IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, KOOME & SICHALE, JJA)

CRIMINAL APPEAL NO. 91 OF 2017

BETWEEN

JKM.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nairobi (Kimaru, J) dated 23rd *June, 2015 in HC. CR. A. NO. 74 OF 2012)*

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JUDGMENT OF THE COURT

This is a second appeal arising from the judgment of the High Court of Kenya in **Criminal Appeal No. 74 of 2012** (**L. Kimaru**, J) dated 23rd June, 2015.

The appellant was arraigned before the Senior Principal Magistrate's Court at **Kikuyu** with the offence of defilement contrary to **Section 8 (1)** of the Sexual Offences Act (SOA) No. 3 of 2006. The particulars of the charge were that on diverse dates between 2009 and August 2010 in **Kikuyu** District within the then Central Province unlawfully and intentionally caused his penis to penetrate the vagina of **MMK** a girl aged 8 years. The appellant also faced an alternative count of committing an indecent act with a child contrary to **Section 11 (1)** of the same Act. The particulars were that during the same period of time and place the appellant unlawfully and intentionally caused his penis to touch the vagina of **MMK** a girl aged eight (8) years. The appellant denied both counts prompting a trial in which the prosecution called six (6) witnesses to prove the charge, while the appellant gave sworn testimony and called one (1) witness in support of his defence.

The brief facts are that appellant and **ENK (PW3**) were legally married as husband and wife. They had two children between them. The complainant **MMK** and another child named **L**. They had lived together for eight (8) years since the celebration of their marriage. In 2009 on an unknown date the appellant started defiling **MMK**. He would take her to the bedroom defile her by inserting his penis into her vagina and threaten her not to disclose the defilement to anyone. It was not until the year 2010 during the August holidays, that **MMK** disclosed the defilement to her maternal grand-mother **LWK (PW2)**. PW2 passed on that information to **(PW3),** and she took **MMK** to **Kinoo** Hospital for examination and treatment from where she was referred to Nairobi Women's Hospital for further treatment. Medical reports were filled at both hospitals respectively. **Dr. Kavete Jackline, (PW 5)**, made findings that the child had been defiled on several occasions for a long duration of time, while the one at Nairobi Women's Hospital filled by **Dr. Liku,** but produced by **Dr. Charles Gachene** under **Section 77** of the Evidence Act, indicated that her hymen was torn which was evidence of sexual assault.

The matter was reported to Kikuyu Police Station, investigations carried out by **PC Stephen Odinda (PW6),** following which the appellant was arrested and arraigned in court with the aforementioned offences which he denied terming them fabrications by PW 2 his mother in -law in revenge for turning down her sexual advances on him. The appellant's witness **James Njenga Wangui DW2** stated that appellant and his family were his tenants. Prior to his arrest, he never heard of any complaints of sexual assault by him to his daughter.

The trial court analyzed the record and rendered itself as follows:

> **"Having considered the evidence presented in its totality and having warned myself of the danger of convicting the accused person on the uncorroborated evidence of a child of tender years and further having given the reasons for doing so, it is my considered view that the prosecution was able to show beyond any reasonable doubt that the accused person was the one who defiled the complainant herein.**
>
> **On the issue of the complainant's age which is critical in this case especially with regard to the sentence to be imposed should**

the accused be found guilty of the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act Number 3 of 2006, I find that the prosecution was able to discharge its burden through the evidence of PW1 who indicated that she was 8 years at the time she testified. I note that this evidence was not challenged by the accused person and consequently make a finding that the age of the complainant was proved to be 8 years at the time she testified.

The prosecution in my view was able to discharge the burden of proof bestowed on it. It is my considered view that in this case, the prosecution has been able to prove the main charge of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No 3 of 2006 Beyond any reasonable doubt and the defence offered by the Accused person has not cast any doubt on the prosecution's case.

I therefore find the accused person guilty of the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006 and consequently proceed to convict the accused person of the same under Section 215 of the Criminal Procedure Code. ---

The appellant was aggrieved. He appealed to the High Court raising various grounds of appeal. The High Court re-evaluated the record, reminded itself of the role of a first appellate court as enunciated in the case of **Njoroge v Republic [1987] KLR 19**, namely to re-evaluate and re-consider the evidence and submissions on the record, in totality before drawing conclusions thereon and identified issues for determination. On whether the appellant had been charged with the right offence the High Court construed **Section 8 (2)** and ruled that the section stipulates that a person who commits an offence of defilement with a child aged eleven (11) years or less is liable upon conviction to imprisonment for life; that under the said provision the relationship between the perpetrator and the victim is immaterial as what is material is the age of the victim and on that account rejected the appellant's complaint that he had been charged under a wrong provision of the law. The High Court also construed **Section 214** of the Criminal Procedure Code and ruled that the prosecution amended the charge and called upon appellant to take plea to the amended charge which he did but opted not to have any of the witnesses who had testified before the amendment recalled and on that account dismissed this complaint as well.

On the birth certificate of the complainant, the High Court re-analyzed the evidence of the complainant and that of her mother and considering it in light of the High Court decisions in the case of **John Cordon Wagner v Republic Criminal Appeal No. 404 of 2009,** for the holding *inter alia* that;

"in defilement cases the age of the complainant is proved either by medical evidence or through other evidence since the sexual offences Act has different categories of ages"

and the case of **Musyoki v Republic Criminal Appeal No. 172 of 2012** for the holding *inter alia* that apart from medical evidence, age may also be proved by birth certificate, the victims' parents or guardian and by observation and common sense. On that basis the High Court found that the complainant's age was properly ascertained through the evidence of PW3, the mother of the complainant and PW2, her grandmother.

On Proof of the charge against the appellant, the High Court expressed itself as follows:

"In the present appeal, it was clear that the prosecution established penetration. This was proved by medical evidence. The age of the complainant was also established. She was eight (8) years old at the time of the sexual assault. The identity of the perpetrator was proved. The appellant is the father of the complainant. The defence of the appellant did not dent the otherwise strong cogent evidence adduced by the prosecution witnesses. The appeal brought by the appellant lacks merit. This Court therefore dismisses the appeal and upholds the conviction and sentence of the trial Court. The sentence was legal. It is so ordered."

Undeterred the appellant is now before this Court on a second appeal raising five (5) grounds of appeal which may be paraphrased that the appellate judge erred in law:

i. By failing to evaluate the evidence as a whole and appreciate that the charge as framed against the appellant was defective rendering the trial a nullity,

ii. By failing to appreciate that the trial court misapplied the law when invoking Section 77 of the Evidence Act to allow production of treatment records by a person other than the maker without following the correct procedure for such production.

iii. By allowing the parties to make written submissions to affirm contrary to Section 213 of the Criminal Procedure Code which requires submissions to be made orally.

iv. By relying on contradictory and incredible evidence to affirm conviction by the trial court.

v. By failing to consider appellants plausible defence contrary to Section 169 (1) of the Criminal Procedure Code.

The appeal was canvassed by way of written submissions filed and adopted by appellant without highlighting, and oral presentations on behalf of the state by **Mr. Gitonga Muriuki,** Senior Public Prosecution Counsel (SPPC). Appellant complained that the trial was vitiated for failure to substitute conviction for the offence charged of defilement *perse* for the disclosed offence of incest contrary to **Section 20(1)** of the Sexual Offences Act, especially when it was not disputed that the appellant was related to the complainant; that the defect detected was fatal and incurable under **Section 382** of the Criminal Procedure Code and should be resolved in his favour by either directing an acquittal or a re-trial as deemed fit; that as the law stands the trial court misapplied it by allowing the prosecution to tender medical documents belonging to

PW1 through PW4 on behalf of **Dr. Liku** in the absence of evidence of attestation of the makers handwriting. Neither was there any inquiry made as to whether the maker's availability would reasonably have been procured without delay or expense, especially when it was not disputed that PW4 who testified on 16th March, 2011 had only been at the hospital for three months to that date. There was therefore no way she could have familiarized herself with both the handwriting and signature of **Dr. Liku** who filled the P3 on behalf of the complainant on 5th September, 2010 and was long gone for over a year before PW4 joined the hospital.

On proof of the charge, appellant contended that there was no medical evidence properly tendered in evidence to prove penile penetration, a necessary ingredient for proof of the offence of defilement. The entire prosecution evidence was incredible and inconsistent for; lack of corroboration of PW1's evidence; PW1's failure to indicate where and the time the offence took place; failure to indicate where the other child and PW3's sister were on all the occasions that the defilement occurred; failure of PW1 to demonstrate that she suffered any pain, other injuries or bled. Neither did she proffer any reason as to why she failed to disclose the complaint to PW3, her mother at the earliest opportunity. Finding that PW1's hymen was broken was not conclusive proof of penile penetration as a broken hymen could be caused by other numerous factors which the prosecution failed to exclude before drawing conclusion that PW1's hymen had been broken in the course of the alleged defilement by the appellant.

The appellant relied on Sections 213 and 310 of the Criminal Procedure Code as construed and applied in the case of **Akhuya v Republic [2002] EA 323** and **Henry Odhiambo Otieno v Republic [2006] eKLR**, and faulted both courts below for relying on written submissions when rendering the respective judgments, when **Sections 213** and **310** Criminal Procedure Code which apply to proceedings before the two courts below respectively, use the word "address" the court orally, meaning they donated jurisdiction for an oral address to the court. None compliance with **Sections 213** and **310** of the Criminal Procedure Code violated his right to fair trial and process as enshrined in Article 50 of the Kenya Constitution 2010, rendering the trial vitiated resulting in a mistrial in respect of which he should be acquitted or order a retrial.

That his defence was not only plausible especially considering the unexplained delay in PW1 disclosing the alleged numerous sexual assaults allegedly perpetrated against her by him, in reporting the incident to the police, ten (10) days after disclosure of the sexual assault by PW1 to PW2 in arresting the appellant six (6) weeks after disclosure; in recording a statement from PW1 several months after disclosure; failure to interrogate and record statements from DW2 and other persons who shared the same house as PW1 and the appellant. On the totality of the above submissions, the appellant prayed for the appeal to be allowed as prayed.

Mr. Gitonga opposed the appeal submitting that the charge was proved beyond reasonable doubt as the concurrent findings of facts by the two courts' below were well founded on the undisputed evidence on the record. There was also a proper application of the law to those facts before arriving at the concurrent findings of the two courts below that penetration was proved by corroborative oral and medical evidence. Age of the victim was also proved by corroborative oral evidence through PW1 and medical evidence tendered through PW4. **Section 77** of the Evidence Act is explicit on the circumstances under which documentary evidence may be tendered in evidence by a person other than the maker, which circumstances the trial court properly appreciated as PW4 explained to the court why the maker of the medical documents could not be availed to court to tender those documents as evidence. The law empowered the trial court to receive and act on that evidence especially when the appellant raised no objection to the mode of production of those documents in evidence.

Mr. Gitonga also submitted that **Section 124** of the Evidence Act was properly invoked by the trial court to convict the appellant on the evidence adduced through PW1 especially when there was no allegation of mistaken identity as the appellant was a father to the victim; that the trial magistrate was alive to the danger of convicting on the evidence of a single witness and appropriately warned himself accordingly and explicitly stated in his judgment that he was satisfied with the demeanor of the witnesses whom he found as truthful. It was therefore safe to base a conviction on their evidence; that both courts below considered the appellant's defence and dismissed it for reasons recorded in both judgments. On sentence, **Mr. Gitonga** submitted that the same was lawful and on that account prayed for dismissal of the appeal.

In reply to **Mr. Gitonga's**, opposition to the appeal, the appellant stated that he is not conversant with the law; that he was not accorded sufficient time to defend himself; that there was no evidence linking him to the commission of the offence against the victim. Medical evidence did not also link him to the commission of the offence; that his wife PW3 had no complaint against him. That is why she never accompanied PW1 either to hospital or Police Post to report the incident or lead police to his arrest. All those activities were carried out by PW2, in furtherance of the fabrication of the charge against him. On sentence, he pleaded for release from prison to enable him contribute to the common good of himself in particular and the society at large.

This is a second appeal. By dint of the provision of **Section 361** of the **Criminal Procedure Code**, only points of law fall for our consideration (see **Chemangong v Republic [1984] KLR 213** where the Court stated as follows:

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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 find as it did (Reuben Karari C/o Karanja v Republic (1950) EACA 140."**

We have considered the record in light of the above mandate and the rival submissions of the respective parties. The issues that fall for our determination are namely, whether:

i. The appellant was charged and convicted of the right offence.

ii. Medical documents were properly tendered in evidence.

iii. The High Court appreciated and discharged its mandate properly as was expected of it in law.

iv. Failure to grant appellant an opportunity to make oral submissions at trial was fatal to the prosecution case.

v. The two courts below relied on inconsistent and contradictory evidence as basis for finding and affirming the appellant's

conviction.

vi. The applicant's defence was appreciated and properly considered by the two courts below.

vii. The offence was proved to the required threshold.

On the nature of the correct offence, appellant ought to have been charged with, it is not disputed that the appellant was charged and convicted by the trial court and his conviction affirmed by the High Court for the offence of defilement contrary to **Section 8 (1)** as read with **Section 8(2)** of the SOA. It is also not disputed that the appellant and the victim PW1 were related as daughter and father. **Section 8 (1)** as read with Section **8 (2)** of the SOA provide as follows:

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

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

While **section 20 (1)** of the same Sexual Offences Act provides as follows: -

"Any male person who commits an indecent act or an act which causes penetration with a female person who to his knowledge is his daughter, grand-daughter, Sister, Mother, Niece, Aunt or grand-mother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen (18) years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or indecent act was obtained with the consent of the female person."

In **Section 22(1)** of the same Sexual Offences Act, a father is defined to include a half father. In light of the above provision, appellant being related to the victim, he ought to have been charged with the offence of incest contrary to **Section 20 (1)** of the Sexual Offences Act.

The appellant has argued that the above omission is incurable under Section 382 of the Criminal Procedure Code and therefore fatal to the prosecution case leading to a mistrial entitling him to either an outright acquittal or a retrial.

Section 382 of the Criminal Procedure Code provides as follows:

"Subject to the provisions herein before contained no findings 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, order, judgment or other proceedings before or during the 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 of the proceedings."

The guiding principles in the above provision is that an error, omission or irregularity is incurable within the ambit of **section 382** of the Criminal Procedure Code where the same has occasioned a failure of justice. See **Mugo v Republic [1984] KLR 608, David Irungu Murage & Another v Republic [2006] eKLR**; and **Thomas Aluga Ndegwa v Republic [2018] eKLR.**

In light of the above principles, it is our finding that with the exception of the failure to substitute the offence charged with the offence disclosed, no miscarriage of justice was occasioned to the appellant by that omission, error or irregularity. Our reasons for the above conclusion is because offences provided for under both sets of provisions is a sexual assault. The evidence the prosecution would have relied upon to prove the charge under **section 20 (1)** of the SOA is the same as that relied upon to prove the charge proffered. The sentence provided for the respective offences is the same namely life imprisonment since the victim was under the age of eleven (11) years for purposes of the offence of defilement and eighteen years for purposes of the offence of incest under **Section 20 (1)** as provided for in the provisal to **section 20 (1)**.

On production of medical documents on behalf of the victim, the relevant portion of the record reads as follows:

"….report was prepared on 5/9/2010 by Dr. Liku. I wish to produce the same as an exhibit.

I am conversant with her signature. Report is on Nairobi Women's Hospital letter head and has an authentic stamp.

Prosecutor: **I make application under section 77 of Evidence Act for witness to produce the report on behalf of Dr. Liku.**

CA Otieno RM 10/3/011

Omala – I have no objection

Court: MFI MO1 produced as P.Exh. 1

CA Otieno

RM

10/3/011

Prosecutor: That is for this witness.

CA Otieno

RM

10.3.011

Omala in cross-examination

I have 19 years' experience. Report (P. Exh.1) only dealt with the complainant. Report indicates

that complainant's hymen was torn.

C.A Otieno

RM

10.3.011

Prosecutor

No re-examination. Pray for adjournment. Dr. Kavete of Tigoni hospital attending a seminar. Investigating officer is Mr. Amagoro….."

Section 77 of the Evidence Act provides as follows:

> **"(1) In criminal proceedings, any document purporting to be a report under the hand of a government analyst, medical practitioner or any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.**
>
> **2. 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 at the time when he signed it.**
>
> **3. When any report is so used the court may, if it thinks fit, summon the analyst, ballistic expert, document examiner, medical practitioner or geologist, as the case may be, and examine him as to the subject matter thereof."**

Section 77(1) of the Act therefore allows for production of the specified documents in criminal proceedings. Under **Section 77(2)** of the Act, the court is allowed to make a presumption that the signature appearing on a report is genuine and the person who signed it held the office and qualification which he professed to hold at the time he signed it, while **Section 77(3)** of the Act grants a court of law the leeway to summon the maker of a report prepared by a government entity if it deems fit.

We therefore find no merit in the appellant's complaint on the manner medical evidence was tendered to Court as PW4 explained explicitly the circumstances under which he came to be called upon to tender the medical documents on behalf of **Dr. Liku**, following which the prosecution applied to have them produced under **section 77** of the Act, to which request appellant's counsel's acceded.

On the discharge of the mandate of the High court as a first appellate court, its role was spelt out explicitly in **Pandya v Republic [1957] EA 336** and **Okeno v Republic [1972] EA 32.** It is simply that a first appellate court is not only required to but it must also be seen to have consciously and deliberately subjected the entire record to thorough scrutiny so as to arrive at its own independent conclusions on the factual issues in contention, and to determine on its own, the guilt or otherwise of the appellant. The only limitation to its task being a caution that it is without the advantage, enjoyed by the trial court, of seeing and observing the witnesses as they testified, for which it must make due allowance. The approach the High court took in the discharge of the above mandate was to set out the nature of the offence the appellant faced at the trial, an in-depth and a thorough summary of the evidence adduced at the trial, identified issues for determination, considered them in light of the rival submissions, before drawing out conclusion already highlighted above. We therefore find nothing to suggest lack of proper appreciation and exercise of the mandate of a first appellate court.

On lack of opportunity to make oral submissions, the record indicates that at the conclusion of the trial on 14th November, 2011, it is the appellant's counsel who applied for a date for submissions. After several adjournments, the prosecutor intimated to the court on 5.12.011 that

submissions for both parties had been filed and they could take a date for judgment. Apparently appellant's counsel was not in court. It is the appellant who concurred with the suggestion made by the prosecution that they could take a date for judgment as both parties had filed their submissions. At the High court level, the record is explicit that counsel then on record for the appellant failed to attend court despite several adjournments for him to do so. On 20th November, 2014 the appellant is on record and without being probed or prompted by the Judge, he said that he had prepared written submissions which he wished to rely on.

Sections 213, 310 and **161** of the CPC provides as follows:

> **"213 The prosecutor or his advocate and the accused and his advocate shall be entitled to address the court in the same manner and order as in a trial under this Code before the High Court."**
>
> **310. If the accused person, or any one of several accused persons adduces any evidence, the advocate or the prosecutor shall, subject to the provision of section 161, be entitled to reply.**
>
> **161. In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply."**

In **Akhuya v Republic [2003] KLR 14,** in which the trial court at the conclusion of the trial *suo motu* advised parties to file submissions at the registry and thereafter proceeded to write the judgment, the court vitiated the trial process because:

> **"Firstly, a careful examination of the cited provisions by the Court showed that submissions must be made in open Court in the presence of the accused. Secondly, Section 77 (2) of the repealed Constitution made it mandatory for an accused person to be present at the hearing of his case except where there is demonstration of voluntary consent for stay away or where due to his conduct, the Court excluded him from the Court room. Thirdly, a Presiding Officer of the Court is expected to orally hear such submissions both sides in a Criminal case wish to make and to seek clarification of such submissions as found necessary in order to appreciate each side's case before delivering his opinion. Fourthly, an accused person is also supposed to hear the submissions and also has the right to clarify any point raised or to object to it being raised where he considers it necessary for his benefit. Fifthly, a trial cannot be said to be complete unless the record shows that both sides were granted an opportunity of addressing the court on certain matters or otherwise used against the accused. Sixthly, written submissions do not have any sanction of the law. Magistrates and Judges who ask for or accept them deny the accused person a statutory right of orally persuading the Court to grant him an acquittal."**

Likewise, in **Henry Odhiambo Otieno v. Republic [2006]** eKLR, in which at the conclusion of the trial, the trial Magistrate *suo motu* made orders giving dates both for filling of written submissions and the delivery of the judgment, this Court reiterated the stand taken by its predecessor, in **Salim Dean v Republic [1966] EA 272,** as approved in **Robert Fanali Akhuya v Republic** (supra) and considering them in light of Section 77 (2) of the repealed Constitution rendered itself as follows:-

> **"It cannot be said that merely because the appellants counsel acceded to putting in written submissions the accused thereby consented to that course of events. The question as to whether or not written submissions could be put in was not put to him. The Constitution envisages express consent. So when section 213 and 310 of Criminal Procedure Code are read with Section 77 (2) of the Constitution, it is clear that where written submissions are tendered without the accused's express consent the proceedingsof the Court concerned are thereafter rendered null and void. That is the conclusion we have come to here."**

A contrary position was however taken by the Court in the case of **Katana alias Benson & 2 Others v Republic [2017] eKLR** in which at the close of the defence case the appellants were directed to file written submissions and thereafter the matter was mentioned for purposes of scheduling a judgment date. On appeal, appellants raised issue with the directive on submissions arguing that they were unrepresented and did not know the true import and consequences of the submissions. They were therefore denied an opportunity to be heard. The Court construed **Article 25 (e) and 50 (2) (c)** of the **Kenya Constitution 2010** and **Sections 213 and 311** of the **Criminal Procedure** Code, in light of the decision in the **Akhuya** case (supra); decided according to **Section 77 (2)** of the repealed Constitution and ruled that failure by counsel for the appellants who requested to be allowed to make written submissions and failed/neglected to abide by the courts' directions could not be construed as failure by the court to ask appellants' consent in so far as written submissions were concerned and that even if there was any lapse on the part of the court, it was curable under the provisions of **Section 382** of the Criminal Procedure Code.

The position on the law taken by the Court in the **Katana Kaka alias Benson & 2 others** (supra) case was applied by the Court in the case of **Joseph Mwathi Nyanjui v Republic [2018] eKLR,** in which the record was explicit that when the trial Magistrate gave a date for taking submissions at no case to answer, it was the appellant who asked for leave of court to file written submissions; and even confirmed on record on a subsequent hearing date that the same had been filed, while the prosecution elected not to make any submissions either oral or written. Secondly, upon conclusion of the trial, when the trial Magistrate gave a date for final submission, it was the appellant therein who once again elected on his own volition to present his submissions in written form.

In light of the threshold in the **Katana alias Benson & 2 others** case (supra); and **Joseph Mwathi Nyanjui v Republic** (supra) we find no merit in the appellant's complaint on this issue as appellant was ably represented by counsel at the trial. It is this counsel who upon conclusion of the defence case intimated to the trial court in the presence and without any objection from appellant that he wished to file written submissions which were accordingly filed. On the mention date set for scheduling a date for judgment, the appellant was in court when the prosecution informed the court that both sides had filed written submissions and requested a date for judgment to which position the appellant himself consented. The complaint is rejected.

Turning to alleged existence of inconsistencies and discrepancies, in the prosecution case, the position in law and which we adopt is as was stated *inter alia* by the Court in **Joseph Maina Mwangi v Republic Criminal Appeal No. 73 of 1993,** that;

> **"in any trial there are bound to be discrepancies and any appellate Court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences**. In **Kimei v Republic [2002] I KAR 757,** it was stated that ***"it is not every conflict or contradiction in evidence, even of a minor nature that vitiates a trial. To lead to such eventuality, the contradiction involved must be of such a nature as to create doubt in the mind of the Court regarding the guilt of the accused."*** In **Njuki & 4 Others v Republic [2012] IKRL 771**, it was stated that ***"where discrepancies, in the evidence do not affect on otherwise proven case against the accused, a court is entitled to overlook those discrepancies."***

Lastly in **Josiah Afuna Angulu v Republic, Criminal Appeal No. 227 of 2006 (CR)** and **Charles Kiplangat Ng'eno v Republic Criminal Appeal No. 77 of 2009 (CR),** it was stated that where contradictions and inconsistencies are alleged to exist in the prosecution case, the duty of the Court is to reconcile these and determine whether they vitiate the prosecution's case or otherwise. The incredibility, contradictions and inconsistencies the appellant complained of relate to PW1's failure to indicate where the offence took place or at what time it took place and why PW1 failed to indicate where the brother and other persons who lived in the house besides PW1, appellant and the mother, PW3 were when all the sexual assaults committed against her took place. This is an invitation for the Court to revisit the evidence and re-evaluate it a fresh a matter outside our mandate. We accordingly reject that invitation.

On the alleged failure of the two courts below to properly appreciate and consider the appellant's defence, the trial court had this to say:

> **"The accused person in his defence stated that he had been framed by his mother in law after he turned down her sexual advances. I however find the defence untruthful in light of the evidence presented. I say so given the fact that there was medical evidence to corroborate the evidence of the complainant that she had been defiled. If PW2 had conspired with the complainant to frame the accused person, how come there was medical evidence to support the assertion that the complainant had been defiled? If it was true that PW2 had indeed framed the accused person for the offence before Court, it would not have been possible for her to also manufacture medical evidence indicating that the complainant had been defiled. I also note that there was no evidence of bad blood between the accused person and the complainant that would have prompted her to conspire with her grand-mother to frame him."**

The High Court had this to say of the appellant's defence:

> **"The defence of the Appellant did not dent the otherwise strong cogent evidence adduced by the prosecution witnesses. The appeal brought by the appellant lacks merit. This Court therefore dismisses the appeal and upholds the conviction and sentence of the trial Court."**

The above excerpts of the record both for the trial court and the High court are sufficient proof that the two courts below properly appreciated and considered the appellants defence and gave reasons for rejecting it, which we find were sound and well-founded both on the facts on the record and in law. We find no merit in this complaint. It is accordingly rejected.

In the totality of the above reasoning, the prosecution's case was proved to the required threshold. Conviction was therefore safe and was rightly affirmed by the High court save for substitution of conviction for the offence charged with conviction for the offence disclosed of incest contrary to **Section 20(1)** of the Sexual Offences Act.

As for the constitutionality or otherwise of the mandatory life imprisonment sentence handled against him by the trial Court and affirmed on appeal by the High court, the Court in the case has already exposed itself:

> **"On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng– v. – Republic [2018] eKLR Kisumu Criminal Appeal No. 2011 and in Jared Koita Injiri v Republic, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & Another v Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the aforestated Supreme Court decision, this Court in Christopher Ochieng v Republic (Supra) stated:**

> **"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….. Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & Another v Republic (Supra), we would set aside the sentence of life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial Court."**

In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & Another v Republic (Supra) and persuaded by the decisions of this Court in Christopher Ochieng v Republic (Supra) and Jared Koita Injiri v Republic, Kisumu Criminal Appeal No. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 years' term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20years term of imprisonment meted upon the appellant. We substitute the 20 years' term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th *September 2015.*

In light of the above current jurisprudential trend on mandatory sentence, we find basis for tempering with the mandatory sentence herein.

We bear in mind the fact that the appellant as a half father to the victim abused his position of trust and severally abused the minor.

The appeal against conviction is dismissed. Save for the substitution of conviction for the offence charged of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the Sexual Offences Act with the disclosed offence of incest contrary to **Section 20 (1)** of the Sexual Offences Act. The appeal against sentence partially succeeds. The mandatory sentence of life imprisonment is set aside and substituted with a sentence of thirty (30) years imprisonment with effect from the date of conviction.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPTY REGISTRAR