



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL APPEAL NO. 16 OF 2018[SO]**

**GOO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against conviction and sentence arising from Bondo Principal Magistrate's Court*

*in Sexual Offence Case No. 37 of 2017 delivered by Hon. M. Obiero,*

*Principal Magistrate on 15th February 2018)*

**JUDGMENT**

1. The Appellant **GOO** was charged before the Principal Magistrate's Court in Bondo in Sexual Offences Case No. 37 of 2017 with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. Particulars are that on diverse dates between the 8<sup>th</sup> day of August 2017 and 29<sup>th</sup> August 2017 at [particulars withheld] village, Bondo sub-county within Siaya County, he intentionally and unlawfully caused his penis to penetrate the vagina of CA a girl aged 13 years.

2. The appellant also faced the alternative charge of Committing an Indecent act with a child contrary to Section 2 (1) of the Sexual Offences Act No. 3 of 2006 in that on diverse dates between the 8<sup>th</sup> day of August 2017 and 29<sup>th</sup> August 2017 at [particulars withheld] village, Bondo sub-county within Siaya County, he intentionally and unlawfully caused his penis to penetrate the vagina of CA a girl aged 13 years.

3. The appellant pleaded not guilty to both the main and alternative counts and the matter proceeded for hearing.

4. The trial magistrate, Hon. M. Obiero after hearing the five prosecution witnesses and unsworn testimony of the appellant acquitted the appellant of the main charge of defilement but proceeded to convict him of the alternative charge of committing an indecent act with a child and after hearing the appellant's mitigation proceeded to sentence the appellant to the minimum sentence of 10 years' imprisonment as provided under section 11 (1) of the Sexual Offences Act No. 3 of 2006.

5. Dissatisfied with the said conviction and sentence the appellant filed his initial petition of appeal based on three grounds as follows:

a) **That, the trial Magistrate erred in law and fact by convicting me though contradictions were made by medical officer who exonerated upon testifying in court and proof of main charge was fail to be adduced by the prosecution. [sic]**

b) **That, I pray to be present before court during hearing of this appeal.**

c) **That, I was sick during the trial process and therefore do pray to be supplied with court proceedings to adduce more grounds.**

6. The appellant subsequently filed a supplementary petition of appeal dated 13<sup>th</sup> day of April 2018 through his advocate **ODHIAMBO B.F.O. & COMPANY ADVOCATES** setting out the following grounds:

a) **The learned Magistrate erred in fact by putting reliance on irredeemably illogical, contradictory, and inconsistent evidence of incredible witnesses to convict the Appellant;**

*b) The learned trial Magistrate erred in law during the trial process by failing to make certain fundamental inquiries into the prosecution evidence in order to ensure the ends of justice are met, especially because the Appellant was unrepresented.*

*c) The learned trial Magistrate erred in law by convicting the Appellant using the prosecution evidence which did not prove the case against the said Appellant beyond reasonable doubt;*

*d) The learned trial Magistrate erred in law and in fact by convicting the appellant on the alternative charge based on speculation and uncorroborated evidence by the prosecution;*

7. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424.”*

8. Revisiting evidence before the trial court, PW1 the complainant CA, [full name withheld] testified that the appellant herein was her brother-in-law. She stated that on the 8<sup>th</sup> day of August 2017, she went to visit her sister who was living with the appellant herein when her mother made a phone call and informed them that she was sick forcing her sister to go attend to their mother leaving her with the appellant.

9. It was her further testimony that on a day she could not remember, she prepared supper and that after supper, when they were preparing to retire to bed, the appellant requested her to give him something which she accepted and they had sexual intercourse.

10. She further stated that after that, they continued living in the house and their neighbours went and reported to the area Chief that the appellant had married her. After that, police officers went and arrested her and escorted her to the police station where she was interviewed and she explained what had transpired. She stated that she was thirteen and a half years old and she identified her child Health Card which was later produced by the investigating officer as an exhibit showing that she was born on 17.3.2004.

11. In cross examination by the appellant she stated that she knew the appellant very well as brother in law and that they used to live together. She stated that SA who was her sister was his wife. She also stated that the appellant left her in the town house on 22.8.2018 and that an old lady told her to do and say with her (complainant).

12. The testimony of **PW2, FA** was that the complainant is her daughter while the appellant was her son in law. She recalled that on the 8<sup>th</sup> day of August 2017, she realized that the complainant was missing. Later, she came to learn that the complainant had gone to visit her sister that is the wife of the appellant. She went and took her back home but the complainant later disappeared again after two days. She later learnt that her daughter the complainant had been seen at Masita and was living with her brother-in-law, the appellant herein. She then heard that the complainant was being detained at Bondo Police Station where PW2 went and saw her.

13. In cross examination, PW2 reiterated her testimony in chief and added that there was a time she informed the appellant that she was looking for the complainant.

14. **PW3, Dr. Ahono Oketch** based at Bondo Sub County Hospital testified that he examined the complainant aged 13 years on 29<sup>th</sup> day August, 2017 and filled her P3 form with a history of being defiled from 7/8/2017 to 29/8/2017 and that she was accompanied by a Children’s Officer. He explained that on examination on the genitalia, he noted that there was smell from external genitalia and vaginal discharge and the hymen was absent. There were no bruises on external genitalia. The complainant’s urine however had numerous pus cells on examination indicative of Urinary Tract Infection. On further examination the child was HIV positive. He stated that from the history the complainant had been defiled for a long time but he formed the opinion that there was no evidence of defilement. He produced the P3 form which he signed on 31/8/2017 as an exhibit 1.

15. In cross examination he restated his evidence in chief and added that the girl was clean but with a smelly vagina which could have been due to infection or normal.

16. **PW4, No. 206554 Inspector Boaz Odera**, testified that on the 28<sup>th</sup> day of August 2017, the Children’s Officer went and informed him that there was a school girl who was being suspected to have been married by a certain man and was living in a rented house in Masita area. He stated that on the same day at about 8.00pm, he was accompanied by his colleagues and they went to the house where they were told that the girl was living. On arrival, they did not find anybody as the door was locked.

17. He further testified that they went to another house which was within the same compound and for the land lady and they found an elderly lady and the complainant herein. When he interrogated the complainant, she told him that she was married by her brother-in-law, who had disagreed with her sister. After that, he took her to Bondo Police Station for protection and continued to search for the suspect. He stated that on the 29<sup>th</sup> day of August 2017, he went to Nyamonye and he arrested the appellant.

18. In cross examination by the appellant the witness stated that he did not find him with the girl and that the girl told the police officer that the appellant had two houses one in Nyamonye and another house in Masita and that he was a tenant at Masita as they had found the girl’s clothes in the said house.

19. **PW5, No. 43449 PC Omudho Okwaro stationed at Bondo Police Station** and the investigating officer testified that on the 29<sup>th</sup> day of August 2017, PW4 called him and informed him that he had rescued a girl. He went and collected the girl and took her to Bondo Police Station. Later, he took the girl to the hospital where she was examined and the P3 form was filled. He then recorded statements from the witnesses.

20. It was his further testimony that on the 30<sup>th</sup> day of August 2017, he received the appellant herein who had been arrested by PW4. He further stated that, during the investigations, he obtained a clinical birth card in respect of the complainant which was produced as exhibit 2.

21. In cross examination the witness reiterated his evidence in chief.

22. At the close of the prosecution's case, the appellant was placed on his defence. He opted to give unsworn testimony. He stated that between the 8<sup>th</sup> and 29<sup>th</sup> August 2017, he was in Nyamonye and that he was arrested on the 29<sup>th</sup> day of August 2017 while in Nyamonye. He denied the allegations that he defiled the complainant.

23. In his judgment delivered on 15.2.2018, the trial magistrate Hon. M. Obiero, Principal Magistrate restated the evidence on record by the prosecution witnesses and the defence tendered by the appellant and framed 2 issues for determination:

**1) Whether the appellant was living with the complainant in Masita.**

On this issue the trial court held that the evidence of PW1 and PW2 is well corroborated and the same clearly demonstrates that the complainant was living with her brother-in-law that is the appellant herein in Masita. The trial court found that it appeared that the appellant was living both in Masita and Nyamonye and that on the material day, he was in Masita.

**2) On the second issue of whether the prosecution had demonstrated and or proved the essential elements of the offence of defilement,** the trial court held that despite the complainant being underage, and considering the evidence of the complainant as well as the doctor which contradicted that of the complainant, the trial court made a finding that there was no evidence of defilement.

24. Regarding the alternative charge of committing an indecent act with a child, the trial court found that despite the finding by the doctor that the hymen was not intact, there was no evidence of defilement and in light of the evidence of the complainant that the appellant had sexual intercourse with her it was the court's considered opinion that there was contact between the vagina of the complainant and the penis of the appellant and as such deemed the appellant to have committed the indecent act with the complainant.

## **SUBMISSIONS**

25. The appellant was represented during the hearing of the appeal which was canvassed orally. His counsel Mr Odhiambo B.F submitted relying on the petition of appeal and argued that there were contradictory evidence of the medical officer who exonerated the appellant of the offence of defilement. He submitted that the moment there was no defilement then touching of genitalia of the complainant with a penis did not arise hence the alternative charge could not stand. Further, counsel submitted that PW1 could not remember when she was allegedly defiled yet it was her first time that she was being defiled.

26. Further submission was that the complainant stayed at the Police Station for 30 days and that she was therefore intimidated to say what she told the court hence the trial court should not have relied on her evidence to convict the appellant. According to counsel, the prosecution did not discharge its burden of proving its case against the appellant beyond reasonable doubt hence the conviction of the appellant should be quashed and sentence set aside.

27. In opposing the appeal herein, Mr Okachi Senior Principal Prosecution Counsel submitted relying on evidence adduced for the prosecution before the trial court. He reiterated the evidence on record that the victim and appellant were not strangers to one another and that s a brother in low to the victim, the appellant took advantage of her. Counsel submitted that defilement had been an ongoing act and that penetration was not necessary in the charge of committing an indecent act.

28. On sentence, prosecution counsel submitted that the same was lawful and lenient hence the court should uphold the conviction and sentence imposed.

## **DETERMINATION**

29. Having carefully considered the appellant's grounds of appeal, the submissions for and against the appeal and the evidence adduced before the trial court, in my humble view, the main issues for determination are:

**30. Whether the appellant was convicted based on illogical, contradictory and inconsistent evidence.**

31. According to the appellant, as emerges from his petition and supplementary petition of appeal as well as the written submissions that he was convicted despite the testimony of the medical officer which exonerated him of the main charge.

32. The trial Magistrate noted the contradictions in the testimony of the medical doctor vis a vis that of the complainant, as raised by the appellant herein, and proceeded to acquit the appellant of the main charge of defilement. Regarding the alternative charge upon which the appellant was convicted, the trial court stated that although the doctor was unable to find any evidence of defilement, this may have been due to the lapse of time from the time of the incident and the time of examination.

33. This court is **alive to the provisions of Section 124 of the Evidence Act** which is clear that a trial Court can convict the appellant in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. (*See George Kioyi V R Cr. App. No. 270/2012 (Nyeri) and Jacob Odhiambo Omumbo V. R. Cr. App No. 80 of 200 (Kisumu)*).

34. In the instant case, the trial court convicted the appellant as it believed the testimony of PW1 and discounted the allegations by the appellant that he was in Nyamonye and he was arrested on the 29<sup>th</sup> day of August 2017 while in Nyamonye.

35. Furthermore, it was the un rebutted testimony of PW2, FA that the complainant her daughter, was living with her brother-in-law, the appellant herein, in Masita. This evidence was further corroborated by PW4, IP Boaz Odero, that on the 28<sup>th</sup> day of August 2017, he received information from the Children's Officer to the effect that a school girl had been married by a certain man and upon visiting the compound where he was told that the girl was living, he found an elderly lady and the complainant herein and upon interrogating the complainant, she stated that she was living with her brother-in-law, the appellant, who had disagreed with her sister.

36. Albeit the doctor who examined the complainant stated that there was no defilement, but nonetheless found that the complainant's hymen was absent, and there being no evidence that the complainant could have been coached to frame the offence against the appellant who was her brother in law, I find and hold that there was no material contradiction that could vitiate the trial or conviction of the appellant for the offence of committing an indecent act with the complainant child.

37. The submission by Mr Odhiambo B.F advocate that the moment the doctor found that there was no defilement then the alternative charge could not stand against the appellant has no basis in law. If anything, that is why the law provides for conviction of a lesser offence under section 179 of the Criminal Procedure and or inchoate offences under section 295 of the Penal Code.

38. The appellant also raised an alibi defence to the effect that during the alleged time of offence, he was living in Nyamonye and not in Masita and that he was arrested at Nyamonye. The general principle is that by setting up an alibi defence, the accused does not assume the burden of proving the alibi (*Ssentale v. Uganda [1968] EA 36*). The prosecution always bears the burden of disproving the alibi and proving the appellant's guilt (*Wang'ombe v. Republic [1976-80] 1 KLR 1683*).

39. **However**, the Court of Appeal has made it clear that it is desirable that an alibi defence be raised at the earliest opportunity to give the prosecution time to investigate its truth or otherwise. In **Hadson Ali Mwachongo v Republic [2016] eKLR where it was held that:**

*"We have stated before that while it is desirable that an alibi defence be raised at the earliest opportunity to give the prosecution time to investigate its truth or otherwise, nevertheless where an alibi is raised in the defence, the court must still address it. (See Ganzi & 2 Others v. Republic [2005] 1 KLR 52). In the present case, when the appellant's alibi defence is weighed against the evidence adduced by the prosecution, which was accepted by the two courts below, the conclusion is inescapable that the alibi defence was effectively displaced.*

40. In the instant case, the appellant's belated alibi defence, when weighed against the evidence adduced by the prosecution witnesses which was accepted by the trial court and which I wholly accept, the conclusion I make is that the alibi defence is and was effectively displaced.

41. An alibi defence which was raised at the defence hearing stating that the appellant was at Nyamonye on the dates when the child is said to have been defiled or the act of indecency committed against her, without providing any substantial corroboration of the same is in my humble view an afterthought and no defence at all.

42. Having re-examined the evidence by the prosecution witnesses leading to the arrest of the appellant *Vis a vis* the defence, I am persuaded that the prosecution proved their case against the appellant beyond reasonable doubt and that the defence of alibi was farfetched.

43. The evidence by the prosecution witnesses as a whole displaced the allegation by the appellant that between the 8<sup>th</sup> and 29<sup>th</sup> August 2017, he was in Nyamonye.

44. Accordingly, I am unable to find any ill logic, contradiction or inconsistency in the evidence by the Prosecution against the appellant so as to justify the quashing of the conviction and sentence meted out on the appellant.

45. On **whether the learned trial magistrate erred in law during the trial process by failing to make certain fundamental inquiries into the prosecution evidence in order to ensure the ends of justice are met, especially because the Appellant was unrepresented.**

46. According to the appellant there was a miscarriage of justice since he was unrepresented during his trial and that in the absence of legal representation, the trial court failed to properly interrogate the evidence presented by the prosecution.

47. Article 50 (2) (h) of the Constitution provides that an accused person has a right to have an advocate assigned to him or her at State expense *if substantial injustice would otherwise result.*

48. Thus, failure to afford an accused person the right to legal representation may result in injustice on the part of the appellant. The Court of Appeal in the case of **Macharia vs Republic [2014] eKLR** stated that as follows:-

*"Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interest of ensuring justice. This varies with the repealed law by ensuring that any accused, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language*

***difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence... We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”***

49. The Court of Appeal in the above case was of the opinion that where the accused faced a capital offence, then the State ought to consider providing legal representation. In other instances, it would have to be through a case by case examination, such as where there are complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided. In **Dominic Kimaru Tanui vs Republic [2014] eKLR** the High Court argued that legal representation is to be provided where the offence carries a death penalty.

50. A reading of the provisions of the Constitution on the right to legal representation reveals that an accused person’s entitlement to legal representation at the expense of the state is not automatic but qualified. In other words, an accused person must prove that unless he or she is assigned an advocate by the State, *substantial injustice* would occur. In **Dominic Kamau Macharia v Republic [supra]** the court explained that ***substantive injustice would occur in cases such as where there are complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided.***

51. The Legal Aid Act, 2016 gives effect to the provisions of the Constitution, namely Articles **19 (2), 48, 50 (2) (g) and (h)** to facilitate access to justice and social justice and to provide for legal aid. Section **35** of the said Act lays down the general principles of legal aid while section **36 (1)** provides for persons eligible for legal aid.

52. **Section 36 of the Act** provides:

***“A person is eligible to receive legal aid services if that person is indigent, resident in Kenya and is: a citizen of Kenya; a child; a refugee under the Refugees Act (No. 13 of 2006); a victim of human trafficking; or an internally displaced person; or a stateless person.***

***A person who is eligible to receive legal aid services under subsection (1) shall apply to the Service in the prescribed manner. A person shall not receive legal aid services unless the Service has determined that the individual's financial resources are such that the person is eligible for the services. Despite subsections (1), (2) and (3), the Service shall not provide legal aid services to a person unless the Service is satisfied that: the cost of the proceedings is justifiable in the light of the expected benefits; ... denial of legal aid would result in substantial injustice to the applicant; or there exists any other reasonable ground to justify the grant of legal aid.”***

53. Section 40 of the Act further provides that:

***“(1) a person who wishes to receive legal aid shall apply to the service in writing;***

***(2) Where a person wishes to apply for legal aid, the person shall apply before the final determination of the matter by a court, tribunal or any other forum to which the application relates;***

***(3) an application under subsection (1) shall be assessed, with respect to the applicants' eligibility for legal aid services in accordance with this Act.”***

54.

55. Considering the above authorities, constitutional and statutory provisions and the facts of this case and the judicial interpretation of substantial injustice, I am not persuaded that the appellant herein has satisfied any of the tests stated above to demonstrate that *substantial injustice* was occasioned to him due to fact that he was unrepresented. In any case the appellant did not apply to be provided with legal representation as stipulated in section 40 of the Legal Aid Act. I do not find that the appellant’s Constitutional right to fair trial was violated in any way as the appellant never raised the issue of not being represented during his trial.

56. In **Francis Macharia Gichangi & 3 Others V R. Cr. Appl. No. 11 of 2004**, the Court of Appeal stated that it is to be reasonably expected that an Appellant who claims that his rights have been violated will at the very least raise the issue with the trial court. The appellant herein never raised any issue regarding violation of his rights with the trial court.

57. For that reason, I find the ground of appeal baseless and I dismiss it.

58. **On whether the prosecution proved the alternative charge against the appellant beyond reasonable doubt, the** alternative charge brought against the appellant was the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. It is alleged that he touched the complainant’s vagina with his penis.

59. Section 2(1)(a) of the Sexual Offences Act No.3 of 2006 defines the Phrase, **“Indecent Act”** to mean any contact between the genital organs of a person, his or her breasts and buttocks with that of another person.

60. In this case, the evidence of the complainant was that the appellant had sexual intercourse with her. The doctor made a finding that although the hymen was not intact, there was no evidence of defilement. The trial court held that although the doctor was unable to find any evidence of defilement, this may have been due to the lapse of time from the time of the incident and the time of examination.

61. The trial court relied on the evidence of PW1, the complainant, who testified that on a day she could not remember, she prepared supper and that after supper, when they were preparing to retire to bed, the appellant requested her to give him something which she accepted and they had sexual intercourse. The trial court had the advantage of observing the complainant when she made this statement and determined that she was truthful. The trial court after acquitting the accused on the main charge of defilement on account that the doctor did not find the complainant to have been defiled stated as follows with regard to the evidence proving committing an indecent act with a child:

***“My considered opinion is that although the doctor was unable to find any evidence of defilement, this may have been due to the lapse of time from the time of the incident and the time of examination. However, from the evidence of PW1, I am of the considered opinion that there was contact between the vagina of the complainant and the penis of the accused person.”***

62. As earlier stated, the provisions of **Section 124 of the Evidence Act** provide that a trial Court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. The trial court having found that the complainant was truthful, I find no reason to differ with his finding of fact. I uphold it. Accordingly, I find the ground of appeal by the appellant devoid of merit and dismiss it.

63. The other issue that I must resolve is whether the prosecution proved the age of the complainant. PW2 the mother to the complainant testified that the complainant was aged 13 years and a Clinic birth Card was produced as an exhibit by PW4 which showed that the complainant was aged 13 years. There being no contrary evidence, I find that it was proved by the prosecution beyond reasonable doubt that the complainant was a child as defined in section 2 of the Children’s Act.

64. In the end, I find and hold that the appeal herein against conviction of the appellant is not merited. It is hereby dismissed and the appellant’s conviction by the trial court upheld.

65. On sentence, the appellant urged the court to set aside the sentence of ten years imposed on him. The trial Magistrate imposed on the appellant a mandatory minimum sentence of ten years upon convicting him for the offence of committing an indecent act with a child. This was in accordance with Section 11(1) of the Sexual Offences Act.

66. In doing so the trial court took into account his mitigation that he was a first offender and that he was sickly. The trial court stated:

***“The accused is a first offender. However, the penalty provided under Section 11(1) of the Sexual Offences Act No.3 OF 2006 is a minimum of 10 years’ imprisonment. As such, I do not have any discretion. I do sentence the accused to serve ten (10) years imprisonment.”***

67. The question is whether the appellant’s sentence can be interfered with. In **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated:

***“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306).”***

68. The Court of Appeal further in **Bernard Kimani Gacheru v Republic [2002] eKLR** held:

***“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”***

69. Section 11(1) of the Sexual Offences stipulates that:

***“11. (1) Any person who commits an indecent act with a child is***

***Guilty of the offence of committing an indecent act with a child and***

***is liable upon conviction to imprisonment for a term of not less than***

***ten years.”***

70. The words ‘**not less than ten years**’ imposes a mandatory duty on the court such that the court convicting is left with no discretion in sentencing

71. In **Simon Kipkurui Kimori v Republic [2019] eKLR**, Odunga J citing several decisions from within and without this jurisdiction elaborately held *inter alia*:

*“Such sentences, in my view, do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates. This is my understanding of the Supreme Court decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR, Petition No. 15 of 2015, where it expressed itself as hereunder:*

*“47. Indeed the right to 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.*

*[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.*

*[49] With regard to murder convicts, mitigation is an important facet of fair trial. In Woodson as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.*

*[50] We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts’ mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.*

*[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.*

*[52] We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.*

*[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict.”*

72. Similarly, in *S vs. Mchunu and Another (AR24/11) [2012] ZAKZPHC 6*, Kwa Zulu Natal High Court held:

*“It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in *S v Scott-Crossley 2008 (1) SACR 223 (SCA)* at para 35:*

*‘Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.’*

*‘. . . [i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.’*

73. The Courts have always frowned on mandatory sentences that place a limitation to judicial discretion. In *S vs. Toms 1990 (2) SA 802 (A)* at 806(h)-807(b), the South African Court of Appeal (Corbett, CJ) held:

*“The infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court’s normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been*

*considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant.”*

74. In *S vs. Mofokeng 1999(1) SACR 502 (W) at 506 (d)*, Stegmann, J opined that:

*“For the Legislature to have imposed minimum sentences severely curtailing the discretion of the Courts, offends against the fundamental constitutional principles of separation of powers of the Legislature and the Judiciary. It tends to undermine the independence of the courts and to make them mere cat’s paws for the implementation by the legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases.”*

75. 16. Similarly, in *S vs. Jansen 1999 (2) SACR 368 (C) at 373 (g)-(h)*, Davis J held that:

*“Mandatory minimum sentences disregard all individual characteristics and each case is treated in a factual vacuum, leaving no room for an examination of the prospect of rehabilitation and of the incarceration method to be adopted. Such a system can result in a gross disregard of the right to dignity of the accused.”*

76. In my humble view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. This view is supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:

*‘Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.’*

77. The Court of Appeal in *Jared Koita Injiri vs. Republic [2019] eKLR* where it held that:

*“In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic (supra)*, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”*

78. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in *S vs. Malgas 2001 (2) SA 1222 SCA 1235 paragraph 25* as follows:

*“What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.”*

79. Therefore, the provisions of a legislation that was in force before the Constitution of Kenya, 2010 such as the Sexual Offences Act. No. 3 of 2006 must be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 27 of the Constitution as appreciated in the Muruatetu Case.

80. I have extensively cited Odunga J because in his judgment he elaborately determined issues regarding mandatory sentences as well as sentencing guidelines which are useful to any court of law. The learned judge was clear and I agree entirely with his reasoning that :

*“This does not mean that the court ought not to mete out what appears as prima facie mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentence.”*

81. In the instant case, the minor was aged 13 years and the appellant was her elder sister’s husband. The appellant took advantage of the minor by seducing her and even living with her as his wife until she was rescued. Albeit the Clinical Officer who examined the minor claimed that she had not been defiled simply because there were no bruises on the genitalia yet her hymen was missing and which conclusion led the trial court to conclude that the appellant was only guilty of the alternative charge of committing an indecent act with a child, I find that this is a case where the appellant could safely have been convicted of the offence of defilement as charged in the main charge. Nonetheless, as the prosecution said nothing about this, I will not interfere with the findings and conviction by the trial court.

82. On the whole, I find this appeal against conviction devoid of merit. I dismiss it.

83. On sentence, on the strength of the decision in *Jared Koita Injiri v Republic [supra]*, I exercise discretion and reduce the minimum mandatory sentence imposed on the appellant and substitute it with a prison term of eight years to be calculated from the date of arrest on 30<sup>th</sup> August 2017.

*Orders accordingly.*

**Dated, signed and Delivered at Siaya this 5<sup>th</sup> May, 2020 via skype due to the Covid 19 situation.**

**R.E. ABURILI**

**JUDGE**