REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 27 OF 2019

MIJ ALIAS M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court

at Lamu Criminal Case (S.O) No. 4 of 2019 by Hon. T. A. Sitati (RM) dated 28th June 2019)

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Mwangi for the state

JUDGEMENT

The Appellant was charged with three counts 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 offences were that on unknown dates in the month of September 2018 in Langoni Location, Lamu West Sub-County within Lamu County he unlawfully and intentionally caused his penis to penetrate the vagina of **NA, JY** minors aged 9 years old and, **MY** a minor aged 10 years old.

He was charge with three alternative counts of committing an indecent act with a child contrary to section 11(1) if the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on unknown dates in the month of September 2018 in Langoni Location, Lamu West Sub-County within Lamu County he unlawfully and intentionally touched the vagina of **NA, JY** minors aged 9 years old and, **MY** a minor aged 10 years old with his penis.

At the end of the trial, the Appellant was convicted and sentenced to life imprisonment. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following amended grounds:

> ***1) That the learned trial Magistrate grossly erred in both law in by failing to consider that the prosecution did not prove their case beyond reasonably doubt.***
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> ***2) That the learned trial Magistrate erred in both law and fact by failing to consider that the trial was not fair under Article 50 of the Constitution.***
>
> ***3) ....***

Background

(PW1) NA, the first complainant gave her unsworn evidence after voir dire examination after she was found not to know the meaning of an oath but he understood the importance of telling the truth. She told the court that on a certain Monday she went visit her aunt, **H** with her brothers. Her aunt sent her to fetch water when the appellant, her uncle, grabbed her, covered her mouth and pulled her aside. The appellant then removed his underwear and inserted his male thing in her private parts. When he finished her wiped her private parts with his clothes and threatened that if she told anyone he would kill her. She stated that the incident occurred in the bedroom he shared with the aunt while her brothers and aunt were outside.

(PW1) stated that she informed her mother what had transpired. That the appellant tried to attack **(PW1's)** mother but they went and reported the matter to the police. She was then taken to hospital where she was examined.

In cross-examination by **Mr. Njuguna**, advocate for the appellant, she stated that she was a frequent visitor to her aunt's home which she shares with other aunts. She told the court that on the day of the offence she was playing with her brothers outside the house when her aunt had sent her for water. That as she approached the kitchen, she came across the appellant hiding behind a door to one of the rooms of the house. That the appellant grabbed her and shut the door with a plank from the inside. **(PW1)** stated that the appellant had a knife and threatened to kill her if she told anyone.

(PW1) informed the court that she reported the incident to her mother and Yusuf on the next day after the incident. She stated that the appellant had never attacked her before.

(PW2) AMS was **(PW1's)** mother. It was her testimony that sometime in September she went to visit her cousin H when she found women complaining that their daughters had been defiled by the appellant. She stated that **Y,** the father of one of the girls, informed her that **(PW1)** seemed to exhibit a change of behaviour and suspected that she had been defiled. **(PW2)** stated that she had noticed on the previous day **(PW1)** was having trouble holding her bladder and dressed her with pampers.

(PW2) requested **Y** to interview **(PW1)** on her behalf in her presence. It was her evidence that **(PW1)** was afraid to tell her what happened but she opened up and informed them that the appellant covered her mouth and defiled her in **H's** house. She reported the matter to the police station and she was referred to King Fahd hospital. At the hospital **(PW1)** was examined and it was discovered that her hymen was missing.

(PW2) informed the court that the appellant was introduced to them by **Y** and that he was a long-time family friend. She stated that in the appellant used to live with **Y** before he moved to his own place. She stated that after the appellant was confronted about the allegations, he fled to Mombasa where he arrested.

In cross-examination, **(PW2)** stated that she had noticed that **(PW1)** had a change of smell in her underwear and urine and she suddenly became a bed wetter. She told the court that she did not witness the defilement but believed what had happened after confessed to Y and herself. She told the court that the appellant would at times sleep at **H's** place and that they had no intention to frame the appellant as they had lived with him and had associated with him for a long time.

(PW3) JY the second victim was sworn in after a voire dire examination. She informed that she visited her grandmother on Thursdays and Fridays and that they would leave the door unlocked to allow the appellant to get in when he came back late.

She testified that on the day of the offence the appellant went into the room where she was sleeping with **(PW1)** and **(PW4).** The appellant woke her up, covered her mouth and showed her a knife threatening to kill her if she screamed. The appellant then removed his trouser and underpants and inserted his penis into her vagina. When the appellant had finished, he proceeded and did the same to **(PW4).**

(PW3) testified that on that night he did not do anything to **(PW1)** but one evening as she was going to the toilet, she saw the appellant cover the mouth of **(PW1).**

(PW3) informed the court that the room had a bulb on the wall. She testified that that on the night of the offence they had left the bulb on and she was able to see the appellant when he woke her up. She stated that she knew the appellant as an uncle.

(PW3) told the court in cross-examination that the room where they slept had only one bed and that she slept on the outer edge, while **(PW4)** was in the middle and **(PW1)** was at the farthest end. She stated that when the appellant went into the room the lights were on but he put the off before he defiled her but after he threatened her with the knife.

PW4 MY, was the third victim. In voire dire examination she was found to know the meaning of an oath and was sworn in. She stated that on 1st September 2018 she had gone to visit her grandmother, H, together with **(PW1), (PW3)** and other children. It was her testimony that she was asleep in the same room sharing a bed with **(PW1)** and **(PW3)**. The appellant came through the door at night, removed her underpants and covered her mouth. He then went on top of her and caressed her before he inserted his penis into her vagina. The appellant threatened to kill both her and **(PW3)** if she spoke. When he finished he left.

It was **(PW4's)** evidence that the appellant had defiled **(PW3)** first before he defiled her. She further stated that the appellant defiled both **(PW3)** and herself again on the next day. She testified that it was **(PW3)** who informed their mother, **(PW5),** as she was afraid to speak. They were taken to hospital where the doctor stated that they had been defiled.

It was **(PW4's)** evidence that the room had a round bulb that they had left on when they went to sleep but when she was defiled he light was off. She told the court that she knew the Appellant as her father's cousin.

In cross-examination, **(PW4)** stated that she woke up at night intending to go to the washroom when the appellant armed with a knife, ordered her to remain in bed before he switched off the lights. It was her further testimony that the appellant defiled **(PW3)** and herself two nights in a row and that he would start with whoever was closest to the door. She stated that she did not have a dispute with the appellant and that she knew him as a relative who was brought by their father.

(PW5) AAB, was **(PW3)** and **(PW4's)** mother. She produced the birth certificates of **(PW3)** and **(PW4)** as **(PEx4)** and **(Pex7).** It was her evidence that she did not know about the defilement but she became suspicious when her daughters started to smell funny, their underpants were soiled and they could not control their bladders causing them to wet the bed occasionally. She decided to take them to **King Fadh** for examination when it was revealed that they had been defiled. That when she inquired from the two victims, they informed her that the

appellant had defiled them. They further told her that they were afraid to tell her as the appellant had threatened to kill them. She went and reported the matter to the police.

It was testimony that the appellant had been a close friend to her husband and was well known to the family including the children. She stated that the appellant used to live with **H** who was her husband's mother. She told the court that she did not have any prior differences with the appellant.

(PW5) in cross-examination stated that she learnt of the defilement while at the hospital. She reiterated that she did not have a grudge with the appellant and viewed him like a brother.

(PW6) Madi Sheyumbe, a clinical officer at King Fahd Hospital gave the medical evidence. He stated that **(PW1), (PW3)** and **(PW4)** had been defiled 3 months before he examined her them and found that their hymen was missing. He produced the treatment notes and the P3 for all three victims.

In cross-examination by the appellant he stated that injuries due defilement usually healed between 3 to 7 days except the membrane which cannot recover.

(PW7) No. 119397 P.C. Zephanaih Rono, based at Lamu Police Station was the investigating officer. He stated that he recorded the complainants' reports and statements and he was assisted by **Cpl Mariam** in his investigations, He told the court that the appellant was arrested in Mombasa and transported back to Lamu. He produced the birth certificate of **(PW1)**.

In cross-examination, the I.O stated that they received a complaint from **F's family** on 15th September 2019 but they investigation did not find any evidence of defilement. He further stated that when the appellant learnt of the complaint by **F**, he was spotted speeding of in a boat. He told the court that the appellant was taken to Lamu Police Station on 20th February 2019 and was presented before court on 28th February 2019, 10 days later. **(PW7)** further stated that he did not oppress the appellant in the sale and neither did he allow the complainants' mothers' to harass him while he was in the police cells. At the close of the prosecution case, the trial court found that a prima facie case had been established and the appellant was placed on his defence. The appellant elected to give a sworn.

(DW1) the Appellant told the court that worked as a mechanic and that around 12th or 13th September he was idle. He called his in-laws in Mombasa who assisted him to secure work in Mombasa. He left for Mombasa on the 13th September 2018. That on 15th September 2019, he was arrested on allegations of being a drug trafficker, its only when he arrived at the police station in Makupa he was informed that he was wanted in Lamu for defilement.

In cross-examination, the appellant stated that he knew the complainants' families on friendly times and admitted to sleeping in their grandmother's house from time to time. He further stated that his family leaved in Lamu but he left for Mombasa in September 2018 to do mechanical jobs.

Submissions

Appellant's written submissions

The appellant relied on his written submissions filed on the 2nd March 2021. The appellant submitted that his right to a fair hearing under Article 50 (2) of the Constitution had being infringed. He stated that his advocate in did not cross-examine the main witness and that he withdrew his representation subjecting the appellant to cross-examine a few of the witnesses. He stated that the trial court failed to inquire into the conduct of his advocate and further failed to provide him with a defence advocate as provided for in the Legal Aid Act.

It was the appellant's submission that he was detained at the police station for 10 days before being presented to court contrary to Article 49 of the Constitution. It was his argument that the court failed to acquit him but instead directed him to file a petition against the police officer or withdraw his claim.

The appellant submitted that there were material contradictions and inconsistencies in the prosecution case. He stated **(PW1)** gave contradicting testimonies in her examination in chief and cross-examination of where the defilement took place. He further submitted that **(PW3)** and **(PW4)** contradicted each other on whether the appellant was wearing a lesso or trouser on the day of the defilement. He also questioned **(PW1's)** evidence that she told her mother of the defilement the next day yet the matter was reported almost 6 months later.

He further submitted that the charges were fabricated by **AA**, the wife to **H** and father of YAO, who was the father of **(PW3)** and **(PW4).** He stated that he worked for **AA** who did not pay him for 5 months necessitating the appellant to look for work in Mombasa. That when **AA** learnt that he was working Mombasa he planned the matter before the court to punish him.

The appellant also submitted that the prosecution failed to prove its case to the required standard. He submitted that penetration had not been proved to the required standard as the victims' were not credible witnesses as their evidence was riddled with inconsistencies. He further submitted that the expert witness did not explain how the victims' hymen were missing noting that it could have been happened for a number of reasons.

The appellant faulted the trial court on convicting him based on his character. He submitted that the trial court wrongly concluded that he had ran away to Mombasa yet there was no evidence to support the allegations. He further argued that he had never touched the victims' over the

years despite them going for frequent sleepovers at Halima's house and it was strange that he would defile them in one night.

The appellant submitted that the prosecution failed to call **Y, H** and **A** as who were crucial witnesses and who would have shed light on their strained relationship with the appellant. Finally, the appellant submitted that voire dire was not properly applied as it was evident that **(PW1), (PW3)** and **(PW4)** did not understand the purpose of telling the truth.

Respondent's submissions

Mr. Sirima for the respondent filed his written submissions dated 5th February 2021 on 22nd February 2021. It was his submission that the critical ingredients of the offence had been proved. He **(PW1), (PW3)** and **(PW4)** gave coherent and logical evidence and that the appellant could be convicted on their sole evidence based on section 124 of the Evidence Act. He further submitted that the medical evidence by **(PW6)** corroborated the evidence of the victims.

On breach of the appellant's constitutional rights, counsel submitted that the trial court gave the appellant avenue for exercising his rights but the appellant did not wish to pursue the matter further. It was also contended that the breach of his rights did not in any way prejudice his right to a fair trial.

Lastly, on the appellant's alibi defence, **Mr. Sirima** submitted that the appellant did not have any evidence to support his assertions that he was in Mombasa on the day of the offence. He contended that the defence was an afterthought as the appellant failed to raise his alibi defence early enough during the trial to allow the prosecution to verify it in compliance with section 309 of the CPC. He relied on the case of **Victor Mwendwa Mulinge v R (2014) eKLR.**

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the appellant's rights were infringed and whether prosecution proved its case against the appellant.

The appellant submitted that the investigating officer failed to produce him in court 24 hours after he was handed over to Lamu but brought him to court 10 days later infringing his right to a fair trial. A quick perusal of the trial court records show that once the appellant brought the unlawful detention to the court's attention, the trial Magistrate informed the appellant of his options; to either lodge a petition against the investigating officer or; to forgive the said officer. From the record it is shown that the appellant chose to forgo seeking a remedy and forgave the investigating officer. The trial court having informed the appellant of his choice he cannot be heard to claim that his rights were violated. Additionally the appellant has not demonstrated how the unlawful detention affected his case. It is trite that not all cases of constitutional violations shall lead to an accused person being acquitted. In **Douglas Komu Mwangi V R [2013] eKLR** the Court of Appeal stated:

> ***"There are many instance in which courts have held that a delay in arraigning a suspect in court beyond 24 hours does not necessary entitle the suspect to an acquittal. (See Dominic Mutie Mwalimu – v – R Criminal Appeal No. 217 of 2005; and Evanson K. Chege –v- R Criminal Appeal No. 722 of 2007). This court has stated that if any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages. In Julius Kamau Mbugua –v – R Criminal Appeal No. 50 of 2008, this court stated that:-***
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> ***"A trial court takes cognizance of pre-charge violation of personal liberty, if the violation is linked to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g where an accused has suffered trial related prejudice as a result of death of an important witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of criminal court and which is by section 72(6) expressly compensatable by damages.'***
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> ***In Julius Kamau Mbugua –v- r Criminal Appeal No. 50 of 2008, this court upheld the proposition that even where violation or right to personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuing prosecution is not a nullity and that a prosecution would only be a nullity, if any of the circumstances stated exist. In the present case, the appellant has not demonstrate that he has suffered a trial related prejudice to warrant an acquittal. This ground of appeal has no merit."***

The appellant further faulted the trail Magistrate for failing to appoint an advocate in accordance with the provisions of Article 50(h) after his own advocate withdrew his representation. The purport of Article 50(h) of the Constitution is meant to provide legal aid to those persons who need legal representation but cannot afford it. It is not open to someone who has the means to hire an advocate for himself to wait for the State to provide an advocate for himself. Indeed, the Legal Aid Act 2016, which was enacted to give life to Article 50 (g) and (h) of the Constitution outlines factors that are to be considered before an accused person is assigned an advocate at tax payers expense. Under section 36 of the Act, one of the factors is the persons financial resources. In **John Kioko Mwikya v R [2019] eKLR** the court stated:

> ***"49. The appellants argued that though he was entitled to legal representation at state's expense in the trial court, the State failed to provide such legal representation and neither was he informed of his right. He argued that since his right to a fair trial***

was violated then he is entitled to an acquittal. It is true that the appellant was unrepresented during his trial. He was however represented by Counsel during the hearing of this appeal. Just like Mrima, J noted in Lawrence Ombunga Otondi & Another vs. Republic [2016] eKLR, I did not hear the said counsel say that he was handling the appeal as a pauper brief. He must therefore have been adequately instructed. Further the appellant is not on record as having informed the trial court that he could not afford the services of a legal representative and as such needed the court's intervention....."

Similarly, to the present case, the appellant hired an advocate who represented him for the majority of hearing only to withdraw his services at the tail end. It has not been stated that the learned counsel was offering his service pro-bono nor did the appellant state that he could not afford to hire another advocate. He chose to represent himself for the reminder of the hearing. In the circumstances I find that this ground similarly fails.

In a charge of defilement, it cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the complainant, proof of penetration and the positive identification of the perpetrator. **(See Charles Wamukoya Karani vs. R, Criminal Appeal No. 72 of 2013).**

On the element of age, it is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v R [2015] eKLR**.

The age of the victim in sexual Offences can be proved by documentary evidence such as birth certificate, notification of birth, or baptismal cards. Rule 4 of the Sexual Offence Rules of Court 2014 provides that:-

"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

In the present case, **(PW7),** the investigating officer produced the birth certificate **(P.Ex9)** of the **(PW1)** that indicated that she was born on 5th November 2009. Her mother, **(PW2),** stated in her evidence that the complainant was 9 years old at the time. The age of **(PW3)** and **(PW4)** who were sisters was adduced by **(PW5),** their mother who produced their birth certificates **(P.Ex2)** and **(P.Ex4)** respectively. I find that the age of the complainant was satisfactorily proved.

On the element of penetration, it is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng vs. R [2013] eKLR** where the court stated that:-

"…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."

In the present case, the **(PW1)** testified that one Monday afternoon while at **H's** house, she was sent to get water from the kitchen. That on her way she met with the appellant who was hiding behind a door. She recalled how the appellant grabbed her and covered her mouth and dragged her into a room which he locked. He then removed her underwear and proceeded to sexually assault her. It was her evidence that when the appellant was done he wiped her with his clothes and using a knife threatened to kill her if she told anyone. Her testimony was corroborated by the medical evidence produced by **(PW6).** He stated that when he examined **(PW1)** he found that her hymen had an old tear and stated.

Even in the absence of medical evidence, penetration can be proved by the evidence of a complainant alone as provided by Section 124 of the Evidence Act which provides that:-

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the 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."

This position was succinctly held in by the Court of Appeal in **Williamson Sowa Mbwanga v R [2016] eKLR,** where it stated that:

"The import of the proviso to section 124 of the Evidence Act is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this Court in GEORGE KIOJI V. REPUBLIC, CR. APP. NO. 270 of 2012 (Nyeri):

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

A perusal of the judgment of the trial Magistrate indicates that he found **(PW1)** to be telling the truth and states at paragraph 29:

"The court believes the witness had been truthful. Despite the passage of 8 months from the date of the alleged incident, she

gave a consistent narration which could not be shaken in evidence. The submissions of the accused person were swallowed up in their entirety by the strong evidence given by PW1."

I have gone through the record of the trial court and I concur that **(PW1)** was a truthful witness. She was consistent in her evidence and even on cross-examination she was not shaken but gave a clear account of what happened. While testifying of her ordeal, the court record indicates that **(PW1)** broke down and she had to take about 5 minutes to compose herself. It is unlikely that **(PW1)** was pretending or had been coached to the extent of crying. She was clearly traumatised by what had happened to her. I find that penetration was proved.

Concerning **(PW3)** and **(PW4),** they both testified that they were defiled on the same day at the same place. **(PW3)** stated that on the fateful night he was sleeping in the same room and sharing a bed with **(PW1)** and **(PW4).** The appellant came and woke her up, covered her mouth and removed her underwear. He then removed his trouser and underwear. He showed her a knife and threatened to kill her if she screamed. He then went and switched off the lights and returned to the bed and proceeded to defile her. When he was done, the appellant moved over to **(PW4)** and defiled her too.

(PW4) on her part testified that on 1st September 2018, she had woken up to go to the washroom when the appellant came into the room and ordered her to stay put. She stated that the appellant first defiled **(PW3)** before turning his attention to her. The appellant caressed her and then inserted his penis into her vagina. He threatened to kill both her and **(PW3)** if she dared speak. According to **(PW4)** he defiled both **(PW3)** and herself the next night.

The medical evidence produced by **(PW6)** who found that the hymen was missing corroborated the evidence of **(PW3)** and **(PW4).** The two witnesses corroborated each other's evidence in the material aspects. They were both defiled on the same night by the same person. He started with **(PW3)** before moving on to **(PW4).** He threatened to kill them with a knife if they told anyone. The appellant was the one who switched off the light in the room. The complainants were crossed examined by **Mr. Njuguna** who was still representing the appellant at the time. They stood steadfast in their evidence, they were consistent in the material facts and they were not shaken. I find that penetration was proved.

On the element of identification, recognition has been held by courts to be more reliable than identification of a stranger as long as the court is convinced that the circumstances of identification were favourable. See **Francis Muchiri Joseph – V- R [2014] eKLR** and **Wamunga – vs- R, [1989] KLR**

In the instant case, all the complainants testified that they knew the appellant as their uncle. **(PW2)** and **(PW5)** stated that the appellant was a family friend for many years who was introduced to them by **Y** and that they considered him to be like a brother. It was their evidence that the appellant would occasionally sleep at **H's** house who was the victims' grandmother. The appellant on his part admitted that he knew victims and families, having been family friends for long and that he worked for **AA**, the victims' grandfather.

On whether it was the appellant who defiled them, **(PW1)** testified that the incident happened at 4:00pm in Halima's house as she was going to fetch watch. The appellant pounced on her from behind the door in the house. It was in the afternoon meaning that there was sufficient light by which to identify the appellant. He spoke to her and threatened her. There was no possibility of mistaken identity.

Regarding **(PW3)** and **(PW4)** it was their evidence that the room had a bulb above the door and that they did not switch of the light when they went to sleep. **(PW3)** stated that the appellant woke her up undressed her and threatened her with a knife before going to switch off the light. On her part **(PW4)** stated that she had woken up in order to go and relieve herself but the appellant came into the room. He instructed her to stay put. It was her evidence that the appellant was the one who switched off the light. I find that there was sufficient light provided by the bulb in the room. Furthermore, the appellant spoke to both **(PW3)** and **(PW4)** threatening of repercussions if the spoke of the incident. I find that there was no possibility for mistaken identity and the appellant was properly identified.

The appellant gave a defence of alibi and stated that he moved to Mombasa on the 13th September 2018 in order to look for work opportunities. The principles of how courts deal with an alibi as a defence are well settled. In the case of **Kiarie vs R [1984] KLR** the Court of Appeal held that:-

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons".

In **Athuman Salim Athuman v R [2016] eKLR** the Court of Appeal held that:

"***Although the appellant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the respondent that the alibi defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed in GANZI & 2 OTHERS V. REPUBLIC [2005] 1 KLR 52, this Court stated that where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence."***

I have weighed the appellant's defence against the prosecution's case though it was raised late in the day. The appellant claimed to have travelled to Mombasa on the 13th September 2018, he never gave any evidence of his travel or called anyone to support his contention. Even if it was true that he had travelled to Mombasa on 13th September 2018, **(PW4)** stated that she was defiled on 1st September 2018 which was two weeks before he travelled to Mombasa. I find that his alibi defence did not upset the prosecution case and at no point did it create doubt in the court's mind.

On sentence, the mandatory nature of sentences under the SOA has come under scrutiny following the decision of the Supreme Court in **Francis Karioko Muruatetu & another v R [2017] eKLR.** Many decisions from the Court of Appeal have adopted the decision of the Supreme Court in holding that the mandatory sentences of the SOA takes away judicial discretion in sentencing.

However, the Supreme Court recently in **Francis Karioko Muruatetu & another v R; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR** clarified its decision and held that its judgment was only in respect to the offence of murder. It thus stated:

> ***"[10] It has been argued in justifying this state of affairs, that, by Paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the Court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;***
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> ***"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in 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".***
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> ***Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to Section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases".***
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> ***[11] The ratio decidendi in the decision was summarized as follows;***
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> ***"69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".***

We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute."(Emphasis added)

The Supreme Court in its recent judgment has clarified that mandatory minimum sentences are not unconstitutional but are valid and constitute the law.

Offences under the Sexual Offences Act are serious having long lasting effects on the victims physically, psychologically and emotionally especially where the victim is a minor. This creates a need to protect the victims and the vulnerable in the society and; further act as a deterrence to other would be perpetrators by providing stiff penalties. **Gikonyo J** in **Republic v Jeremiah Koilel [2021] eKLR** stated:

> **"[6] Sexual Offences Act is a special Act enacted to deal with the menace of sexual offences including defilement. Doubtless, the nature of sexual offences depicts moral debauchery; a cruel attack on a person's dignity and person; and, an indelible corrosive hurt of the victim's life. This reality makes sexual offences serious offences, hence, need for protection of victims of sexual offences."**

In the upshot, having evaluated all the evidence on record, it is my finding that the main charge was proved beyond reasonable doubt that the appellant was the culprit. I find that the both the conviction and the sentence was well founded on law. I find no merit in the appeal and consequently dismiss it forthwith.

Orders accordingly.

DATED, SIGNED ON 15TH DAY OF SEPT 2021 and DISPATCHED via email ON 15TH DAY OF SEPTEMBER 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for DPP

2. The Appellant