# REPUBLIC OF KENYA

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

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CRIMINAL APPEAL NUMBER 45 OF 2018**

**BETWEEN**

**PATRICK MALOMBE MASAKU.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

(From original conviction and sentence in Machakos Chief Magistrate's Court SO Case No. 2 of 2017, **Hon. K. Kibellion, SRM** on 28th March, 2018)

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PATRICK MALOMBE MASAKU.....ACCUSED**

**JUDGEMENT**

1. The appellant, **Patrick Malombe Masaku**, was charged in the Machakos Chief Magistrate's Court SO Case No. 2 of 2017 with two counts of defilement. In count I, he was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars were that the appellant, on the night of 13th day of September, 2016 at [particulars withheld] Location in Mwala Sublocation within Machakos County, he intentionally and unlawfully caused his penis to penetrate the vagina of **EN**, a child aged 15 years old. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the ***Sexual Offences Act. No. 3 of 2006,*** the particulars being that on 13th day of September, 2016 at [particulars withheld] Location in Mwala Sub location within Machakos County, he intentionally and unlawfully touched the vagina of EN with his penis, a child aged 15 years old.

2. In count II, the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars were that the appellant, on the night of 24th day of September, 2016 at [particulars withheld] Location in Mwala Sublocation within Machakos County, he intentionally and unlawfully caused his penis to penetrate the vagina of **EN**, a child aged 15 years old. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the ***Sexual Offences Act. No. 3 of 2006,*** the particulars being that on 24th day of September, 2016 at [Particulars Withheld] Village, Wamunyu Location in Mwala Sublocation within Machakos County, he intentionally and unlawfully touched the vagina of EN with his penis, a child aged 15 years old.

3. After hearing the Learned Trial Magistrate found the appellant guilty of the main counts of defilement, convicted him accordingly and sentenced him to serve 20 years' imprisonment.

4. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal in which he has identified three main grounds which are:

1. **Whether the trial court erred in law and fact by convicting the appellant on uncorroborated evidence.**

2. **Whether the trial magistrate erred in both law and fact by convicting the appellant on the circumstantial evidence.**

**3. Whether the trial magistrate erred in law and fact by failing to appreciate that the prosecution failed to apply the cordial principle of criminal law that requires the prosecution to prove each and every ingredient of the charge beyond reasonable doubt.**

5. At the trial, the prosecution called four witnesses. The first witness for the prosecution was the complainant herein, **EN**, testified that she was 16 years old at the time of her testimony. According to her on 13th September, 2016, she was at home with her parents but had agreed with the appellant that she would go to their home. On the material day at about 10.00pm, the appellant went there and he arrived, he called the complainant who opened the window for him and he entered through the window. According to her, she was sharing the same room and bed with her other two siblings aged 6 and 8 years respectively. When the appellant entered the appellant also shared the same bed. According to her, they had sex two times that night before the appellant left at around midnight. On 24th September, 2016, the appellant again went to the complainant's home at around 10.00 pm, called her and she opened the window for him and they had sex once on the same bed and the appellant left at around 3.00 am.

6. According to the complainant she realised that she was pregnant in October when she missed her periods but never informed anyone until December, 2016 when she informed PW2 after PW2 noticed that she was pregnant. She was then taken to the Hospital where the pregnancy was confirmed. The complainant was issued with a P3 form which was duly filled.

7. According to the complainant, she was born on 17th February, 2001 and had known the appellant who was employed by her uncle who lived nearby for about one month before they became friends. It was her evidence that she never disclosed the issue to PW2 because the appellant had asked her not to do so. However, the appellant was arrested in January, 2017 after PW2 forced the complainant to disclose to her what happened.

8. According to PW2, **SK**, the complainant's mother, in the period between October 2016 and November, 2016 she noticed that PW1 was pregnant but when she asked her, PW1 denied. She however saw the pregnancy grow and in November, 2016, PW1 revealed to her that she was in a relationship with the appellant and that he was the one who had impregnated her. According to PW2, pw1 informed her that the appellant used to visit her at night and would get into the house through the window. It was her evidence that the appellant used to work in PW2's brother's house so she knew him very well.

9. After getting information regarding PW1's pregnancy, PW2 reported the matter to Wamunyu Police Post and she was referred to Wamunyu Health Centre. In February, 2001, PW1 delivered and she produced a birth certificate.

10. PW3, **Florence Nthenya**, a clinical officer testified that while working at Wamunyu, she filled a P3 form for PW1, aged 16 years on allegation of defilement. According to her, PW1 went to the facility accompanied by PW2 by which time PW1 was already 31 weeks pregnant. She was accordingly advised to begin antenatal clinic. According to her, PW1 revealed that she had slept with the appellant voluntarily in 2016 and the pregnancy resulted from that act.

11. According to PW3, PW1's general condition was good and she was about 28 weeks pregnant and all the other parts of her body were normal. There were no injuries on penetration and there was no infection of her genitalia. Similarly, there were no physical injuries in the genitalia or the anus. She filed in the P3 form and signed the same.

12. PW4, **Robert Mwangi**, the investigating officer testified that on 19th January, 2017 he was at Wamunyu Police Post when PW1, aged 16 years having been born on 17th February, 2001 based on the birth certificate, in the company of PW2 went to the station and they reported that the appellant, an employee at their neighbour's house used to go to the house where PW1 and her siblings slept. According to her, at the time of the commission of the offence, the appellant was still new in the area and was arrested by *nyumba kumi* officers.

13. At the close of the prosecution case the appellant was put on his defence. In his sworn evidence, the appellant testified that on 19th January, 2017, he was at the home of his employer, one **Mwanzia Musau** and that used to live with **Musau's** mother. On that day he performed his usual duties and after taking lunch, he asked for permission to go to church. It was his evidence that he decided to take his phone for charging and got into a hotel and ordered for tea. After 5 minutes, two people entered and called out his name and another person's name and then said they would call him later. After three minutes they called him and asked him whether he had finished the money he had gotten from selling maize belonging to his employer and upon answering them that he only had Kshs 100, which he had used for buying tea, they took the money and asked why he was denying the offence yet the other person had admitted the same. The two people then started assaulting him and he screamed attracting attention of the people who inquired why he was being assaulted at which the two answered that the appellant and the other person had taken over all their jobs leaving them jobless. They also alleged that the appellant had denied stealing from his employer. Asked to bring the maize which they alleged the appellant had stolen, they were unable to do so and the appellant informed them that he had not stolen anything. They nevertheless took him to the headman and reported that he had stolen maize and beans. Later the police went there and took the appellant to the police station where they demanded Kshs 5,000 from him which he did not have.

14. In cross-examination, the appellant stated that he was working for one **Benson Mwanzia** in Kilebwa as a house boy for 6 months but he did not know PW2 or any of the villagers there. He further denied that he knew PW1 and that he first saw her in court.

15. In his judgement the learned trial magistrate found that there was no doubt that the complainant was fifteen years and seven months old as at the time of the commission of the offence hence was a minor. It was further found that from the evidence of the complainant, the complainant engaged in sexual intercourse hence as a minor, defilement did occur. Since the appellant was clearly known to the complainant the court found that the appellant defiled the complainant. The court therefore found the case proved to the required standards and convicted the appellant accordingly and sentenced him to 20 years' imprisonment.

16. I have considered the evidence as I am required, being a first appellate court. It is clear that the complainant was a child as defined under the ***Children Act*** as read with the ***Sexual Offences Act***. This was proved by both the oral evidence and the documentary evidence beyond reasonable doubt. As regards the penetration, the complainant gave clear evidence as to the circumstances under which she had sexual

intercourse with the appellant leading to her pregnancy. Based on that evidence as well as the medical evidence the finding that penetration was proved cannot be faulted. As regards the identity of the offender it is not in doubt that the appellant was well known to the complainant hence the issue of mistaken identity does not arise. It is therefore my view that the conviction of the appellant cannot be faulted.

17. As regards the sentence, it is clear that the appellant was treated as a first offender. However, the court in sentencing the appellant was of the view that the offence carried a minimum prescribed sentence. In this case the appellant was charged under section 8(1) as read with section 8(3) of the ***Sexual Offences Act.*** The said provision states:

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

18. Section 8(3) of the ***Sexual Offences Act*** applies the phrase *is liable upon conviction to imprisonment for a term of not less than twenty years*. **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."**

19. 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."**

20. 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."**

21. 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 two provisions suffer 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 Waithiegeni 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."**
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> See also **Evanson Muiruri Gichane vs. Republic [2010] eKLR** and **Tom Ochieng Wayumba vs. Director of Public Prosecutions [2019] eKLR.**

22. It is therefore my view that the subsection must be read as if the sentence provided is the maximum sentence. 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 the ***Sexual Offences Act*** gives room for the exercise of judicial discretion.

23. 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.***

24. 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.**
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> **[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.**
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> **[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.**
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> **[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.**
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> **[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.**
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> **[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."**

25. 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:**
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> > **'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.'**
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> **The judgment continues:**
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> > **'. . . [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.'**

26. 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."**

27. 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."**

28. 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."**

29. 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.***

30. 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."**

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

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

32. 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***.

33. 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.

34. 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.**

35. 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.

36. 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.

37. In this case, from the complainant's own evidence, it is clear that the complainant though below the age of consent voluntarily entered into a girlfriend/boyfriend relationship with the appellant. In the court noted that:

> **"the unfair consequences of a skewed application of that statute predominantly against the male adolescent is quite apparent: two youths caught engaging in sex receive diametrically opposite treatment. The girl is branded a victim and guided to turn against her youthful paramour while the boy, Juliet's Romeo, is branded the villain, hauled before the courts and visited with a lengthy jail term. We very much doubt that it conduces to good sense, policy and our own conceptions of justice and fairness that the law should be deployed in a manner so disparative and discriminative in effect. A supposed justice resting on the shaky foundation of injustice against young boys hardly warrants the term."**

38. In this case the appellant was arrested on 20th January, 2017. Though he was admitted to bond, there is no evidence that he was actually released. He therefore has been in custody for a period of more than 2½ years. In my view, this is a case where a non-custodial sentence would have been more appropriate considering the circumstances under which the offence was committed. While the offence is not to be condoned, a sentence ought to serve a useful purpose to the victim, the offender and the public and ought not to be imposed merely because it is a sentence.

39. In the circumstances of this case, I hereby set aside the sentence imposed on the appellant, and substitute therefore the period already served. He is therefore at liberty unless otherwise lawfully held.

40. 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**