *voire doir* examination. There was no legal justification for her to give an unsworn statement.

35. So what is the value of unsworn evidence, where it is taken from a witness who is not allowed in law to give such evidence? It was said

in *May vs. Republic* [1979] eKLR, by the Court of Appeal, that an unsworn statement was strictly not evidence and the rules of evidence could not be applied to it. It was said to be of no probative value, but could be considered in relation to the whole of the evidence. Its potential was said to be persuasive rather than evidential, and for it to be of any value it must be supported by the other evidence recorded in the case. In *Odongo vs. Republic* [1983] KLR 301, it was said that the unsworn statement of an accused person was not evidence and the same could not be used against a co-accused person. The effect of the pronouncements above is that the unsworn evidence of a witness, who should have been sworn, is worthless, and cannot be relied on to found a conviction. It would also mean that receipt of such unsworn evidence is an illegality that renders the trial defective. See *Rashid Wachilu Kasheka vs. Republic* [2015] eKLR. It could be useful for persuasive value when considered purposes alongside other evidence. However, where such evidence is from the principal witness, the complainant or principal accuser, it would follow that the case for the prosecution would be dented beyond repair, and cannot sustained by looking at other evidence, for it is the bulwark upon or around which the other evidence is constructed.

36. The Court of Appeal, in *Mwangi vs. Republic* [2006] 2 KLR 94, declared a trial a nullity where it was unable to find that the witnesses had been sworn, and ordered a retrial. The court stated:

> *"The usual practice of all courts in Kenya is, of course, to show in the record that a witness has taken oath before us, there is no way in which we can determine one way or the other, that the witnesses were or were not sworn before they gave evidence. Most likely, they took the oath before giving evidence. But there is also the possibility that they might not have taken oath and if that is the position, it would mean that the appellant was convicted on evidence which was not sworn. That would be in violation of section 151 of the Criminal Procedure Code and other provisions we have set out herein. That, in our view, cannot be a matter curable under section 382 of the Criminal Procedure Code. To be convicted and sentenced to death on evidence which is not sworn must of necessity, be prejudicial to an accused person. in the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the probability of his having been convicted on unsworn evidence. It does not matter that the issue is being raised for the first time in this appeal. If a trial was a nullity, then it does not matter at what stage that issue is raised."*

37. The take away from the above is that the central plank of the case by the prosecution in the instant cause, the testimony of PW1, should collapse, to the extent that she gave an unsworn statement, which in law did not amount to evidence, as it was of no probative value whatsoever. The reception of that evidence, as stated above, was an illegality that rendered the trial a nullity.

38. The second aspect of the sixth submission, which, according to the appellant, suggests that the trial court was biased against him, is that he was not given a chance to mitigate before sentence.

39. The record reflects as follows, with respect to the sequence of events after judgment was delivered:

> *"26/6/2019*
>
> *Before SO Ongeri – PM*
>
> *CC: Muyoti*
>
> *State Counsel: Judith*
>
> *Accused: Present*
>
> *Court: Judgment delivered dated and signed this 26/6/2019.*
>
> *Hon. Ongeri*
>
> *PM*
>
> *State Counsel: 1st offender*
>
> *Hon. Ongeri*
>
> *PM*
>
> *Accused: My brother is malicious. The girl is now 6 months pregnant*
>
> *Hon. Ongeri*
>
> *PM*
>
> *Court: Let a pre-sentence report be filed. Mention 3/7/2019*
>
> *Hon. Ongeri*
>
> *PM*

3/7/2019

Before Hon. SO Ongeri – PM

State: Okoth

C/A: Muyoti

Accused: present

Probation Officer: Vivian

Probation Officer: report is not ready.

Hon. Ongeri

PM

Court: As the report is not ready. Mention on 8/7/2019.

Hon. Ongeri

PM

8/7/2019

Before Hon. SO Ongeri – PM

State: Judith

C/A: Muyoti

Accused: Present

Interpretation: Kiswahili

Probation Officer: Vivian

Vivian – The pre-sentence report is ready.

Hon. Ongeri

PM

Court: I have looked at the pre-sentence report dated 8/7/2019 by Mr. Sahani which discommends.

Hon. Ongeri

PM

Sentence

The Accused is sentenced to 15 years in imprisonment for the main charge.

Right of Appeal within 14 days.

Hon. Ongeri

PM"

40. Sentencing follows delivery of the judgment where an accused person is convicted. Before sentence, the court should conduct a sentencing hearing, where both the prosecution and the accused have a chance to address the court on the sentence. The statement that an accused person makes at this stage is what is often referred to as mitigation, as he often makes a statement where he points out circumstances that would mitigate or extenuate the sentence. The sentencing hearing may be conducted immediately after conviction, or on date set apart

for that purpose.

41. Did the court in this case conduct a sentencing hearing, where the appellant got a chance to give a statement in mitigation? I believe it did. The sentencing hearing was spread over a period of time. Part of it was conducted on 26th June 2019, shortly after delivery of judgment; and the other bit done on 8th July 2019 after the pre-sentence report was presented. The record is silent on whether any statement in mitigation was given, as the trial court did not record whether it gave the appellant a chance to make such a statement, and whether he did make such a statement. The record though reflects that the prosecutor talked of a first offender, presumably referring to the appellant, to which the appellant is reflected as saying that his brother was being malicious, for the girl was pregnant for six months. It would appear that that was the statement that the appellant made in mitigation after the prosecution said that he was a first offender. With respect to the trial court, the record was made in a rather vague and causal manner, as if the trial court was not trying a person that it was later to sentence to fifteen years' imprisonment. A trial court is a court of record, for whatever it records guides appellate courts, should appeals be filed subsequently, on what actually transpired before it at trial. It cannot afford to be sketchy or vague or casual in the manner it records proceedings. The record should be comprehensive, on what exactly transpired, and it should be clear from the record the nature of the proceedings that the court was conducting.

42. From the record before me, it would appear that a sentencing hearing was conducted on 26th June 2019, shortly after the appellant was convicted, but the recording of the same was done in a poor, casual and splash-dash manner. Such does not meet the standard of what is expected in criminal trials where the convict faces loss of his liberty for a decade or more. I believe that the appellant is justified in saying that he was not given a chance to make a statement in mitigation since the trial court recorded what transpired with respect to that in a very unsatisfactory manner. Mitigation is a critical part of the sentencing proceedings as it affords an accused person a chance to have a say on his sentencing or to contribute to the process of his sentenscing. It ought not be treated with the casualness with the trial court in this case approached the sentencing hearing of the appellant. The Constitution has stated the fair trial or hearing principles. Whether these principles are adhered to in a trial can only be gauged from the record made of the proceedings by the trial court. It behooves the trial court, therefore, to record what transpires before it with some fair amount of particularity, bearing in mind that that record shall be the gauge upon which it shall be assessed as to where fair trial principles were adhered to. It could be that the trial court did scrupulously adhere to those principles, procedures and processes, but did not record what it did with respect to it, and thereby creating an impression that it approached the matter in a casual manner. I would emphasize that that a court trying a criminal matter must observe the constitutional dictates relating to fair trial and fair hearings. The only way to gauge whether it did observe the same is by documenting, with fair particularity, whatever it did, otherwise it would risk its proceedings being adjudged as unsatisfactory, and, therefore, falling below the standard expected in such cases.

43. The Supreme Court addressed these matters in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR. At paragraphs 41, 42 and 43. The said paragraphs read as follows:

> *"[41] … There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This basically means that the principle of fair trial must be accorded to at the sentencing stage too.*
>
> *[42] Pursuant to sections 216 and 329 of the Criminal Procedure Code, Chapter 75, Laws of Kenya, mitigation is a part of the trial process …..…*
>
> *[43] Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost to us that that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavours such as when the appeal is placed before another body for clemency."*

44. The Supreme Court went to say:

> *"[46] We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused person pursuant to Article 50(2) of the Constitution are not exhaustive.*
>
> *[47] Indeed the right to a fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse."*

45. The third aspect on the sixth point of submission by the appellant, that the trial court was biased against him, is that the case the court was trying was not reported to the police. I do not understand what the appellant means by this, given that witnesses testified to a report being made to the police, at Luanda Police Station, of the incident, and the police did take action, which culminated in his being arrested and charged in court with the offence. I do not believe that there is any merit in this ground.

46. The final aspect of the sixth point of submission is that the trial court did not comply with section 333(2) of the Criminal Procedure Code, which, he submits, gives discretion to the sentencing court to reckon the time spent in custody pending trial in assessing sentence. The provision in section 333(2) states as follows:

> *"Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.*

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take into account the period spent in custody."

47. The said provision gives a discretion to the trial court to take into account the period spent in custody in assessing sentence. That discretion is particularly critical in cases such as this, where a person convicted of an offence under section 8(4) of the Sexual Offences Act faces a minimum of fifteen years in prison. Provisions which provide for minimum sentences are mandatory, in the sense that the trial court cannot impose a sentence of imprisonment lesser than that provided for in the relevant provision. That would mean that the hands of the trial court, once it convicted the appellant of the offence charged, were tied to a minimum sentence of fifteen years, unless it was inclined to give him a more serious sentence. Fifteen years was the minimum available, and the trial court sentenced him to the minimum available. The fact that the provisions for minimum sentences are mandatory, and the discretion given by section 333(2) of the Criminal Procedure Code is proscribed by the that fact limited or restricted the discretion of the trial court. The hands of the trial court were tied by the prescription of a minimum sentence in section 8(4) of the Sexual Offences Act, and it could not exercise the discretion in 333(2) of the Criminal Procedure Code. I do not think that the court could be faulted to that extent.

48. However, in *Francis Karioko Muruatetu & another vs. Republic* (supra), the Supreme Court pronounced itself on mandatory sentences. This is what the court said:

> *"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."*

49. The Supreme Court in *Francis Karioko Muruatetu & another vs. Republic* (supra) faced a matter which turned on mandatory death sentences, and specifically murder, however, the principle it stated, in paragraph 48 of its judgment, was universal to all mandatory sentences, including those imposed through the principle of minimum sentences. That decision was made on 14th December 2017, long before the trial court in this case pronounced sentence herein on 8th July 2019. The trial court should have, therefore, followed the principle laid in *Francis Karioko Muruatetu & another vs. Republic* (supra), with respect to mandatory sentences. It should not have presumed that its hands were tied by section 8(4) of the Sexual Offences Act, or that its discretion, under section 333(2) of the Criminal Procedure Code, had been proscribed or taken away by the mandatory nature of the minimum sentence prescribed in section 8(4) of the Sexual Offences Act.

50. The discussion above arises from the submissions of the appellant on the sixth item on the trial court being biased against it. Overall, I find that trial was not satisfactory on certain respects. There are evident improprieties with respect to the way the testimony of PW1 was handled, the recording of the sentencing hearing, and exercise of discretion under section 333(2) of the Criminal Procedure Code. However, that by itself is not evidence of bias on the part of the trial court. To my mind, that has more to do with lack of strict compliance with the standards and principles that underpin fair trial. There is nothing to suggest that the trial court was against the appellant, and conducted the trial in a manner that was manipulated against him.

51. In view of everything that I have discussed above, I am satisfied that the conviction of the appellant was not safe. The trial was fundamentally flawed, and, therefore, I declare a mistrial. I accordingly allow the appeal before me, and quash the conviction of the appellant, and set aside the sentence imposed upon him. I hereby order that the appellant be tried afresh, of the same charges, by a competent court at Vihiga Principal Magistrate's Court, differently constituted, by a magistrate other than Hon. SO Ongeri, Principal Magistrate. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 7th DAY OF May 2021

W MUSYOKA

JUDGE