COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), NAMBUYE, OKWENGU, JJ.A]

CRIMINAL APPEAL NO. 133 OF 2015

BETWEEN

GEORGE KIOKO NZIOKA..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against Judgment of the High Court of Kenya at Machakos (L.

N. Mutende, J.) dated 25th June 2015

in

HCCR Appeal No. 17 of 2015

****

JUDGMENT OF THE COURT

This is a second appeal arising from the judgment of the High Court of Kenya at Machakos (**L. N. Mutende J.**) dated 25th June 2015.

The background to the appeal is that the appellant was arraigned before the Chief Magistrate's Court at Machakos with the offence of defilement contrary to **Section 8(3)** of the **Sexual Offences Act (SOA) No. 3 of 2006**. The particulars of the charge were that the appellant on 5th July 2009 at **[particulars withheld] sub-location** in **Machakos District** unlawfully and intentionally committed an act which caused penetration into the genital organs of **RMM** a girl aged 15 years. He also faced an alternative count of a charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence in the alternative charge were that the appellant on the same date and place indecently assaulted **RMM** by touching her private parts, namely vagina using his penis.

The appellant denied both charges prompting a trial in which the prosecution tendered evidence through five (5) witnesses to prove the charges, while the appellant who gave sworn testimony was the sole witness in his defence. The facts leading to the appeal are that on 5th July 2009 **RMM (PW2)** left home at 9.00am for **[particulars withheld]** Market where she had been sent by her mother to buy soap. She set out from the market for home at 12.00pm. While on the way home, she noticed the appellant following her in a hurry. She knew him very well as an employee in a barber shop at the market. She quickened her steps, but appellant ran after her and managed to catch up with her. He held her hand and led her into a bush with tall grass. He asked her to be his friend but she declined. He pushed her to the ground and made her lie down facing up. He pulled up her skirt and then removed her pant. He also removed his trouser and defiled her.

Meanwhile PW2's brother **BMM** (PW3) who was looking for stray goats in the same bush spotted appellant defiling PW2. PW3 saw and recognized both PW2 and appellant as it was day time. He also knew both very well as PW2 was his sister, while he knew appellant as an employee in a barber shop at **Kaseve** market. PW3 left quietly and reported the incident to their father **PMK**, PW4 who reported the matter to **Kaseve** AP Post. Appellant was arrested by officers from the AP Post and later handed over to Machakos Police station. PW2 was also escorted to Machakos Police Station where the incident was booked in the OB. She was then referred to Machakos General Hospital where she was examined, treated and P3 filled by **Dr. Isika.** The P3 form was tendered in evidence by **Dr. Edwin Mwachama**. The medical examination revealed that the hymen was missing. There were no other injuries. The doctor concluded that this was a case of defilement.

The appellant gave sworn evidence that on the material day of 5th July 2009 he was at Machakos Town where he worked as a shoe shiner. He closed his shop at Machakos at around 5.15pm and left for **Kaseve** to deliver a customer's shoes. On arrival at **Kaseve**, he handed over the

shoes to the customer and on his way to the bus stage intending to go back to Machakos, when he was set upon and beaten by two men who wanted to know what he did for a living. The men took him to **Kaseve** AP Post where he found PW2's father, PW4. He was later taken to Machakos Police Station where he was charged with an offence he knew nothing about. According to him the P3 form was forged as it had no official hospital stamp of Machakos General Hospital. He denied knowing PW2 before his arrest.

The trial court relied on the evidence of PW2 as corroborated by PW3 whom the trial court believed was an eye witness who saw the appellant defiling PW2 in the bush where PW3 had gone to look for a stray goat. He also relied on the P3 form filled by the Doctor which indicated that PW2's hymen was missing and there were blood stains on the pad consistent with PW2 having been defiled.

On the age, the trial court believed PW2's testimony that she was fifteen (15) years of age as at the time of the offence as corroborated by the clinic card which indicated that she was born on 12th October 1994. The trial court rejected appellant's assertion that the P3 form was a forgery for lack of an official stamp of Machakos General Hospital where it was filled, and, ruled that the P3 was authentic as it bore the signature of **Dr. Isika** whom **Dr. Edwin Mwachama** in his testimony stated was based at Machakos General Hospital at the material time. **Dr. Isika** indicated on the form that he had examined PW2 and filled the P3 form.

The appellant's defence was rejected as baseless because; the trial court believed the testimony of PW2, 3 and 4, who all knew the appellant before as an employee at a barber shop at **Kaseve**; and that the incident took place in broad day light. The court therefore ruled out the issue of mistaken identification and found that the prosecution evidence had disproved the appellant's *alibi.* The trial court noted that the appellant's own evidence corroborated that of the prosecution that he was arrested at **Kaseve** Market within the locality of where the offence was committed. The trial court therefore found the prosecution case proved to the required threshold, convicted him on the main charge and sentenced him to serve 25 years' imprisonment.

The appellant was aggrieved and appealed to the High Court raising various grounds. The High Court reevaluated the record, reminded itself of its role as a first appellate court, namely, to re-evaluate evidence adduced at the trial as a whole and resubmit it to a fresh and exhaustive examination before coming up with its own conclusion bearing in mind that it neither saw nor heard witnesses who testified. Relying on Court of Appeal decision in **Laban Nyaga Njue v Republic [2015] eKLR,** the High Court ruled that **Section 85(2)** of Act No. 7 of 2007 had amended **Section 88** of the **Criminal Procedure Code** by deleting the requirement that only police officers of the rank of assistant inspector and above could be appointed as prosecutors. Appellant's prosecution was therefore valid.

On age of PW2, the High Court found it proved by production of the child's clinic card indicating that she was born on 12th October 1994, meaning that she was 14 years and 9 months, as at the time of the commission of the offence against her. On penetration the High Court ruled that evidence of PW2 that appellant inserted his genital organ into her vagina while lying on her was corroborated by PW3 who saw them in the act and medical evidence which established that complainant's hymen was bruised which was evidence of penetration into her genital organ. The High Court believed PW2's evidence that the appellant was interrupted and rose up and pulled up his trouser before ejaculation when he noticed the presence of PW3 in the vicinity hence absence of spermatozoa; that it was not mandatory for the prosecution to prove that the blood stain on the pad at the time of examination of PW2 by **Dr. Isika** necessarily resulted from the broken hymen and was therefore fatal to the prosecution's case as the major element for proof of the offence of defilement namely age and penetration had on the evidence on record been proved to the required threshold.

Relying on the case of **Sentale v Uganda [1968] EA 365**, the High Court ruled that the burden is always on the prosecution to prove its case to the required threshold even if an accused person raises a defence of alibi; and all that was expected of the trial court in the first instance and a first appellate court in the second instance was to weigh appellant's alibi defence against prosecution evidence and determine whether the defence had been dislodged or not. Upon weighing appellant's defence against the prosecution evidence, the High Court ruled that the evidence adduced by the prosecution was cogent, overwhelming and therefore sufficient to sustain the conviction handed down against the appellant by the trial court and accordingly affirmed the appellant's conviction.

On sentence, the High Court relied on the Ugandan Supreme Court decision in the case of **Kiwalabye Benard v Uganda, Criminal Appeal No. 143 of 2001** for the holding inter alia that:

> ***"The appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence unless exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."***

In light of the above, the High Court took into consideration appellant's mitigating factors and reduced the sentence from 25 years to 20 years' imprisonment.

Undeterred the appellant is now before this court on a second appeal, raising 7 supplementary grounds of appeal contained in his undated written submissions filed on 4th December 2019. These may be paraphrased as follows: the learned judge of the High Court erred in law in upholding conviction and sentence when:

> ***1. Voir dire examination was not conducted in respect of the minor in accordance with the law.***
>
> ***2. She failed to find that the charges leveled against the appellant were fatally defective.***
>
> ***3. Relied on evidence tendered through hostile witnesses.***
>
> ***4. She failed to subject the entire evidence on exhaustive re-evaluation as was required of a first appellate court.***

5. She relied on evidence produced contrary to Section 77(2) of the Evidence Act Cap 80 Laws of Kenya.

6. She dismissed his plausible and unrebutted defence and shifted the burden of proof on the defence.

7. She failed to consider the time spent in remand when affirming the sentence contrary to Section 333(2) of the Criminal Procedure Code.

The appeal was canvassed by way of written submissions filed and adopted by the appellant without orally highlighting the same, and oral submissions by **Mr. Obiri,** Assistant Director Public Prosecution (ADPP).

The appellant faulted the High Court for the failure to appreciate that: the entire trial process was irregularly conducted and therefore a nullity. This was because the trial court failed to conduct *voire dire* examination on PW1 (who was a minor), to determine her intelligence and obligation to speak the truth before allowing her to give evidence. The charge as laid against the appellant was fatally defective for failure to state that appellant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section (3);** failure to indicate the particulars of the genital organs that came into contact with each other; failure to impeach the prosecution witnesses who were hostile to the appellant; and to discount medical evidence which was based on the P3 form which was defective for lack of affixing of the official hospital stamp where the P3 was filled. In addition, the trial court relied on the evidence of presence of blood on a pad as proof of penetration when PW2 herself never mentioned that she had bled either during or after the act; and failed to properly re-evaluate and appreciate the evidence adduced at the trial that the appellant was seventeen (17) years old which should have prompted the trial court to call for an age assessment report. The appellant contended that the P3 form filled by **Dr. Isika** was produced in evidence contrary to **Section 77(2)** of the **Evidence Act** as he (i.e appellant) was not asked if he had any objection to the P3 being produced by **Dr. Mwachama** on behalf of **Dr. Isika**; that the burden of proof was shifted on him to prove his innocence and his alibi defence was not rebutted in terms of **Section 201** of the **Criminal Procedure Code** as no police officer visited his place of work in Machakos to investigate his movement on the date of the alleged offence; and lastly that the trial court fell into error when it allowed the prosecution to file written submissions, and acted on the said submissions as basis for evaluating the record without affording him an opportunity to be served with the said submissions and respond thereto. On the totality of the above submissions, the appellant prayed for the appeal to be allowed in its entirety.

Opposing the appeal, **Mr. Obiri** submitted that judgments of both courts below complied with the prerequisites in **Section 169** of the **Criminal Procedure Code** as they summarized the evidence, identified issues for determination and drew conclusions thereon; that although the High Court did not specifically set out in the body of its judgment, the issues identified for determination, the issues determined by the High Court included that which related to the age of PW2, Identity of the perpetrator, penetration and the weight to be attached to appellant's *alibi defence*, and the court found the prosecution case proved to the required threshold. Contrary to the appellant's contention, the charge sheet was not defective as it complied with **Section 134** of the **Criminal Procedure Code**; that **Section 77(2**) of the **Evidence Act** was complied with fully as evidence was adduced as to why **Dr. Isika** was not available to tender the P3 in evidence. **Mr. Obiri** maintained that the prosecution evidence was cogent and overwhelming as the incident took place in broad daylight and the issue of mistaken identity did not arise.

In reply to **Mr. Obiri's** submissions, the appellant maintained that the charge sheet was defective; that the P3 was improperly admitted in evidence especially when the doctor stated on oath that it did not bear the official stamp of the hospital where it was filled, that there was nothing to show that the P3 was authentic; that PW3 contradicted himself when at first he said that he knew nothing about the incident and only for him to later change and state that he witnessed the incident. Lastly that it was erroneous for the trial court to shift the burden of proof on him to prove his defence.

As this is a second appeal, our jurisdiction is confined to consideration of questions of law only by dint of **Section 361** of the **Criminal Procedure Code Cap 75 Laws of Kenya**. See the case of **Karingo v Republic [1982] KLR 213**, for the holding inter alia that:

"A second appeal must be confined to points of law and this court will not interfere with concurrent findings arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could rule as it did. (Reuben Karari s/o Karanja versus Republic [1956]17 EACA IC 16)."

We have considered the record in light of the above mandate. Issues that fall for our determination are the same as those raised by the appellant in his supplementary grounds of appeal contained in his written submissions. On *voire dire*, **Section 125 (1**) of the Evidence Act provides as follows:

"All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, diseases (whether of body or mind) or any similar cause."

Section 19 (1) of the **Oaths and Statutory Declarations Act Cap 15 Laws of Kenya** requires *voire dire* procedure to be carried out on a child of tender years before such a child gives testimony either before a court of law or a tribunal as the case may be. It provides:

"Where in any proceedings before any court or persons having by law or consent of parties' authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the Court or such person, understand the nature of an oath his evidence may be received, though not given upon oath, if in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."

The purpose for undertaking the *voire dire* procedure is as was set out by the

Court in the case of **Patrick Kathurima versus Republic [2015] eKLR** as follows:

> ***"We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of section 19 of CAP 15. We are aware that section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the oaths and Statutory Declarations Act Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes."***

The jurisprudential position as to who is a child of tender years as at the time when the **Johnson Muiruri versus Republic [1983] KLR 445,** *Locus Classicus* on the *voir dire* procedures was decided is as was set out by the predecessor of the Court in **Kibangeny Arap Kolil versus Republic [1959] EA82**, in which the Court held *inter alia* that:

> "***Tender years means a child under the age of fourteen years"***

Neither **Section 19** nor the case of **Johnson Muiruri v Republic** (supra), in which the said section was construed and guidelines laid down on how to conduct*voir dire* defined a child of tender years. At holding number 1 in the **Muiruri case** (supra), it simply stated that it is a mandatory requirement in instances where evidence of a child of tender years is intended to be received in criminal proceedings.

The enactment of the **Children Act, Chapter 141** of the Laws of Kenya has not changed that position. This is because, **section 2** of the Act stipulates explicitly that: "**In this Act, unless the context otherwise requires-**

> ***"child" means any human being under the age of eighteen years;*** while ***"child of tender years" means a child below the age of ten years;***

In **Samuel Warui Karimi versus Republic [2016] eKLR**, confronted with a similar issue, the Court appreciated that both **sections 125 (1**) of the Evidence Act and **19(1)** of the Oaths and Statutory Declarations Act and the **Muiruri Case** (supra) were silent on the definition of who is a child of tender years. It then expressed itself as follows:

> ***"In our own understanding of the above provisions of the law voir dire is an examination that serves two purposes: one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus under the Evidence Act, the test is one of competency as the Court is supposed to consider whether the child witness is developmentally competent to comprehend the question put to him or her and to offer reliable testimony in Criminal Proceedings, it therefore, follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence."***

The Court then made observations on section 2 of the Children's Act, which defines a child of tender years as already highlighted above, and then expressed itself as follows:

> ***"We have not come across any other statutory definition of a child of tender years other than the above which in our view was perhaps informed by the broad interests of protecting children from Criminal responsibility and not as a test of competency to give evidence in Criminal Proceedings. Court decisions regarding the competency of evidence by children of tender years have maintained a higher threshold of 9-14 years and not 10 years as witness of tender years whose evidence must be subjected to voir dire examination."***

On the current jurisprudential position on the issue, the Court expressed itself as follows:

> ***"In a more recent decision of the Court of Appeal sitting in Malindi in the case of MK versus Republic [2015] eKLR, the Court termed as unnecessary voir dire examination conducted on a child aged 15 years by the trial court. It was held that voir dire examination is done where a child witness is a child of tender years (***emphasis added). ***This postulation of the law on voir dire is***

not reflected across the board by all courts as our research has led us to numerous decisions of the High Court where the interpretation of "a child years" is different. For example, in the case of JGK versus Republic [2015] eKLR, the trial court had received evidence of a girl aged 17 years without conducting voir dire examination. On Appeal, the High Court at Nyeri (differently constituted) disagreed with the trial Magistrate and held:

"So long as the witness was below 18 years as in the present case, she was a child and a voir dire examination was necessary."

The court then continued as follows:

15. In the above case, it was apparent the Court did not distinguish the difference between two definitions of "a child" and "a child of tender years." There is distinction and fundamental difference between the two definitions. In yet a another case of Gamaldene Abdi Abdirahim & another versus Republic [2013] eKLR, the High Court in Garisa set aside a conviction and sentence of the appellant on a count of failure on the part of the trial court's magistrate to conduct voire dire examination of the complainant who was aged 13 years at the time she gave evidence"

In light of the above reasoning and also bearing in mind the decision in the **Patrick Kathurima versus Republic case** (supra), the Court rendered itself as follows:

"(18) The above decision supported the definition of a child of tender years to be 14 years and below and contextualized that definition within the oaths and Statutory Declarations Act and under the Children Act. On our part we have no good reason to depart from this well-trodden path, as we are in agreement the purpose of undertaking voir dire examination in a criminal trial is to protect the guaranteed right of a fair trial……."

See also the case of **Maripett Loonkomok versus Republic [2016] eKLR,** in which the Court expressed itself as follows on age:

The question of age, as we have stated earlier is a question of law under the Sexual Offences Act, at least to prove that the victim was a child at time of defilement and also for purposes of sentence.....

In light of the above jurisprudential exposition by the Court itself, on the issue of who is a child of tender years for purposes of **Section 19** of the Oaths and Statutory Declaration Act. We find no reason to depart from the position taken by the Court in the above **Warui & Maripett's cases** (supra), approving the stand taken by the Predecessor of the Court in the **Kibageny** case (supra), that for purposes of **section 19** of the Oaths and Statutory Declarations Act, a child of tender years is one who is fourteen (14) years and below. Second, that the threshhold of a child of tender years as defined in the **Children Act**, is limited for purposes provided for in the said Act. Applying that threshhold to the record before us and appreciating that as at the time PW2 gave her testimony in court, PW2 was fifteen (15) years. We find no miscarriage of justice in the trial court's failure to conduct *voir dire* on PW2 before receiving her testimony.

On the issue as to whether the charge was correctly laid, it is correct that the charge the appellant faced at the trial gave the offence and particulars already indicated above. In the copy of the charge sheet exhibited in the record of appeal there was no indication in the statement of the offence that the appellant faced a charge of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. At page 35-36 of the record there is mention of an amendment of the charge pursuant to which the prosecution case was heard *denovo.* Since we do not have a copy of the amended charge to know the extent and nature of the amendment, we can only go by what is on record whose particulars are as indicated above. We also agree that the particulars of the genital organs of the perpetrator and the victim which came into contact with each other during the defilement were not also specified in the particulars of the offence. Section 2 of the SOA defines genital organs to ***"include the whole or part of male or female genital organs and for purposes of this Act includes the anus***." **Section 134** of the **Criminal Procedure Code** provides as follows: -

"Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

Guidelines for framing charges are as set out in **Section 137** of the same Act. In summary, these are *inter alia* that the charge is to commence with a statement of offence described briefly and in ordinary language and without necessarily stating all the elements of the offence but with a reference to the Section creating the offence. Only necessary particulars of the charge are required to be given. The standard forms to guide framing of charges are amenable to variation according to the circumstances of each case.

Section 382 of the Criminal Procedure Code on the other hand provides as follows:

"Subject to the provisions herein before contained, no findings, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice, the court shall have regard to the question whether the objection should have been raised at an earlier stage in the proceedings."

In light of the above threshold we find no merit in the appellant's complaint that the charge as framed is fatally defective and incurable. Our reasons are firstly that appellant faced a charge of defilement clearly stated in the statement of offence. Since PW1 the victim was aged about 15 years the charge should have read **"defilement"** contrary to **Section 8(1)** as read with **Section 8(3).** However, the omission did not cause

any prejudice to the appellant as it is on record that the charge was amended occasioning the trial to restart *denovo.* It is therefore curable under **Section 382 of the Criminal Procedure Code**.

As for the insufficiency of the particulars of the offence, the guidelines on framing of charges as set out in **Section 137** of the **Criminal Procedure Code** explicitly states that only particulars that are necessary are to be specified. The appellant's complaint with regard to the particulars as stated relates to the failure to disclose the particular genital organs of both the perpetrator and the victim that came into contact with each other during the defilement. Indeed, as already observed above these were not stated. However, no miscarriage of justice was occasioned to the appellant especially when the evidence adduced was that he engaged in sexual intercourse with PW2, and therefore the only genital organ that could have come into contact in the perpetration of the offence charged was penetration of PW2's female organ using his male genital organ, i.e his penis especially when **Section 2** of the **Sexual Offences Act** defines genital organs to include the whole or part of the male or female genital organs and includes anus. The complaint is accordingly rejected. On alleged evidence of hostile witnesses, no particulars of the hostile witnesses or the nature of the hostility meted out against the appellant were given.

Second, it is an invitation for us to revisit the evidence and reevaluate it afresh, a matter falling outside our mandate as a second appellate court. It is accordingly rejected.

On the manner the P3 was tendered in evidence, we agree the P3 had been filled and signed by **Dr. Isika** but produced in evidence on his behalf by **Dr. Edwin Mwachama**. **Section 77** of the **Evidence Act** provides as follows:

> ***"77(1) In criminal proceedings any document purporting to be report under the hand of a government analyst, medical practitioner or any ballistic report, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***
>
> ***1. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.***
>
> ***2. When any report is so used the court may if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist as the case may be and examine him as to the subject matter thereof."***

The appellant's complaint relates to the failure of the trial court to give him an opportunity to object or consent to the production of the P3. Second, for admitting it in evidence when it did not have the official hospital stamp on it. In the appellant's view, lack of a stamp rendered the P3 unauthentic and therefore a forgery. The two courts below appreciated that indeed the P3 did not bear the official hospital stamp. They nonetheless acted on it to support the prosecution case because **Dr. Mwachama** was categorical in his testimony that he had worked with **Dr. Isika** and was familiar with both the handwriting and signature of **Dr. Isika** and confirmed that she is the one who had made the entries on the P3 before endorsing her signature thereon. We find no error in the concurrent respective decisions of the lower courts to admit the P3 in evidence. What is stressed for in **Section 77** of the **Evidence Act** is the making and endorsing of a report, both of which had been satisfied. Affixing of a stamp although we agree is not inconsequential, its absence alone cannot be employed to vitiate an otherwise authentic document.

As for the trial court's failure to seek the appellant's opinion before allowing the production of the P3, the complaint is being raised too late in the day. In terms of **Section 382** of the **Criminal Procedure Code**, nothing prevented the appellant from raising that complaint as soon as he was given an opportunity to cross examine **Dr. Mwachama**. In saying so, we are not shifting the burden of proof on to the appellant but simply demonstrating that the appellant had an opportunity to object to the production of the P3 during cross-examination of **Dr. Mwachama** and since he failed to do so, there is no merit in his complaint. It is accordingly rejected.

On the role of a first appellate court, this has been restated in numerous decisions of the court among them the one cited by the High Court itself namely **Okeno v. Republic** [supra]. In light of the guidelines set out in the **Okeno** case [supra], we find that the approach the High Court took in determining the appeal before it as outlined above was to summarize the evidence, identify issues for determination and which though not specifically set out seriatim in the Judgment were addressed sequentially and reasons given for the determination of each issue identified by the High Court for determination. The High Court therefore committed no error in the discharge of its mandate. The complaint is dismissed.

On alleged shifting of the burden of proof, the position in law as correctly observed by the High Court is that the burden of proof in a criminal trial always lies on the prosecution even if an accused person raises an alibi defence. See the case of **Ssentale v Uganda** (supra). The reasons the trial court gave for rejecting the appellant's defence were, firstly, because he failed to call witnesses to support his alibi, which as found by the High Court was erroneous. The above notwithstanding, the High Court sustained the conviction because the prosecution evidence was cogent and overwhelming; that the appellant was known both to the victim and her brother PW3, as an employee in a barber shop at **Kaseve** market. The incident took place in broad daylight and issue of mistaken identity did not therefore arise. There was also no reason to frame the appellant.

On appellant's complaint that he was a minor at the time he allegedly committed the offence and arraigned in court, this was never raised by him on 10th July 2009 when he responded to the charge, on 22nd October 2009 and 20th November 2009 when he requested for variation of bond terms and on 22nd September 2010 when he was called upon to respond to the amended charge. This complaint is not only belated but also baseless. It is rejected. As for the trial courts alleged reliance on submission filed by the prosecution, what we have on record is that when the trial concluded on 24th August 2011 with appellant's defence, the trial court reserved the matter for judgment on 28th September 2011 with a mention on 7th September 2011. We appreciate the purpose of the mention is not indicated. There is however nothing to show that submissions were called for, received and acted upon. This is also rejected.

On sentence **Section 361** of the **Criminal Procedure Code** explicitly states that on a second appeal we have no mandate to deal with facts and severity of sentence is a matter of fact, except where the sentence has been enhanced by the High Court, a position not obtaining in this

appeal as the sentence handed down by the trial court was not enhanced but reduced. The reduced sentence is within the law and the High Court gave sound reason for the reduction. Appellant's complaint is that the High Court should have taken into consideration the prerequisites in **Section 333(2**) and directed the revised sentence to run from the date of arrest. The proviso to **Section 333(2)** states as follows: -

> ***"Provided that where the person sentenced under sub-section (1) has prior to such sentencing been held in custody, the sentence shall take account of the period spent in custody."***

The record is explicit that bond terms were revised twice for the appellant. He therefore has no genuine complaint. The appeal is accordingly dismissed.

Dated and **Delivered** at **Nairobi** this 24th **day of April, 2020.**

W. OUKO, (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH M. OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPTY REGISTRAR