



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 111 OF 2019**

**MATHEW KIPRUTO.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon. C. Ateya, SRM, delivered on the 12<sup>th</sup> day of June 2019 in Iten Principal Magistrate's Criminal Case No. S.O. 11 of 2018)*

**JUDGMENT**

[1] This appeal arises from the Judgment of the Senior Resident Magistrate at Iten Law Courts in **Iten Principal Magistrate's Criminal Case No. S.O. 11 of 2018**. The appellant was charged therein with the offence of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars were that on the **29<sup>th</sup> day of March 2018** at about 7.00 p.m. within Elgeyo Marakwet County, the appellant intentionally and unlawfully caused penetration by use of his genital organ, namely penis, into the genital organ, namely vagina of **VJ** a girl aged 14 years.

[2] In the alternative, the appellant was charged with the offence of indecent act with a child. It was alleged that on the **29<sup>th</sup> day of March 2018** at about 7.00 p.m. within Elgeyo Marakwet County, the appellant intentionally and unlawfully committed an indecent act to **VJ** a girl aged 14 years, by touching her private parts, namely vagina.

[3] Having denied those allegations, the Prosecution was put to the task of proving their case beyond reasonable doubt; and upon hearing both sides, the learned trial magistrate, in a Judgment dated and delivered on **12 June 2019** was convinced that the elements of the main charge had been proved against the appellant beyond reasonable doubt. She accordingly found the appellant guilty thereof and convicted him accordingly. Thus, the appellant was sentenced to 20 years' imprisonment on **27 June 2019**.

[4] Being aggrieved by his conviction and sentence, the appellant preferred this appeal on **9 July 2019**, through the law firm of **Mathai Maina & Company Advocates** on the following grounds:

[a] That the learned Magistrate misdirected herself by sentencing the appellant in the absence of evidence linking him to the alleged act of intercourse with the victim.

[b] That the learned Magistrate misdirected herself by sentencing the appellant using a P3 that was defective in substance.

[c] That the appellant's constitutional rights to be informed of the charges and to be supplied with witness statements prior to the hearing of the case were violated.

[d] That the learned Magistrate erred in law and fact by basing her findings on the Prosecution's case, which was full of contradictions.

[e] That the trial Magistrate erred in law and fact by holding that the Prosecution had proved its case beyond reasonable doubt yet there were no material facts presented before the court to reach that conclusion.

[f] That the trial Magistrate generally erred in law and fact in rendering a judgment that was contrary to the law and facts.

[g] That the trial Magistrate erred in law and fact by failing to consider the weight of the defence evidence and submissions.

[5] Thus, it was the appellant's prayer that the appeal be allowed and that his conviction and sentence be set aside and be substituted with an acquittal.

[6] The appeal was urged by way of written submissions; and to that end **Mr. Mathai** relied on his written submissions dated **28 November 2019**. He argued the 7 Grounds of Appeal under the following 3 broad heads:

[a] the effect of failure to accord the appellant the right to be informed of the charges and to be supplied with witness statements prior to the hearing;

[b] that the Prosecution had failed to prove the key elements of the main charge beyond reasonable doubt;

[c] That the Prosecution case was marred by contradictions.

[7] Counsel relied on **Article 50(2)** of the **Constitution** to underscore his submission that the appellant, as an accused person, had the right to be informed in advance of the charge and the evidence the Prosecution intended to rely on; and to have a reasonable access to that evidence, as well as adequate time and facilities to prepare his defence. He submitted that the appellant was never served with the Charge Sheet or the witness statements prior to the hearing. Counsel relied on **Cholmondeley vs. Republic** [2005] eKLR, **Joseph Ndungu Kagiri vs. Republic** [2016] eKLR and **Ruward** [1993] 2 ALLER 557 to buttress his arguments.

[8] With regard to the burden of proof, counsel discredited the medical evidence presented before the lower court; and in particular the P3 Form exhibited in support of the complainant's allegations of penetration. He pointed out that whereas the alleged offence was said to have been committed on **29 March 2018**, the P3 Form was dated **2 April 2018**; an indication that the medical examination was conducted several days from the date of the alleged offence. He also impugned the P3 Form not only for being unstamped for purposes of authenticity but also for the reason that the clinical officer concerned was inconclusive as to whether the red discharge noted in the complainant's genitalia was indeed blood; and if so, the reason for it. He took the view that, given the complainant's age, the possibility that the blood was attributable to natural biological menses needed to be ruled out.

[9] Lastly, counsel for the appellant submitted that the Prosecution evidence was so contradictory and incoherent that it was incapable of proving the elements of the main charge beyond reasonable doubt. For instance, he pointed out that the Occurrence Book gave the date of arrest as **30 March 2018** yet the appellant was arrested on **29 March 2018**; and therefore that the evidence of **PW7** was contradictory to that of **PW1, PW3** and **PW4** in this respect. Counsel relied on **Article 50(2)** of the Constitution as to the presumption of innocence and **Section 107(1)** of the **Evidence Act, Chapter 80** of the **Laws of Kenya** on the burden of proof. The cases of **Miller vs. Minister of Pensions** [1947] 2 ALLER 372 and **Bhatt vs. Republic** [1957] EA 332 were cited to underscore the submission that the Prosecution had the obligation to prove all the elements of the charge beyond reasonable doubt; and that **"...a mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence..."** Thus, it was **Mr. Mathai's** prayer that the appeal be allowed.

[10] **Mr. Chacha**, learned counsel for the respondent, opposed the appeal, contending that all the ingredients of the main charge of defilement for purposes of **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**, were proved beyond reasonable doubt. He submitted that penetration was proved by the evidence of the complainant, which was corroborated by the evidence of the clinical officer, **PW6**, who examined the complainant shortly after the incident. Counsel further submitted that the appellant was arrested at the scene of crime and therefore that his identity was not in issue. Likewise, it was the submission of the **Mr. Chacha** that the age of the complainant was uncontested; and that in any case, this was amply proved vide a clinic card that was produced before the lower court.

[11] In response to the appellant's contention that his fair hearing rights were infringed, **Mr. Chacha** asserted that, having been supplied with the Prosecution witness statements and documents at the beginning of the trial, the appellant had no cause for complaint. He added that the appellant was always afforded the opportunity to declare whether or not he was ready to proceed with the hearing of his case and that at no point did he raise any objection. Accordingly, **Mr. Chacha** urged the Court to uphold both the conviction and sentence by dismissing the appeal in its entirety.

[12] This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32**, the Court of Appeal for East Africa had the following to say in this connection:

**"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function 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..."**

[13] Accordingly, I have carefully perused the record of the lower court and note that the complainant testified before the lower court on **17 May 2018** as **PW1**. She told the court that, at the material time, she was aged 14 years and was in Class 6. She had come from school on **29 March 2008** at about 5.00 p.m. and had been sent to the posho mill by her grandmother. She was accompanied by her cousin, **NJ** aged 13 years. The complainant stated that on her way back home at about 7.00 p.m., she was accosted by the appellant, a *boda boda* rider operating from the local shopping centre known as Kipepeo; and that he forcefully dragged her into the bush and defiled her.

[14] It was further the evidence of the complainant that her uncle **TKR (PW3)** got to know of the incident through her cousin and went to her rescue with the area chief; and that on seeing them approach, the appellant made an attempt to escape but was chased and arrested. She was then escorted to Iten Hospital for examination and treatment; after which the matter was reported to the police at Iten Police Station.

[15] The complainant's cousin, **NJ (PW2)** confirmed that they had been sent to the posho mill by their grandmother; and that on their way back, they noted that they were being followed by three men on a motorbike; one of whom alighted and grabbed her cousin **VJ** by the hand and pulled her toward the bushes. She was able to see and recognize the person to be the appellant, a *boda boda* rider in the area. She rushed home, as **VJ** screamed for help, and informed her aunt, **CJK** who in turn alerted their uncle **TKR (PW3)**. **PW2** concluded her evidence by stating that she remained at home as her aunt and uncle left in haste for the scene.

[16] **TKR (PW3)** confirmed that **PW1** and **PW2** are his nieces; and that he was at home on **29 March 2018** when he heard his sister **CJK** calling him from a distance. He rushed towards the road and found **CJK**. She reported to him that she had sent the two girls to the posho mill; and that her daughter **VJ** had been accosted by a man. He then ran to the nearby Kipepeo Trading Centre and found the area chief, to whom they reported the incident. They rushed to the scene on the chief's motor cycle; and in the course of scouring the area between their home and the posho mill they saw the appellant holding **VJ's** hand. **PW3** further told the lower court that, when the appellant saw them approach, he let go of **VJ's** hand and started running away. It was thus the evidence of **PW3** that as the chief was parking his motorbike, he chased and arrested the appellant; and that the appellant called him by name and asked for forgiveness. They went back to where **VJ** was standing, and found her crying; and that she confirmed that the appellant was the person who had defiled her. She was taken to hospital by her mother for examination and treatment; while the appellant was escorted to the police station.

[17] The assistant chief of Kapkenoin Sub-location, **Abraham Kipkoech Kibet**, testified as **PW4** before the lower court and confirmed that he was at Kipepeo Shopping Centre on **29 March 2018** at about 7.30 p.m. when **TKR (PW3)** informed him that a certain girl had been defiled by a *boda boda* rider. He then proceeded to the scene with **TKR** on his motorbike and found the appellant standing on the road with the complainant; and that on seeing them the appellant started running away. He testified that, as he stopped to park his motorcycle, **TKR (PW3)** went after the appellant, caught up with him and arrested him. **PW4** also mentioned that the complainant confirmed that the appellant had defiled her. She was taken to hospital for treatment while the appellant was taken to the police station.

[18] The complainant's mother, **CJK (PW5)** testified before the lower court on **11 July 2018** and confirmed that **VJ** is her daughter and that she was born on **23 April 2004**. She confirmed that she received a report from **NJ** at about 7.30 p.m. on **29 March 2018** that a certain person had grabbed **VJ** by the hand and pulled her into the bush. She alerted her brother **TKR (PW3)** who in turn reported the occurrence to the area assistant chief. As they headed towards the scene, she saw her daughter, **VJ** standing next to the road with the appellant, who on seeing them approach, started running away. She confirmed that **TKR** went after him and arrested him; and that after the complainant narrated to them what had befallen her and identified the appellant as her assailant, she escorted her to Iten County Hospital for treatment after which they went to Iten Police Station to register the complaint. Their statements were recorded the following day, and the complainant was issued with a P3 Form that was filled at Iten County Hospital and returned to the police station. She handed over the complainant's Immunization Card to the police as an exhibit.

[19] **Meshack Chemjor Kandie (PW6)**, a clinical officer at Iten County Referral Hospital confirmed to the lower court that he attended to the complainant on the night of **29 March 2018** at about 9.30 p.m. following allegations of having been sexually assaulted by someone known to her. He examined her and observed that the complainant had bruises and lacerations on the vaginal wall; and that her hymen was freshly torn. He also noted that the complainant's cervix was red and there were bloodstains in her genitalia. **PW6** later filled the P3 Form for the complainant, and formed the opinion that there was penetrative sexual intercourse causing fresh hymenal tears and bruises on the complainant's vaginal wall. He produced the P3 Form and his treatment notes as **the Prosecution's Exhibit 1 and 2** before the lower court.

[20] The last Prosecution witness was the Investigating Officer, **Cpl. Lucy Sambu (PW7)**. Her testimony was that she was on duty at Iten Police Station on **30 March 2018** when a suspect, the appellant herein, was handed over to her by the chief, **Abraham Kibet (PW4)** in the company of the complainant, her mother **CJK (PW5)** and her uncle **TKR (PW3)**, on allegations that he had defiled the complainant. She confirmed that she received the complainant's Immunization Card from **PW5** and that it gives the complainant's date of birth as **26 April 2004**. In addition, she arranged for the complainant to undergo age assessment at **Iten County Hospital** on **24 December 2018**. In the opinion of the examining doctor, the complainant was 15 years old at the time. **PW7** produced the age assessment report as the Prosecution's Exhibit 4 before the lower court.

[21] On his part, the appellant denied the allegations against him. He denied any knowledge of the complainant and stated that he was on his way home on **29 March 2018** at around 7.30 p.m. when the chief stopped him and accused him of defiling a certain girl. He was then arrested and escorted to the police station. He contended that he had been framed on account of a grudge the chief harboured against him. He, in the same vein, attributed his arrest to a grudge between the family of the complainant and him, though he did not give details thereof.

[22] It was in the light of the foregoing evidence that the learned trial magistrate came to the conclusion that:

**"...the prosecution's evidence has not been controverted. The accused was found at the scene and was seen by PW1, the complainant, PW2, the complainant's cousin who was with the complainant walking home, PW4 and PW5 who arrested him and PW6 the complainant's mother who ran to the scene after being informed by PW2. He was arrested shortly after the incident at the scene and the medical evidence confirmed that the complainant had been defiled. His defence doesn't raise any doubt that he indeed committed the offence...The prosecution needed to prove penetration and from the above evidence it is clear that there was penetration. They also needed to prove the age of the girl and from the evidence she was 14 years old at the time of the incident. I therefore find that the prosecution has proved their case to the required standard of beyond reasonable doubt. The accused person is found guilty of the offence of defilement as charged and is convicted under section 215 of the Criminal Procedure Code..."**

[23] The main charge was laid pursuant to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. **Section 8** stipulates that:

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

**(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

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

**(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.**

[24] Accordingly, it was incumbent upon the Prosecution to prove the following essential ingredients:

[a] That the Complainant was, at the material time, a child for purposes of **Section 8(3) of the Sexual Offences Act**;

[b] That there was penetration of the complainant's genitalia;

[c] That the penetration was perpetrated by the Appellant.

**[a] On the age of the Complainant:**

[25] There is no gainsaying that for purposes of **Section 8 of the Sexual Offences Act**, the age of a complainant is an essential ingredient that must be proved beyond reasonable doubt; not only for purposes of proving that the complainant is a minor, but also for purposes of sentence. In **High Court Criminal Appeal No. 34'B' of 2010: John Otieno Obwar vs. Republic, Hon. Makhandia, J.** (as he then was) observed that:

**"Defilement is a strict offence whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly it is important that the age of the victim to be proved by credible evidence..."**

[26] Similarly, in **Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010** the Court of Appeal reiterated this point thus:

***"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".***

[27] As correctly observed by the learned trial magistrate, credible evidence was adduced by the complainant and her mother that she was, at the material time, a primary school girl aged 14 years. She was then in class 6 at [Particulars Withheld] Primary School. In particular, **PW5** told the lower court that the complainant was born on **26 April 2004**; and in this regard, her evidence was backed by the complainant's Child Health Card (**the Prosecution's Exhibit 3**) and the Age Assessment Report produced by the investigating officer (**PW7**). According to that report, the complainant was around 15 years old as at **24 December 2018**. It is instructive that in **Rule 4 of the Sexual Offences Rules of Court Rules** it is recognized 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."**

[28] Clearly therefore, the Prosecution proffered proof beyond reasonable doubt that complainant was within the age bracket envisaged by **Section 8(3) of the Sexual Offences Act**, noting that the appellant's defence was that he did not know the complainant before. In effect, the Prosecution evidence as to the age of the complainant was entirely uncontroverted; and therefore, it is my finding that the complainant's age was proved beyond reasonable doubt, and that it fell within the **Section 8(3)** bracket.

**[b] On Penetration of the Complainant:**

[29] The complainant told the lower court what befell her as she was walking home from the local posho mill with her cousin, **NJ (PW2)**. She stated that it was dusk and that it was still possible to see at close range; and that, as they were walking along, three people came from behind riding a motorcycle; that one of them alighted and grabbed her hand; and that she looked up and recognized the person to be the appellant. The appellant pulled her into the bushes near the cattle dip and defiled her before pulling her back to the road. She added that although she felt pain, there was nothing she could do other than scream for help.

[30] The clinical officer (**PW6**) corroborated the complainant's evidence. He testified that he attended to the complainant shortly after the incident and noted that she had bruises and lacerations on her vaginal wall. He also noted that the complainant had a freshly torn hymen; that the complainant's cervix was red and that there were bloodstains in her genitalia. From his observations **PW6** came to the conclusion that the complainant had been subjected to penetrative sexual intercourse. He produced the P3 Form and his treatment notes as **the Prosecution's Exhibit 1 and 2** before the lower court.

[31] Counsel for the appellant urged the Court to disregard the P3 Form, contending that the details thereon did not tie in with the rest of the Prosecution case. In particular, he pointed out that whereas the alleged offence was said to have been committed on **29 March 2018**, the P3 Form was dated **2 April 2018**; an indication that the medical examination was conducted several days from the date of the alleged offence. He also impugned the P3 Form not only for being unstamped for purposes of authenticity. I have looked at the original P3 Form produced before the lower court and it does bear the stamp for Iten County Referral Hospital; and, from a consideration of the evidence presented before the lower court, it is discernible that the P3 Form was filled on a date later than the date of the crime. This, therefore explains the variance in the date stated on the P3 Form. Similarly, other than the bloodstains noted in the complainant's genitalia, there were other presentations such as a freshly torn hymen and bruises on the complainant's vaginal that supported **PW6's** conclusion that there was penetration.

[32] Thus, having considered all the perceived contradictions, I am unable to find that they in any way detracted from the main theme of the Prosecution case or caused any prejudice to the appellant; bearing in mind the determination by the Court of Appeal in **Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1992**, that:

**“An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence”.**

[33] On a reconsideration of that evidence, I am satisfied, as was the trial court, that the Prosecution proved penetration beyond reasonable doubt, and I so find.

**[c] On the identity of the offender**

[34] Granted the line of defence adopted by the appellant, the key issue that the lower court had to grapple with and resolve is the question whether the defilement of **PW1** was perpetrated by the appellant. In this regard, the evidence of the complainant was that she had known the appellant before as a *boda boda* rider in their area. She therefore immediately recognized him. Likewise, the complainant’s cousin, **NJ** told the lower court that she knew the appellant before-hand and recognized him when he pulled the complainant by her hand into the bush. She said she rushed home and informed the complainant’s mother of what had happened, mentioning the appellant by name as **Mathew**; a fact confirmed by **PW5**.

[35] Granted that it was twilight and that darkness had started setting in, it is imperative, in such circumstances, to bear in mind the caution expressed by the Court of Appeal in **Paul Etole & Another vs. Republic** [2001] eKLR regarding such evidence. It held that:

**“...Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.**

**All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger...”**

[36] And, in **Anjononi & Others vs. Republic** [1980] KLR 59 the Court of Appeal held that:

***“...recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.”***

[37] It is manifest therefore that given the cogent evidence presented before the lower court by **PW1 and PW2**, the identification of the appellant was well above board. Moreover, in addition to the evidence of **PW1, PW2 and PW5**, evidence was called by the Prosecution from **PW3, PW4, and PW5** that their reaction to **PW2’s** report was swift; and that when they got to the scene, they found the appellant with the complainant standing beside the road; that the appellant was holding the complainant’s hand; and that before they could get to where the two were, the appellant bolted and started running away, but was chased and arrested by **PW3** in a ploughed field without losing sight of him. Clearly then, there can be no doubt that the appellant was placed at the scene of the crime and that there was no possibility of mistaken identity. Under those circumstances, the contention by the appellant that he was framed, or that his arrest was attributable to grudges between him and the assistant chief on the one hand and with the family of the complainant, on the other hand, was rightly rejected by the lower court.

[38] Turning now to the question as to whether the appellant’s right to fair trial was infringed and whether that infringement had the effect of vitiating the entire trial, conviction and sentence, reference was made by Counsel to **Article 50(2)(c) and (j)** of the **Constitution**, which stipulates that:

**“Every accused person has the right to a fair trial, which includes the right—**

**(c) to have adequate time and facilities to prepare a defence;**

**(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence...”**

[39] As to whether the appellant was accorded adequate time and facilities to prepare a defence, a perusal of the record reveals that whereas his arraignment took place on **3 April 2018**, his trial did not begin in earnest until **17 May 2018**. An order was made, on the date of plea, for his release on bond, so long as he furnished security for his court attendance. The appellant was accordingly released on bond on **5 April 2018**. He therefore had the time and space to prepare for his trial. Indeed, before the commencement of his trial, he was given an opportunity to express himself and is recorded to have told the lower court that he was ready for the trial. Hence, for purposes of **Article 50(2)(c)** of the Constitution, the appellant has no cause for complaint.

[40] Nevertheless, sight is not lost of the fact that an accused’s right to be given adequate time and facilities to prepare his defence is, in

essence, intertwined with the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence, as entrenched in **Article 50(2)(j)** of the **Constitution**. Hence, in **Cholmondeley vs. Republic** (supra) the Court of Appeal held that:

**“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under our constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.”**

[41] While it was the assertion of **Mr. Chacha** that the appellant was duly supplied with copies of the Prosecution’s witness statements and documents prior to the commencement of hearing, there is no indication thereof on the record. Hence, the Court was urged to find that there was non-compliance and to follow the path taken by my learned brother, **Hon. Mativo, J.** in **Joseph Ndungu Kagiri vs. Republic** (supra), that:

**“...failure to provide the Appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50(2)(j) violated their constitutional right to a fair trial and violated the entire trial and its immaterial that they were ultimately acquitted. In my view, under no circumstances should a fair trial be jeopardized. These were the key witnesses and their evidence was crucial and the accused persons were entitled to be supplied with the said statement prior to the trial. It is immaterial that they were able to cross-examine the prosecution witness as learned counsel Mr. Njue for DPP submitted the fact that they were able to cross examine the witness does not take away their constitutional rights provided in the constitution nor can it be the yardstick for measuring a fair trial. In fact, failure to provide the accused persons with the witness statements prior to the trial was an illegality and a breach of their rights to a fair trial. I find that failure by the prosecution to provide the accused persons with the witness statements amounted to a violation of their constitutional rights to a fair trial...”**

[42] It is however instructive that in **Simon Ndichu Kahoro vs. Republic** [2016] eKLR, the Court of Appeal pointed out that:

**“We should not be understood to be setting up a general principle or precedent that every breach of Article 50 of the Constitution, 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case.”**

[43] As pointed out hereinabove, the assertion by counsel for the state is that there was compliance. Accordingly, I find the facts to be similar to the facts in **Republic vs. Francis Muniu Kairu** [2017] eKLR in which the trial court failed to record that the appellant had received the witness statements. The position taken by **Hon. Ngugi J.**, which I entirely agree with, is that:

**“...an Accused Person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the Court. This minimum obligation on the Accused Person triggers the Court’s duty to ensure the documents are supplied before commencement of the trial. It would appear that here the Appellant simply decided not to raise the issue again. This raises the spectre that it is possible that he received the documents as Mr. Kinyanjui claims. The Appellant appears to have participated in the trial by vigorously cross-examining the witnesses which – in opposition to the case in the *Simon Githaka Malombe Case*– might indicate that he, indeed, adequately knew the case against him...”**

[44] *Similarly, in M E M v Republic [2018] eKLR it was held that:*

**21. In this case, the Appellant says on appeal that the witness statements were never supplied to him. However, he does not allege that he asked for them and that the Court failed to give them. Indeed, his argument is that the Court record does not reflect that he was given witness statement. This argument verges on the technical: that failure of the Court to record that an Accused Person has been given witness statements is a per se proof violation of his constitutional right to fair trial. I do not think our decisional law has enunciated such a rigid and formalistic rule.**

**22. Instead, our case law provides a more functional approach. While it is a salutary practice for a Trial Court to record to indicate that it has given orders for an Accused Person to be provided with the statements or has facilitated their supply, failure to record this is not necessarily fatal.**

[45] In this matter, when the case came up before the trial court for hearing on **17 May 2018**, the appellant assured the court that he was ready to proceed. At no time did he raise any complaint in connection with the witness statements and documents; and unlike the case of **Simon Githaka Malombe vs. Republic** (supra) wherein the appellant was unable to cross-examine the Prosecution witnesses for lack of statements and documents, the appellant herein easily participated in cross-examination of the Prosecution witnesses; such that no prejudice can be said to have been suffered by the appellant. I take the view that whereas the trial court ought to have made a record of the fact that pre-trial disclosure was duly made, failure to do so, as was the case herein, is not fatal to the lower court proceedings.

[46] Thus, for the reasons aforementioned, and having given a careful consideration to the evidence presented before the lower court, I am satisfied that the conviction of the appellant was based on sound evidence. As for the sentence of 20 years, the Court of Appeal held thus in **Evans Wanjala Wanyonyi –Vs- Republic** [2019] eKLR:

**“On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in**

*Christopher Ochieng – -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution...*

*In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years.”*

[47] It is noteworthy that, in imposing the 20 years’ imprisonment, the learned trial magistrate did not feel constrained by the provisions of **Section 8(3)** of the **Sexual Offences Act**; and therefore she must have had the aforestated decisions in mind. The record further shows that before meting out the sentence of 20 years’ imprisonment, she called for a Pre-Sentence Report which revealed not only that the offender had a history of being a bully who took pleasure in harassing girls, but also that he was not remorseful at all for the offence. The report also showed that the local community was unhappy with his conduct. Thus, taking all these factors into account, I find no reason to interfere with the sentence imposed by the learned trial magistrate.

[48] In the result, I find no merit in the appellant’s appeal. The same is hereby dismissed in its entirety.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2020**

**OLGA SEWE**

**JUDGE**