



**Francis Matonda Ogeto v Republic (Criminal Appeal 49 of 2017)
[2019] KEHC 10896 (KLR) (3 October 2019) (Judgment)**

Francis Matonda Ogeto v Republic [2019] eKLR

Neutral citation: [2019] KEHC 10896 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CRIMINAL APPEAL 49 OF 2017

GV ODUNGA, J

OCTOBER 3, 2019

BETWEEN

FRANCIS MATONDA OGETO APPELLANT

AND

REPUBLIC RESPONDENT

The sentence for gang rape or gang defilement for a term of not less than fifteen years which could be enhanced to life imprisonment vis-à-vis the sentence of life imprisonment for defilement is unreasonable for issuing a lighter sentence.

The appeal was against conviction and sentencing of the appellant to 15 years' imprisonment for the offence of gang defilement. The court held that the sentence for gang rape or gang defilement for a term of not less than 15 years which could be enhanced to life imprisonment vis-à-vis the sentence of life imprisonment for defilement was unreasonable for issuing a lighter sentence.

Reported by Kakai Toili

Criminal Law – sexual offences – gang rape or gang defilement under section 10 of the Sexual Offences Act – whether the sentence for gang rape or gang defilement for a term of not less than fifteen years which could be enhanced to life imprisonment vis-à-vis the sentence of life imprisonment for defilement was unreasonable for issuing a lighter sentence – Sexual Offences Act, sections 8(2) & 10

Criminal Law - sexual offences – gang rape or gang defilement - ingredients for proving the offence of gang rape or gang defilement – association or common intention with others - where the accused did not defile the victim - whether committing defilement in association or with a common intention with others notwithstanding that the accused did not defile the victim amounted to gang rape or gang defilement - Sexual Offences Act, section 10

Criminal Law – sentences - minimum and maximum sentences – where a court opted for a maximum sentence but failed to give reasons - what was the effect of failure of a court to give a reason in opting for the maximum prescribed sentence where the law provided for a minimum and maximum sentence



Evidence Law – evidence – medical evidence - where an accused was charged with a sexual offence - whether it was mandatory to subject accused persons to medical examinations to prove that they committed the alleged sexual offence where the complainant could identify the accused

Statutes – interpretation of statutes – interpretation of section 10 of the Sexual Offences Act - whether the use of the phrases “shall be liable” and “not less than” in section 10 of the Sexual Offences Act gave room for the exercise of judicial discretion - Sexual Offences Act, section 10

Brief facts

The appellant was charged at the trial court with the offence of gang defilement contrary to section 10 of the Sexual Offences Act. He was alternatively charged with the offence of indecent act contrary to section 11(1) of the Sexual Offences Act. The trial court found that the evidence adduced by the prosecution placed the appellant at the *locus quo* and hence the offence of gang defilement was committed and found the appellant guilty and convicted him. The trial court then sentenced the appellant to 15 years’ imprisonment. Aggrieved by the trial court’s decision the appellant filed the instant appeal.

Issues

- i. Whether the sentence for gang rape or gang defilement for a term of not less than fifteen years which could be enhanced to life imprisonment *vis-à-vis* the sentence of life imprisonment for defilement was unreasonable for issuing a lighter sentence.
- ii. Whether committing defilement in association or with a common intention with others notwithstanding that the accused did not defile the victim amounted to gang rape or gang defilement.
- iii. What was the effect of failure of a court to give a reason in opting for the maximum prescribed sentence where the law provided for a minimum and maximum sentence?
- iv. Whether it was mandatory to subject accused persons to medical examinations to prove that they committed the alleged sexual offence where the complainant could identify the accused.
- v. Whether the use of the phrases “shall be liable” and “not less than” in section 10 of the Sexual Offences Act gave room for the exercise of judicial discretion.

Relevant provisions of the Law

Sexual Offences Act, No. 3 of 2006

Section 8

(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.

Section 10

any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment to life.

Held

1. The instant court was a first appellate court; an appellant on a first appeal was entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court’s own decision on the evidence. The first appellate court had to itself weigh conflicting evidence and draw its own conclusion. It was not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the trial court’s finding and conclusion; it had to make its own findings and draw its own conclusions. Only then could it decide whether the trial court’s findings should be supported. In doing so, it should make allowance for the fact that the trial court had had the advantage of hearing and seeing the witnesses.



2. Under section 10 of the Sexual Offences Act, the ingredients of gang rape were:
 - a. Rape or defilement under the Act;
 - b. committed in association with others; or
 - c. committed in the company of another or others who commit the offence of rape or defilement with common intention.
3. Defilement which was committed in association with others or with common intention notwithstanding the fact that the accused could not have defiled the victim amounted to gang rape according to the section 10. It mattered not whether the offence was rape or defilement as long as the conditions under section 10 were found to exist.
4. There was overwhelming evidence both oral and documentary that the complainant was 17 years old hence a child under the Children Act. Accordingly, the offence ingredient would be that of defilement. For the accused to be convicted of the offence of defilement, certain ingredients had to be proved:
 - a. Whether there was penetration of the complainant's genitalia;
 - b. whether the complainant was a child; and finally,
 - c. whether the penetration was by the appellant.
5. There was no doubt about the age of the complainant which was proved both by oral and documentary evidence to have been 17 years at the time of the offence. The first encounter between the complainant and the assailants was at Utawala Bus Stage and it was during the day. The appellant himself in his evidence did not dispute the fact that the complainant knew him. The next encounter was at the gate of the place where the assault occurred. Accordingly, there was sufficient opportunity for the complainant to properly identify her assailants. It was evident that subjecting an accused to a medical examination to prove that he committed the offence was not a mandatory requirement of law.
6. Both from the oral evidence and the documentary evidence it was clear that there was penetration of the complainant's genital organs with a male genital organ since there was infection in her genitalia. From the evidence of the complainant, it did not come out clearly that the appellant penetrated the complainant. In the circumstances one could not conclusively find that there was penetration of the complainant's genital organs by the appellant's genital organs for the purposes of defilement.
7. If the defilement of the complainant by the person who escaped was committed in association with the appellant or with common intention of both, the appellant would still be guilty of gang rape. In the instant case, while the other person was defiling the complainant, the appellant was guarding the place. It was clear that the appellant knew the intention of the other person and assisted and abetted the same. Considering the definition of gang rape, the appellant was properly convicted of the offence and the said conviction could not be faulted.
8. Section 10 of the Sexual Offences Act stated that a person convicted of the offence of gang rape was liable to imprisonment for a term of not less the fifteen years but which could be enhanced to imprisonment to life. In the instant case, however, the relevant provisions used the phrases "shall be liable" and "not less than" in the same breath. As a result, the provision suffered from the malady of poor legal draftsmanship since the two phrases implied, in legal terms, diametrically opposed positions. In criminal law, where there was an ambiguity in phraseology of sentencing, the accused was entitled to the benefit of the least severe of the prescribed punishments for an offence. Section 10 had to be read as if the sentence provided was the maximum sentence. The use of the words "shall be liable to imprisonment" in section 10 gave room for the exercise of judicial discretion.
9. Section 10 of the Sexual Offences Act under which the appellant was charged provided for *prima facie* mandatory minimum sentence. Under the constitutional dispensation, mandatory minimum sentences ought to be looked at in light of article 27 of the Constitution as read with clause 7 of the transitional and consequential provisions of the Constitution. Such sentences did 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 was deprived of the discretion to consider whether a



- lesser punishment would be more appropriate in the circumstances. Therefore, such provisions did not meet the constitutional dictates.
10. The opinion of the Supreme with respect to mandatory sentences applied with equal force to minimum sentences or non-optional sentences. That was in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it was appreciated that: whereas mandatory and minimum sentences reduced sentencing disparities, they however fettered the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders. Therefore, the provisions of a legislation that was in force before the Constitution such as the Sexual Offences Act had to be construed with the said adaptations, qualifications and exceptions when it came to the mandatory minimum sentences and particularly where the said sentences did not take into account the dignity of the individuals as mandated under article 27 of the Constitution.
 11. There were several degrees of defilement; the Sexual Offences Act itself recognised so in section 8 when it prescribed different sentences for each set of ages of the victims concerned. In doing so, the Act applied the principle of proportionality and gravity of the offences in prescribing the sentence. However, it failed to take into account the fact that even within a particular set, the gravity of the offences could not be same. Some offences of defilement were committed in very gruesome circumstances while others were committed after occasioning serious bodily injuries to the victim. Others were committed in the very site of other members of the victim's family while others were committed by persons who were almost the age groups of the victims in circumstances that if the law did not presume lack of consent was such offences, it could well be concluded that there could have been connivance.
 12. The Court did not condone offences against minors and vulnerable persons. However, to treat offences as the same notwithstanding the aggravating circumstances, clearly violated the right to dignity as the offenders were thereby treated as a bunch rather than as individuals. That did not mean that the court ought not to mete out what appeared as *prima facie* mandatory minimum sentence. What it meant was simply that the circumstances of the offence had to be considered and having done so nothing barred the court from imposing such sentence.
 13. There was some unreasonableness in the sentencing under section 8(2) of the Sexual Offences Act *vis-à-vis* section 10 of the said Act. The unreasonableness was due to the fact that where a person who, for all intent and purposes committed an offence under section 8(2) could well get away with a lighter sentence simply because he was in the company of other persons. On the converse a lone ranger who committed an act which for all intent and purposes amounted to an offence under section 10 faced a *prima facie* mandatory life sentence. Such sentencing could well be challenged on the ground of unfairness.
 14. The appellant was a first offender. He was not the principal defiler of the complainant. He was sentenced to the maximum prescribed sentence. No reason was given for that option. Though the Sexual Offences Act permitted the court to enhance the sentence to imprisonment to life, in opting for the maximum prescribed sentence where the law provided for a minimum and maximum sentence, the court ought to give a reason for so doing. In the absence of such a reason such a sentence had to be deemed to have been arbitrarily meted.

Appeal partly allowed.

Orders

Sentence set aside and substituted with ten (10) years imprisonment to run from the date of his sentence in the lower court. However, the said sentence would, be inclusive of the period when he was in custody pursuant to section 333(2) of the Criminal Procedure Code.

Citations

Statutes

None referred to



Advocates

Miss Mogoi

JUDGMENT

1. The appellant, Francis Matondo Ogeto, was charged before Mavoko SPM's Court in Criminal Case No. 12 of 2015 with the offence of gang defilement contrary to section 10 of the Sexual Offences Act, No. 3 of 2006. The particulars for the main charge were that on the June 13, 2015 in Athi River Sub-county within Machakos County, the appellant jointly with others not before Court, wilfully and intentionally caused his male genital organs (penis) to penetrate into the female genital organ (vagina) of DDF a girl aged 17 years.
2. He was alternatively charged with the offence of indecent act contrary to section 11(1) of the same Act the particulars being that on the said date in the same area, the appellant wilfully and intentionally caused his male genital organ (penis) to come into contact with the female genital organ (vagina) of DDF, a girl aged 17 years.
3. After hearing, the Learned Trial Magistrate found that the evidence adduced by the prosecution placed the appellant at the locus quo and hence the offence of gang defilement was committed and found the appellant guilty and convicted him accordingly. She then sentenced the appellant to 15 years' imprisonment.
4. Being dissatisfied with the conviction and sentence the appellant appeals to this court citing the following grounds:
 1. That the Learned Trial Magistrate failed to observe that the offence of gang defilement as outlined in section 10 of the Sexual Offences Act was not satisfactorily proved beyond reasonable doubt as required by the law.
 2. That the Learned Trial Magistrate erred in both law and fact and misapplied the law by shifting the burden of proof to the appellant.
 3. That the Learned Trial Magistrate erred in both law and fact by failing to note that the clinical officer never examined the appellant to ascertain the perpetrator of the alleged offence contrary to section 36 of the Sexual Offences Act, No 3 of 2006.
 4. That the Learned Trial Magistrate failed to observe that the evidence adduced was based on circumstantial evidence and thus there was possibility of mistaken identity based on the complainant's state of mind at the time and the offence having been committed at night and in the darkness and that the age of the victim was also not proved satisfactorily.
 5. That the Learned Trial Magistrate erred in both law and fact by failing to attach any due weight to the appellant's defence and the need to outline candid reasons before rejecting or discarding the same.
5. In support of its case the prosecution called six witnesses.
6. PW1, DDF, the complainant herein testified that she was 17 years at the time of her testimony having been born in 1998. According to her evidence, she was working as a house-help since June 2015 but could not remember the date she came to Nairobi. She was however referred to that house by a friend and her employer was called Elizabeth and had worked for her for three days before she disagreed with her said employer and left the employment and spent the night with a lady neighbour. However, this



annoyed her employer and on June 13, 2015 at about 9am her said employer dismissed her and as a result she borrowed Kshs 500 from one Caro and boarded a vehicle from Kasarani heading to town but at around 3pm they were told to alight at Utawala, near Equity Bank where she was informed by the security guards that there was no stage. She then proceeded to the stage where at about 4pm some boys approached her and upon inquiring what she was doing there, one of the boys informed her that he had a sister who was looking for a house-help and was paying Kshs 7,000. That boy was in the company of the appellant.

7. The complainant then boarded a motor cycle with the said boy while the appellant was told to go and tell the said sister to open the gate. They took a rough and bushy road and upon arriving at a gate where they found the appellant, the said boy paid the motor cyclist. According to the complainant the house they went to was made of iron sheets and had two doors and though there was a nearby block, it did not have people. When the complainant asked the appellant whether that was the place she was going to work, the appellant instead got hold of her back while the other boy held her legs. There was also another man who had gone to pluck vegetables and who laughed when the complainant told the two to leave her alone. They then took her to a house which had one room with a plastered floor. The room had a bed and a mattress. They hit her with a panga and threatened to cut her while the other boy slapped her. The other boy then removed her clothes. According to her, she was wearing a skin tight, a brown skirt, a black top, white pants and a sweater and slippers all of which she identified as well as the panga. It was her evidence that the time was 6pm and the room was dark and without windows though there was little light. The other boy undressed the complainant, removed his trouser then placed the complainant on the bed facing up and defiled her. It was her evidence that the said boy had a black trouser and a yellow shirt. After defiling her, the said boy informed the appellant that he was leaving and in the event that the complainant disappeared, it would be the appellant's problem and he left leaving the complainant with the appellant.
8. The complainant testified that every time she cried, the appellant would slap her. At about 8pm the appellant lit a chimney and then was called by someone as he started defiling the complainant. According to the complainant the appellant was in the same attire he had during the time of the assault. It was her evidence that the appellant had removed his trouser halfway as well as his shirt but had a vest on. At the time he was called, the appellant had removed his trouser together with his pant and hid her clothes. When he was called he put on his clothes and was informed by the caller to go pick tomatoes. According to her, the appellant had started "kidogo kidogo" when he was called.
9. When the appellant left, the complainant ran through the barbed wire and trees fence naked, climbed a tree and jumped down and left. As a result, she was injured by a barbed wire on her right leg as she ran away. By then it was about 9.00pm and it was dark and the houses were scattered. When she approached one of the houses she found a man and a child and the man told her to leave. She then went to another house where she knocked and a woman opened and gave her a lesso to cover herself and after explaining to the woman what happened to her, the woman called another neighbour who upon hearing what had happened to her, said she knew the place and it was called Kwa Richard. When the husband of the woman came back she told the complainant to leave after telling the lady to give her Kshs 1000 since they did not require a househelp. However, upon hearing what had happened to the complainant they called the councillor and the complainant led them to the scene of crime in the company of the said lady and her husband and when they arrived there, they found the door locked with two padlocks. Upon breaking the door, they found the appellant sleeping inside and he said that he was not the one who had committed the offence but after being beaten, accepted that he was the one.
10. After that they proceeded to Utawala Police Station then to Mlolongo Police Station where the complainant was advised to go to the hospital. According to the complainant though that was the first



time she had the intercourse, she did not bleed. She was however admitted in hospital for three days and later went to Athi River Health Centre where a p3 form was filed in for her.

11. In cross-examination, the complainant stated that it was the other person who had defiled her from 6pm to 8pm and it was only when he left that the appellant started defiling her but was called by the person who had gone to pluck the vegetables. According to her, the appellant was talking to that person in their language and they were laughing. It was her evidence that though she heard neighbours, when they returned the neighbours were not there. She stated that the appellant had defiled her for a short while before he left and that she saw the face of the appellant.
12. PW2, Beatrice Bossibori, on June 13, 2015 at 8pm heard someone knocking the door and when she checked through the curtain, she saw a girl who requested her to help her with a lessa. She ushered her in as she was naked and was crying. PW2 then called a neighbour who interrogated the complainant. When PW2's husband arrived, they called the community chairman and PW1 took them to the scene though PW2 remained behind since she had a small baby. When her husband returned he informed her that the complainant and the appellant had been left at Mlolongo Police Station. It was her evidence that when in the company of the assistant chief she went to see the house where the complainant was allegedly defiled, a panga was recovered therein and upon searching, they found the complainant's clothes in the toilet. The place was a two-roomed house made of iron sheets, fenced with a barbed wire.
13. On June 13, 2015 at 8pm, PW3, Linet Miruka, a businesswoman had left for church when she was called by PW2 who told her to go to her place immediately as there was an emergency. She then found the complainant at the door while PW2 was coming from the house with a lessa which she covered the complainant with. According to her the complainant was crying and was naked. PW2 told her to talk to the complainant and see how to assist her. Together with PW2's husband they interrogated the complainant and the three agreed to assist the complainant. They then called the area community policing officer after the complainant informed them that she had been defiled. Upon asking her if she knew the house where she had been defiled, they proceeded to the place and found the gate locked with a padlock and was fenced with a barbed wire. They knocked but no one opened after which they created a small entry and accessed the compound. However, when they knocked no one responded and the two men then broke into the house where they found the appellant sleeping and the complainant identified him. When asked if he knew the complainant, the appellant denied. He was then tied and told that he was under arrest after which the appellant took them to his employers who were very rude. After that they took the appellant to Githunguri Police Post and later to Mlolongo Police Station where they left the complainant and the appellant.
14. According to PW3, there was no moonlight that day and from PW2's house to where the appellant was found was not far.
15. PW4, Ruth Lengete, a clinical officer at Nairobi Women's Hospital, Kitengela was called to produce the PRC Form filed by her colleague, Cynthia Sitati, who was on leave. According to the said form, the complainant was 17 years old orphan and was examined on June 14, 2015 at about 1.40 am based on allegation of assault that occurred on June 13, 2015 at 6.00pm. According to the report the assault was allegedly perpetrated by two males aged around 30 years at Utawala. The report indicated that the complainant had soft tissue injuries on her forehead, the vaginal examination indicated that the hymen was broken though the anus was intact, she had yellowish smelling foul discharge and the lab tests revealed that she had a bacterial infection with many pus cells in her urine. Both the HIV and pregnancy tests were however negative.
16. In her evidence, the presence of the bacterial infection indicated a sexually transmitted disease. It was her evidence that the age of the complainant was verified having been born in 1998. It was her evidence



that the examination of the genitalia vagina revealed a discolouration of the skin, implying that redness of the skin because of trauma meaning the assault was recent.

17. PW5, a clinical officer at Athi River Health Centre, testified that on June 18, 2016 she carried out age assessment for the complainant and ascertained her age as 17 years. She also filled in the P3 form the same day. According to her the complainant had a swelling on the forehead and had discolouration of the vaginal wall with a broken hymen and yellowish foul smell. In filling in the form she relied on the examination done at Nairobi Women's Hospital, Kitengala. It was her evidence that the pus cells indicate bacteria from sexual assault. She proceeded to produce the P3 Form and the age assessment report as exhibits. While discolouration was a sign of change in colour from the normal colour, it was her evidence that it was not a sign of an infection since it can be caused by penetration or interference with vaginal walls. The complainant however had an abnormal discharge in her vagina which was a bacterial infection as it was an abnormal discharge. According to her the discolouration was because it was not one person and was caused by penetration,'
18. PW6, Cpl. Elizabeth Mbithi, was the investigations officer. She recorded the witness statements, visited the scene and recovered the complainant's clothes and a panga used to threaten the complainant. According to her the exhibits were recovered at the appellant's house and the panga under his bed. It was her evidence that the complainant was admitted in hospital for 5 days during which they had to wait for her to be discharged in order for her to take them to the appellant's place. It was her evidence that the compound they went to was fenced with wire mesh with one unfinished toilet and the house was made of iron sheets with 3 rooms and 3 separate doors. It was her evidence that it was a site house and the appellant was the caretaker of the plot. According to her the complainant was assaulted in the middle room which had only one bed while the other rooms were not in use. It was her evidence that the complainant's clothes were hidden in the unfinished toilet in the compound but were not bloodstained.
19. At the close of the prosecution's case, the appellant was placed on his defence and he opted to give sworn testimony. According to him, he knew the complainant. On June 13, 2015, a Saturday, he woke up to go and operate his shop. At 10.00-11.00 am there was a riot at Utawala. It was his evidence that he had a disagreement over the expansion of his shop with his neighbour, a village elder who threatened. At 7pm he left work and went to his friend, called Robert and found the door open and there was nobody. When he called his said friend there was no response. After a while people went to his house and he saw the said village elder and PW2's husband as well as the complainant. He was then arrested. According to him the complainant was Robert's girlfriend and they were neighbours. He was then taken to AP's Camp and later to Mlolongo Police Station and was later charged. According to him, he used to see the complainant at Robert's house over the weekends as he used to go and buy eggs there. He therefore denied the offence. He however admitted that the complainant was a minor.
20. In this appeal the appellant submits that there was doubt as to whether the complainant could have identified her attackers considering that the house was dark. It was submitted that the circumstances of the case could not permit proper identification of the assailants. The appellant also questioned why he was not examined since he was arrested immediately. In the absence of the examination he submitted that the prosecution failed to prove its case beyond reasonable doubt. It was his case that the only way in which the prosecution could have proved its case would have been through DNA test. It was his submission that the case was simply based on circumstantial evidence. To him the age of the complainant was not proved. It was therefore his case that there was lack of proof that he was involved in the commission of the offence and prayed that his conviction be quashed.
21. On behalf of the Respondent, it was submitted by Ms Mogoi, the learned prosecution counsel that the evidence of the complainant's age was corroborated by the assessment of her age by PW5 hence



it was established that she was 17 years hence a minor. According to the Respondent, it is not clear from the evidence whether the appellant and the other suspect had any form of conversation between themselves in order to form an opinion that they both had a plot to deceive with an intention of defiling her. It was submitted that from the evidence there was no evidence that the appellant had penetrated the complainant before he was called. It was submitted that from the evidence the appellant had the intention to defile the complainant but it was not clear from her testimony whether the appellant penetrated her. It was therefore submitted that the appellant ought to have been found guilty of attempted defilement. According to learned counsel, there was no evidence of common intention. However, since the complainant met the appellant at Utawala stage during the day, there was sufficient light to see him well and they also met at the gate.

Determination

22. I have considered the evidence adduced before the trial court. This is a first appellate court. In *Okeno vs. Republic* [1972] EA 32, the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R.* (1957) EA. 570). 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 finding and conclusion; 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 vs. Sunday Post* [1958] E.A 424.”

23. Similarly, in *Kiilu & Another vs. Republic* [2005]1 KLR 174, the Court of Appeal stated thus:

1. 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 evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
2. 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; 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.”

24. The offence with which the appellants were charged was gang rape contrary to section 10 of the Sexual Offences Act which states:

“any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life.”

25. Under section 10 of the Sexual Offences Act, the ingredients of gang rape are: rape or defilement under the Act; committed in association with others; or committed in the company of another or others who commit the offence of rape or defilement with common intention. It is therefore clear that defilement



which is committed in association with others or with common intention notwithstanding the fact that the accused may not have defiled the victim amounts to gang rape according to the said section. It therefore matters not whether the offence was rape or defilement as long as the conditions under section 10 are found to exist.

26. In this case, there was overwhelming evidence both oral and documentary that the complainant was 17 years old hence a child under the Children Act. Accordingly, the offence ingredient would be that of defilement. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013 where it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

27. In this case there is no doubt about the age of the complainant which was proved both by oral and documentary evidence to have been 17 years at the time of the offence.

28. As regards the identity of the assailants, the first encounter between the complainant and the assailants was at Utawala Bus Stage and it was during the day. The appellant himself in his evidence did not dispute the fact that the complainant knew him. The next encounter was at the gate of the place where the assault occurred. Accordingly, there was sufficient opportunity for the complainant to properly identify her assailants.

29. The appellants also took issue with the fact that no DNA samples were taken from them to prove whether they were the offenders. However, in Martin Nyongesa Wanyonyi vs. Republic [2015] eKLR the court held that:

“As such, it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law and we find this ground to be unfounded.”

30. As regards penetration, section 2 of the Sexual Offences Act provides that:

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person

31. The complainant's evidence was that from 6pm to 8pm she was sexual assaulted by the other assailant who escaped. After the escapee was done, he left warning the appellant that the appellant would be held responsible if the complainant escaped. Both from the oral evidence and the documentary evidence it was clear that there was penetration of the complainant's genital organs with a male genital organ since there was infection in her genitalia. This was explained in the case of George Owiti Raya vs. Republic [2013] eKLR where it was held:-

“There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane...It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration.”



32. In *Mwangi vs. Republic* [1984] KLR 595 at 603, the Court rendered itself thus:

“The presence of spermatozoa alone in a woman’s vagina is not conclusive proof that she has sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape.”

33. It is therefore clear that there was penetration of the complainant’s genital organ.

34. The issue however is whether the appellant penetrated the complainant. From the evidence of the complainant, it does not come out clearly that the appellant penetrated the complainant. According to the complainant, the appellant was called when the appellant had started “kidogo kidogo”. She did not say that the appellant had in fact inserted his genital organ into hers. In those circumstances one cannot conclusively find that there was penetration of the complainant’s genital organs by the appellant’s genital organs for the purposes of defilement.

35. That however is not the end of the matter. If the defilement of the complainant by the person who escaped was committed in association with the appellant or with common intention of both, the appellant would still be guilty of gang rape. In this case, the evidence is that it was the other person who stated that his sister was in need of a househelp and the appellant who was with them was told to go tell the sister to open the gate. According to the complainant, the two talked on phone. The complainant and the other person however ended up at a gate where they found the appellant who got hold of her at the back while the other person held her legs. While the other person was defiling the complainant, the appellant was guarding the place. It is clear that the appellant knew the intention of the other person and assisted and abetted the same. Considering the definition of gang rape, I am satisfied that the appellant was properly convicted of the offence and the said conviction cannot be faulted.

36. As regards the sentence, the section states that a person convicted of such offence is liable to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment to life.

37. Sir Henry Webb C.J. in *Kichanjele S/O Ndamungu versus Republic* (1941) 8 EACA 64 had this to say on the proper construction of the words “liable to”:

“The wording used throughout the code is “shall be liable to” but a consideration of the various sections shows in our judgment, that the use of the words “shall be liable to” does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated.”

38. The predecessor of the court went further in *Opoya versus Uganda* [1967] EA 752 at page 754 where Sir Clement DeLestang V.P. picked up the conversation *inter alia* thus:

“It seems to us beyond argument that the words “shall be liable to” do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it.”



39. A similar position was adopted in *D W M vs. Republic* (supra) where the Court held that:

“As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender “shall be liable to imprisonment for life” means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant’s protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion.”

40. In this case, however, the relevant provisions use the phrases “shall be liable” and “not less than” in the same breath. As a result, the provision suffers from the malady of poor legal draftsmanship since the two phrases imply, in legal terms, diametrically opposed positions. In criminal law, where there is an ambiguity in phraseology of sentencing the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence, since as *Mativo, J* graphically put it in *Elizabeth Waithieni Gatimu vs. Republic* [2015] eKLR:

“The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea.”

See also *Evanson Muiruri Gichane vs. Republic* [2010] eKLR and *Tom Ochieng Wayumba vs. Director of Public Prosecutions* [2019] eKLR.

41. It is therefore my view that the section must be read as if the sentence provided is the maximum sentences. Accordingly, bearing the totality of the above principles in mind, it is my view that the use of the words “shall be liable to imprisonment” in section 10 of the Sexual Offences Act gives room for the exercise of judicial discretion.

42. Apart from the foregoing, the said provision under which the appellant was charged provides for prima facie mandatory minimum sentence. In my view under the current constitutional dispensation, mandatory minimum sentences ought to be looked at in light of Article 27 of the Constitution as read with clause 7 of the Transitional and Consequential Provisions which provide as follows:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with conformity with this Constitution.

43. 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 'overpunishing' the convict.”

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

“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.’

The judgment continues:

‘... [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.’

45. The Courts have always frowned on mandatory sentences that place a limitation 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 that:

“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.”

46. 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.”

47. 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.”

48. In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact 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.



49. I associate myself with the opinion of 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.”

50. 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 1222SCA 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.”

51. 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*.

52. In my view there are several degrees of defilement. The Sexual Offences Act, itself recognises so in section 8 when it prescribes different sentences for each set of ages of the victims concerned. In doing so, the Act applies the principle of proportionality and gravity of the offences in prescribing the sentence. However, it fails to take into account the fact that even within a particular set, the gravity of the offences may not be same. Some offences of defilement are committed in very gruesome circumstances while others are committed after occasioning serious bodily injuries to the victim. Others are committed in the very site of other members of the victim’s family while others are committed by persons who are almost the age groups of the victims in circumstances that if the law did not presume lack of consent is such offences, it might well be concluded that there might have been connivance.

53. This Court does not condone offences against minors and vulnerable persons. As was appreciated by Madan, J (as he then was) in *Yasmin vs. Mohamed* [1973] EA 370:

“The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect



fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved.”

See also *Omari vs. Ali* [1987] KLR 616.

54. However, to treat offences as the same notwithstanding the aggravating circumstances, clearly violates the right to dignity as the offenders are thereby treated as a bunch rather than as individuals.
55. 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.
56. What has troubled me, however, is that section 8(2) of the Sexual Offences Act provides that:

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.

57. Clearly, there is some unreasonableness in the sentencing under section 8(2) vis-à-vis section 10 of the said Act. The unreasonableness is due to the fact that where a person who, for all intent and purposes commits an offence under section 8(2) aforesaid may well “get away” with a lighter sentence simply because he was in the company of other persons. On the converse “a lone ranger” who commits an act which for all intent and purposes amounts an offence under section 10 thereof faces a prima facie mandatory life sentence. Such sentencing may well be challenged on the ground of unfairness. However, as I was not fully addressed on the issue in this appeal, I will go no further than that.
58. In this case, the appellant was a first offender. He was not the principal defiler of the complainant. He was sentenced to what I have found to be the maximum prescribed sentence. No reason was given for this option. Though the Act permits the court to enhance the sentence to imprisonment to life it is my view that in opting for the maximum prescribed sentence where the law provides for a minimum and maximum sentence, the court ought to give a reason for so doing. In the absence of such a reason such a sentence must be deemed to have been arbitrarily meted. In *Charo Ngumbao Gugudu vs. Republic* [2011] eKLR, the Court of Appeal held that:

“It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence. It is true that the complainant suffered serious injuries but it is equally true that the appellant was provoked at the time that he hit the complainant. There was no basis for the finding made by the trial magistrate and upheld by the superior court, that the complainant was “completely mentally disabled”.”

59. In the case *R vs. Scott* (2005) NSWCCA 152 Howie J Grove and Barr JJ stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”



60. In a New Zealand decision namely R vs. AEM (200) it was decided that:

“One of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”

61. In R vs. Harrison (1997) 93 Crim R 314 it was stated:-

“Except in well- defined circumstances such as youth or mental incapacity of the offender... Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed.”

62. In this case the appellant was arrested on June 13, 2015 and though he was admitted to bail he was in custody till his release on October 26, 2015.

63. In the circumstances of this case, I hereby set aside the sentence imposed on the appellant, and substitute therefor ten (10) years imprisonment to run from the date of his sentence in the lower court. The said sentence will however, be inclusive of the period from June 13, 2015 to October 26, 2015 when he was in custody pursuant to section 333(2) of the Criminal Procedure Code.

64. Judgement accordingly

Judgement read, signed and delivered in open Court at Machakos this 3rd day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey

