



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NUMBER 8 OF 2015**

(From original conviction and sentence in Mavoko Principal Magistrate's Court Criminal Case No. 1353 of 2013, **P O Ooko, Ag. PM** on 9<sup>th</sup> October, 2014)

**DANIEL OTIENO YUGI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

**Introduction**

1. The appellant, **Daniel Otieno Yugi**, was charged in the Principal Magistrate's Court at Mavoko in Criminal Case No 1353 of 2012 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 diverse dates between 30<sup>th</sup> November, 2013 and 1<sup>st</sup> December, 2013 at Kitengela Township within Kajiado County, he intentionally and unlawfully caused his male genital organ (penis) to penetrate into the female genital organ (vagina) of **DM**, a child aged 13 years old. Alternatively, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the **Sexual Offences Act. No. 3 of 2006**, the particulars being that on diverse dates between 30<sup>th</sup> November, 2013 and 1<sup>st</sup> December, 2013 at Kitengela Township within Kajiado County, he intentionally and unlawfully caused his male genital organ (penis) to come into contact with the female genital organ (vagina) of **DM**, a child aged 13 years old.

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

**Grounds of Appeal**

3. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

**1. That, the Hon Trial Magistrate erred in points of law and fact by holding that the case for the prosecution was proved against the appellant whereas penile penetration was not adequately proved.**

**2. That, the Hon Trial Magistrate erred in points of law and fact by holding that the case for the prosecution was proved against the appellant whereas the age of the complainant was not properly ascertained to justify the charges or the sentence passed.**

**3. That, the Hon Trial Magistrate erred in points of law and fact by holding that the case for the prosecution was proved against the appellant whereas the conduct of the complainant was consistent with that of an adult. The statutory defence as contained under section 8(1) as read with (5) and (6) of the Sexual Offences Act was therefore spelt out in evidence but denied by the trial court.**

**4. That, the Hon Trial Magistrate erred in points of law and fact by failing to realise that the whole of the prosecution's case was riddled with material contradictions which were enough to displace the prosecution's narrative**

**The Evidence for the prosecution Before the Trial Court**

4. At the trial, the prosecution called five witnesses. The first witness for the prosecution was the complainant herein, **DM**, who after *voir dire* examination, testified that in the month of September, 2013, she had gone swimming when she met the appellant who gave her his personal details including his place of work and two contact numbers and told her to call him. Thereafter the complainant got in touch with the appellant who disclosed to her his place of work and residence and his marital status. The complainant then went to the appellant's place

of work and requested the appellant to take her to his residence but the appellant declined to do so telling her to wait till 6.00pm. Later that evening the complainant returned to the appellant's place of work and the appellant took her to what the appellant informed her was his brother's place where they found a person whom the appellant introduced as his brother. After taking refreshments, the said brother left the two behind.

5. The appellant then told the complainant that they should sleep and though the complainant refused, the appellant removed the complainant's clothes while telling her that he loved her. He also removed his clothes and switched off the lights and the radio. The two then jumped onto the bed and the appellant lay on top of the complainant who was facing upwards and inserted his penis into the complainant's vagina. As a result of the pain, the complainant asked the appellant to stop but the appellant did not relent. Consequently, the complainant bled from her private parts and though the complainant wailed, no one went to her rescue. According to the complainant, on that night the appellant defiled her three times. She then spent the night in the said house.

6. When the complainant woke up at 9.00 am, the appellant had already left for work. Later the appellant went back and informed her that there was a problem and left again for work. When the appellant returned the second time, he was in the company of the complainant's uncle, **B M**, with whom the complainant was residing and police officers. Both of them were arrested and taken to Kitengela Police Station where the matter was reported and the complainant recorded her statement. She was thereafter taken to Nairobi Women Hospital, Kitengela where both of them were examined after which they were taken to Kajado County Hospital for further examination. After that they returned to the police station. She was later released while the appellant was remanded at Athi River G K Prison.

7. It was the complainant's evidence that she was 13 years old, the age which was confirmed by the assessment report. The complainant further confirmed that prior to this incident, the appellant used to be her boyfriend for a short period though this was her first visit to the appellant.

8. PW2, **Geoffrey Wagura**, was a clinical officer in charge of Kitengela Heath Centre. According to him, on 1<sup>st</sup> December, 2013 while he was at the institution, he received the complainant for the purposes of examination. The complainant was brought with a history of having been defiled. Upon examination, he found her biker blood stained and formed the opinion that she had had her menstrual period two days before. In his view the blood stains could have been caused by menstruation. The complainant informed him that she removed her clothes without threats and never screamed even when the appellant was defiling her thrice.

9. Upon his general examination, the witness found that the complainant was stable without any physical injuries. He however stated that the defilement happened 20 hours prior to the examination and the same was done by penis. He however found that while her genitalia was inflamed, there were no fresh lacerations and the hymen was absent but with no bruises or physical injuries. There was however blood inside her vagina with no seminal fluid. While the other tests were negative, the urine analysis revealed some red blood cells possibly from menstruation.

10. It was further his evidence that he assessed the complainant's age as approximately 13 years.

11. The witness also examined the appellant but found no significant findings on his body evidencing sexual assault.

12. PW3, **B M O**, was on 30<sup>th</sup> November, 2013 at 7.00pm at Gilgil travelling to Nairobi with his wife when he received a call from their house help who informed his wife that that the complainant, his 13 year old niece, was nowhere to be seen. Upon his arrival at their house, they mounted a search for the complainant. The house help gave him a sim card number through which she had been called and on attempting to call the number the call did not go through. However the following day when he called the number it was received by a person who introduced himself as **Dan** and upon inquiring about the whereabouts of the complainant the person agreed to meet him at a Kobil Petrol Station, Kitengela and sought for forgiveness. On reaching the said place they met the appellant alone who told them that the complainant was in Athi River whereupon they drove together with the appellant and a neighbour, PW4, to Kitengela Police Station where the matter was reported and the appellant was arrested. After that the appellant took them to Kitengela where they found the complainant in a single-roomed house. The complainant was similarly arrested and taken back to the Police Station where PW3 recorded his statement. According to him, he used to see the appellant at Safari Land Hotel where the appellant used to work since he used to take his children there for swimming.

13. PW4, **Raphael Osimo**, was in his house at Kitengela on 30<sup>th</sup> November, 2013 at 7.30pm when PW3, a neighbour called him and informed him that PW3's niece, the Complainant herein, had disappeared from the house. PW3 requested him to go to his house and confirm since PW3 was not present. Upon going to PW3's house he confirmed that the complainant was indeed not in the house. After searching for the complainant in vain, he informed PW3 and went back to his house. The following day PW3 informed him that he had gotten a contact from his house help's phone and upon calling the number they arranged for a meeting with the caller at Kobil Petrol Station. There they met the appellant who thereafter led them and the police to where the complainant was. Both the complainant and the appellant were then arrested and taken to Kitengela Police Station where the complainant disclosed that the appellant had defiled her on the night she disappeared.

14. PW5, **PC Margaret Chepchumba**, attached to Kitengela Police Station was on 11<sup>th</sup> February 2013 in the office when she perused the OB records and noted that the complainant had been defiled and had been taken to Hospital for examination together with the appellant who had been arrested. She testified that the complainant was treated at Nairobi Women Hospital and later referred to Kitengela Medical Services where her P3 form was filled. From the Hospital the witness recorded statements from the witnesses and preferred charges against the appellant.

15. From her investigations he found out that the complainant and the appellant used to be in a boyfriend-girlfriend relationship. She however confirmed that the appellant defiled the complainant based on the findings in the P3 form and the statements from the witnesses. Prior to the incident, she learnt that he two were in communication.

#### **Evidence for the Defence**

16. At the close of the prosecution case the appellant was put on his defence. In his sworn evidence, the appellant testified that on 30<sup>th</sup> November, 2013, he was at his place of work during a function which was attended by the complainant at night. The complainant had however been there during the day in the company of a fellow girlfriend when they had gone to pass time. According to the appellant he knew the complainant who used to be their customer at the swimming pool. Though the two girls left, the complainant returned at 7.00pm alone and went where the party was. It was his evidence that when the party ended the following morning the complainant went back home after informing him that she was leaving.

17. He testified that at 8.00am someone called him on his cell phone and inquired about the whereabouts of the complainant and he explained the complainant's whereabouts the previous day. Later on the caller called him and requested for a meeting which he accepted and upon arrival at Kitengela Kobil Station, PW3 inquired the whereabouts of the complainant and he reiterated what he had informed him earlier on. He however offered to take them to the complainant's girlfriend who had accompanied the complainant the previous day. They then proceeded to the place where they found the complainant standing outside the veranda and after the two spoke in their mother tongue, they boarded the vehicle but to his surprise they drove to the Police Station where the charges were preferred against him and he was locked up together with the complainant. He therefore denied having committed the said offence.

18. In cross-examination he admitted that he knew the complainant since he used to work as a swimming instructor at the said Hotel when the complainant used to visit the Hotel with PW3 for swimming.

19. It was his evidence that from his observation, the complainant was adult based on how she used to visit the Hotel as well as her conduct in going for the disco, paying for the same and spending the whole night. He however denied that he had an affair with the complainant prior to the incident and that he spent the night with.

### **The Judgement**

20. In his judgement, the Learned Trial Magistrate found that the age of the complainant was proved to be 13 years. As regards penetration, it was his finding that from both the evidence of the complainant and the medical examination report, it was proved that the complainant was penetrated.

21. As regards the appellant's identification, he found that since the complaint was the appellant's girlfriend and as the appellant was tracked through the call he made to the house help, there was no mistaken identity.

### **Appellant's Submissions**

22. It was submitted by the appellant based on **Pappyton Mutuku Ngui vs. Republic Cr. Appeal No. 296 of 2010** and **Charles Wamukoya vs. Republic Cr. App. No. 72 of 2013** that the trial court's erred in not finding that the prosecution failed to prove their case beyond reasonable doubt. According to the appellant the facts leave reasonable doubt as to whether PW1 was actually penetrated and if so whether it was the appellant who caused the penetration. This submission was based on the evidence of the clinical officer which according to the appellant did not link him to the penetration as the complainant was in the normal monthly menses.

23. To the appellant the absence of hymen was not a conclusive proof of penetration since hymen can be lost through many facts in young girls. According to him, if the complainant was defiled, the absence of bruises or physical injuries is inconsistent with penetration that had taken place for the first time.

24. It was therefore submitted that penetration was not proved by medical evidence.

25. As regards the age of the complainant the appellant relied on **Hilary Nyongesa vs. R Eldoret Cr. Appeal No. 123 of 2009** and submitted that there were a lot of inconsistencies in the evidence of the prosecution's witnesses in relation to the complainant's age. It was his submission that since the age of the complainant was given by mere approximation, threw a big spin on the age of the complainant. Since there is a hierarchy of sentences based on age, it was submitted that the difference may determine the sentence to be meted to the accused. Therefore the trial court ought not to have relied on approximation since the criminal process explicitly prohibits over punishment.

26. It was further submitted that since the statutory defence under section 8(1) as read with subsections (5) and (6) of the Sexual Offences Act were well brought out in evidence the accused was entitled to the same. According to the appellant, from the conduct of the complainant in behaving like an adult, he appellant was led to believe that the complainant was an adult who knew what she was doing by making free will choice of hanging out with the appellant. In this regard, the appellant relied on **Elizabeth Waitiegeni Gatimu vs. Republic [2015] eKLR**, **Karisa Katana Gona v Republic [2015] eKLR** and **Martin Charo vs. Republic [2016] eKLR**. It was submitted that the medical examination did not reveal any fresh injuries on the genitalia that would have been consistent with forceful penetration hence the hymen may have been lost long ago. Accordingly, it was unfair to hold that a man cannot spend a night with a female without having sex with her as there needed to be evidence of the presence of spermatozoa or evidence of bruises or lacerations on the genitalia.

27. The appellant further submitted that it was not explicitly show the date of the alleged offence. According to the complainant's evidence, she visited the accused's residence in September, 2013 while the charge sheet talked of diverse dates between 30<sup>th</sup> November, 2013 and 1<sup>st</sup> December, 2013. It was therefore submitted that the narratives of the prosecution's witnesses were untrue. In this respect the appellant relied on **Suleiman Juma alias Tom vs. Republic [2003] eKLR** and **JOO vs. Republic [2015] eKLR**.

### **Respondent's Submissions**

28. The Respondent in opposing the appeal submitted that the element of penetration was proved beyond reasonable doubt by the evidence of the complainant as supported by the P3 Form.

29. As regards the age of the complainant it was submitted that the same was known right from the time of the drafting of the charge sheet which indicated her age as 13 years which was confirmed by the medical evidence of an age assessment.

30. As regards the conduct of the complainant it was submitted that under section 8(5) and (6) of the **Sexual Offences Act**, the key word is deceive hence the child should have deceived the accused person that she is over 18 years which deception the accused should have believed. Furthermore the section ought to be determined with regard to the circumstances including the steps taken by the accused to ascertain the age of the complainant. To the Respondent, since the appellant met the complainant the first time in the company of children, he ought to have presumed that the complainant was a child. .

31. In this case it was submitted that no evidence was led to show that the appellant was deceived to believe that the complainant was over 18 years and did not demonstrate the steps he took to ascertain the age of the complainant.

32. It was submitted that the decision of the trial court was well reasoned and the prosecution's case was consistent, direct, clear and without any doubt that the appellant committed the offence with which he was charged hence there is no reason to interfere with the said decision.

### **Analysis, Re-evaluation and Determination**

33. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.**

34. Section 8 of the **Sexual Offences Act** provides as follows:

**8. (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.**

**(5) It is a defence to a charge under this section if -**

**(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and**

**(b) the accused reasonably believed that the child was over the age of eighteen years.**

**(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.**

**(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.**

**(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.**

35. 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.”**

36. As regards the age of the complainant, in **Dominic Kibet vs. Republic Criminal Appeal No. 155 of 2011** it was held that:

**“...while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof.”**

37. The importance of establishing the complainant's age in defilement cases cannot be over-emphasised. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

**“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence.”**

38. Closer home in the case of Kaingu Elias Kasomo vs Republic in Malindi the Court of Appeal in criminal appeal No. 504 of 2010 stated as follows:

**“Age of the victim of the 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.”**

39. The Court quoted with approval its own decision in Alfayo Gombe Okello vs. Republic (2010) eKLR where again it commented on the age of the victim of a sexual assault; in that case it said:-

**“In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)... In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16<sup>th</sup> October, 2007 that... “This child in court is mine aged 14 years born in 1992...The other piece of evidence on age was an estimate made in the P3 form dated 20<sup>th</sup> August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find.”**

40. However in In the case of Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000, was observed as follows:

**“Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”**

41. The emphasis is therefore that the onus of proving the age of the Complainant lies on the prosecution and that while, in the absence of any other evidence, medical evidence is paramount in determining the age of the victim, where there is credible evidence other than medical evidence, the conviction will not be overturned simply because of lack of medical evidence. In fact according to the above authorities age may well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words in assessing age a holistic approach must be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other information and circumstances. See Aroni, J in Kevin Kiprotich Amos alias Rotich vs. Republic - Criminal Appeal No. 89 of 2016.

42. What the Court frowns upon is mere averments of age without any documents in support thereof. In this there was oral evidence which was supported by the medical age assessment report that the complainant was 13 years old. Accordingly, I do not see any reason why that finding should be interfered with.

43. As regards the identity of the appellant, both the appellant and the complainant knew each other very well. According to the complainant, the appellant had been his boyfriend while the appellant stated that he used to see the complainant at the Hotel. In those circumstances there cannot be any mistake as to the identity of the appellant.

44. With respect to the evidence of penetration, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. This position is fortified by the holding of the court of appeal in Martin Nyongesa Wanyonyi vs Republic Criminal Appeal no. 661 of 2010, (Eldoret), D. K. Maraga, J (as he then was), D. Musinga & A. K. Murgor JJA citing Kassim Ali vs Republic Criminal Appeal No. 84 of 2005 (Mombasa) where the court stated that:

**“The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence”**

45. However in John Mutua Munyoki vs. Republic [2017] eKLR, the Court of Appeal held that:

**“Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt...The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration. Faced with similar situation, this Court in the case of Arthur Mshila Manga (supra) observed while allowing the appeal that:**

**‘But did the medical evidence on record establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was**

open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI.’

The Court proceeded and stated that:

‘From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the Evidence Act, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.’

As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the Evidence Act aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant.”

46. In this case it is similarly important to produce the evidence of the Clinical Officer verbatim. According to his examination:

“Upon examination her biker had blood stains and further informed out (sic) she had had her menstrual period two days ago. So the blood stains might have possibly (sic) caused by the said menstruation. She also told me that she removed her clothes without threats and that she never screamed for help even when the accused person defiled her thrice. On the general examination, she was stable without any physical injuries on the head, neck upper and lower limbs. The defilement had happened 20 minutes prior to my examinations and the same was done by penis...On examinations of her genitalia, the intergenitalia was inflamed but with no fresh lacerations. The hymen was absent with no bruises physical injuries. But there were blood inside the vagina with no seminal fluid...But the urine analysis revealed some red blood cells possibly from menstruation.”

47. From the foregoing, it is clear that though the examination was done 20 minutes after the alleged defilement, there were no lacerations of the hymen which was itself absent. Just like in John Mutua Munyoki vs. Republic (supra) the vagina was open and there was no evidence that the absence of the hymen could be attributed to the said penetration. While there were blood stains, the witness was unable to attribute the same wholly to the defilement since in his view, the same could have been due to the fact that the complainant had undergone her menstrual period.

48. In my view the medical evidence could not corroborate the allegation of penetration. However **Section 124 of the Evidence Act** makes this quite clear that:

*“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.*

*Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*” [Emphasis added]

49. It is therefore clear that the evidence of the complainant, if a minor, requires corroboration, save that in sexual offences where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction.

50. Dealing with a similar issue in the case of Mohamed vs. R, (2008) 1 KLR G&F 1175, the Court held that:

“It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”

51. However as was held in John Mutua Munyoki vs. Republic (supra)

“As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the Evidence Act aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant.”

52. In the said case it was held that:

**“What is required as we have already pointed out is for the trial court to be satisfied first, that the victim is telling the truth and thereafter record reasons for such belief. It was thus not sufficient for the trial court to have merely held that, “therefore owing to the nature of the offence, having duly warned myself wish to state that I believe that the child herein, PW1 was telling the truth of the occurrences of the material night when the accused was taking her to school.” What or where are the reason(s) for the belief?”**

53. In the present case, the Learned Trial Magistrate was of the view that the evidence of the complainant was corroborated by the medical evidence. He therefore did not make any finding as to whether in his view the complainant was telling the truth. As the medical evidence was unsatisfactory in so far as penetration was concerned, the failure to deal with the truthfulness of the complainant’s evidence can only be resolved in favour of the appellant.

54. It is therefore my view and I hold that the prosecution did not prove penetration beyond reasonable doubt. **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}, at pages 361-64** stated:-

**“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction... Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”**

55. Similarly in 1997, the Supreme Court of Canada in **R vs. Lifchus {1997} 3 SCR 320** suggested the following explanation:-

**“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”**

56. In her judgement the Learned Trial Magistrate expressed herself inter alia as hereunder:

**“I do not think that one can ask for forgiveness without being privy to and/or acknowledging the mistake and/or offence he or she had committed. In this context I am of the view that the accused person knew so well the heinous and beastly act he had committed to the complainant and that is why he had to ask for such forgiveness.”**

57. It would seem that the Learned Trial Magistrate formed the view that by asking for forgiveness the appellant was admitting that he was culpable. With due respect that conclusion would have meant that the appellant admitted or confessed to have committed the offence since under section 25 of the **Evidence Act**, a confession means words from which an inference of the guilt of the maker may be made. However pursuant to section 25A(1) thereof, for a confession to be admissible, it must be made either in court before a judge or a magistrate, or to a police officer (other than the investigating officer) with a rank above Inspector of Police in the presence of a third party of the person’s choice. Those conditions were not satisfied in this case for the alleged request for forgiveness to be taken against the appellant.

58. The Learned Trial Magistrate also took issue with the fact that the appellant’s defence was not brought forward during his cross-examination of the prosecution’s witnesses and therefore must have been an afterthought. Whereas it is true that an accused’s case starts during cross-examination, it is my view that the mere fact that the accused does not disclose his defence till the time of his testimony ought not to be used against him particularly where he is acting in person otherwise it may well be construed as shifting the burden of proof to he accused. **Viscount Sankey L.C** in the case of **H.L. (E)\* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

**“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”**

59. According to **Halsbury’s Laws of England**, 4<sup>th</sup> Edition, Volume 17, paras 13 and 14:

**“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular**

*allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.”*

60. Before penning off, this Court has had occasion to express its doubts and even make a finding as regards the constitutionality of mandatory minimum sentences in Mombasa High Court Criminal Appeal No. 262 of 2012 - Hamisi Mwangeka Mwero vs. Republic.

61. In my view such sentences 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. Whereas the Court is given the leeway to impose any sentence over and above the minimum sentence, the section like any other sections prescribing for minimum sentences does not permit the Court 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, 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.”

62. 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.’**

63. 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.”**

64. 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.”**

65. Also 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.”**

66. In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to mandatory minimum 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.*

67. 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.”**

68. 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, pursuant to section 7(1) of the Sixth Schedule to the Constitution be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution of Kenya, 2010, 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*.

69. That said, it is my view that the prosecution failed to prove all the three ingredients of the offence of defilement beyond reasonable doubt. As was held by the Court of Appeal with respect to heavy minimum sentences in the case of Hamisi Bakari & Another vs. Republic [1987] eKLR:

**“We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear.”**

70. I associate myself with the sentiments of Murima, J in JOO vs. Republic [2015] eKLR, that:

**“It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person.”**

71. In the premises, the appellant’s conviction was unsafe. The said conviction is hereby set aside, the sentence quashed and it is hereby directed that the appellant be set free forthwith unless otherwise lawfully held.

72. Right of appeal 14 days.

73. Judgement accordingly

**Judgement read, signed and delivered in open court at Machakos this 1<sup>st</sup> day of October, 2018.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**The Appellant in person**

**Ms Mogoi for the Respondent**

**CA Geoffrey**