IN THE COURT OF APPEAL

AT KISUMU

CORAM: MUSINGA, M'INOTI & MURGOR, JJ.A)

CRIMINAL APPEAL NO.129 OF 2014

BETWEEN

DISMAS WAFULA KILWAKE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Bungoma (Gikonyo, J.) dated 20th April 2014

in

H.C. CR.A. No. 28 of 2012)

****

JUDGMENT OF THE COURT

The ***appellant, Dismas Wafula Kilwake***, was convicted on 14th February 2012 by the ***Chief Magistrate's Court, Bungoma***, for the offence of defilement of a child contrary to ***section 8 (1)*** as read with ***section 8(3)*** of the ***Sexual Offences Act, No. 3 of 2006 (the Act)***. At the material time, ***MA***, the girl whom the appellant was alleged to have defiled, was 14 years old. Section 8(3) of the Act prescribes a sentence of imprisonment of ***not less than*** twenty years for defilement of a girl aged between twelve and fifteen years. Accordingly the appellant was sentenced to the minimum twenty years imprisonment provided by the Act. He was however discharged on the alternative charge of committing an indecent act with a child contrary to ***section 11(1)*** of the Act.

The appellant was aggrieved by the conviction and sentence and preferred a first appeal in the High Court of Kenya at Bungoma, contending, in the main, that the prosecution did not prove its case beyond reasonable doubt; that the trial court ignored his defence; and that the sentence that was meted out was harsh and severe. In the judgment, the subject of this appeal, ***Gikonyo, J***. found no merit in the appeal, dismissed the same and upheld the conviction and sentence, noting that the sentence that the trial court imposed on the appellant was lawful, being the mandatory minimum sentence prescribed by the Act. The appellant was still aggrieved and lodged a second appeal. Before we delve into the merits of the second appeal, it is apposite to set out in brief the background to it.

The prosecution case, constructed around the evidence of five witness, was that the appellant and MA were neighbours at ***[particulars withheld] Village*** in ***Bungoma County***. On 21st October 2009 at about 6.00 pm, MA's mother sent her, her brother, ***KS (PW2)***, and another boy called ***Dedan*** to collect some money from a neighbour. The appellant escorted them on the mission, but on the way back, he led them through a bush, claiming that it was a shortcut back home. He then demanded to be paid for his services, in the form of sex with MA, but when the children failed to oblige, the appellant, who was armed with a *panga*, forced MA to the roadside, fell her down, removed her panties and defiled her. The other children ran away and reported the incident to a neighbour, ***John Wainaina Kareru (PW3)***. A report of the defilement was made at Bungoma Police Station and MA was referred to Bungoma District Hospital, where ***Dr. Adoka*** examined her and subsequently filled a P3 Form. The appellant was arrested later the same day and charged with the offences aforesaid.

When he was put on his defence, the appellant gave an unsworn statement and called one witness. The substance of his defence was that on the material day, a neighbour of his had invited him to a wedding ceremony, but MA's mother arrived and caused a commotion, compelling the appellant to eject her. MA's mother then threatened him with unstated consequences, and the same night the police visited his home and arrested him for alleged offences, which he had not committed.

MA's age was proved by her own evidence in which she stated that she was a standard 6 pupil at ***[particulars withheld] Primary School*** and aged 14 years old, as well as an age assessment report prepared by a dental specialist at Bungoma District Hospital, which confirmed her age

to be 14 years. As regards the fact of defilement, in addition to MA's evidence and that of PW2, the P3 Form prepared by Dr. Adoka and produced in evidence by his colleague, ***Dr. Kisake Mwamu***, found that MA had sustained tears and lacerations in the vaginal walls and the hymen was torn. A vaginal swab showed presence of spermatozoa and the doctor concluded that MA had been defiled. Lastly, on the identity of the person who defiled MA, there was the evidence of MA herself and PW2, who both testified that it was the appellant who defiled her. Both witnesses knew the appellant well because he was their neighbour and was with them from around 6.00 pm when they were sent to collect money. The two courts below believed and accepted that evidence, which we do not see any basis to interfere with.

In this second appeal, the appellant challenges his conviction and sentence on the grounds that the trial court did not comply with ***section 200*** of the ***Criminal Procedure Code***; that the trial court failed to conduct a proper *voir dire* examination of MA; that the High Court was not properly constituted when it heard the first appeal; and lastly that the mandatory minimum sentences prescribed by the Act are illegal.

In a second appeal like this, by dint of ***section 362(1)(a)*** of the Criminal Procedure Code, this Court concerns itself only with matters of law, the issues of fact having been settled in the two courts below. The Court explained its approach in a second appeal as follows, in ***Dzombo Mataza v. Republic*** **[2014] eKLR**

> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court...By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."***

We are satisfied that the issues that the appellant has raised in this appeal are matters of law, which are within our jurisdictional remit.

On the first ground of appeal, the appellant, represented by ***Mr. Mshindi,*** learned counsel, complained that ***Nyakundi, CM*** conducted MA's voir dire examination, but the appellant was tried by ***Ngargar, SRM***. He contended that the *voir dire* examination was part of the evidence on record and that section 200 (3) of the Criminal Procedure Code should have been complied with when Ngargar, SRM, took over the trial, but it was not. He relied on the judgment of this Court in ***Bob Ayub v. Republic*** **(2010) eKLR** and submitted that noncompliance with section 200 of the Code is fatal to the appellant's conviction.

On the second issue, the appellant submitted that the *voir dire* examination of PW2 was not properly conducted and that the then trial magistrate did not determine whether PW2 understood the nature of the oath and whether he should give sworn or unsworn evidence. He cited the judgments of this Court in ***Julius Cheruiyot v. Republic (2016) eKLR*** and ***Patrick Kathurima v. Republic (2015) eKLR*** on the fundamentals of a *voir dire* examination and submitted that the examination of PW2 did not comply with the law, thus vitiating his conviction.

On the third ground of appeal, the appellant submitted that Gikonyo, J. heard the first appeal alone, but it was signed by Mabeya, J. who did not participate in the hearing of the appeal. He further submitted that the hearing was in violation of ***section 359(1)*** of the Criminal Procedure Code, which requires appeals from subordinate courts to be heard by two judges of the High Court, unless, the Chief Justice or a judge he has authorized in writing directs otherwise. The appellant contended that there is no evidence on record to show that the Chief Justice or an authorized judge directed the appeal to be heard by only one judge. He relied on the judgments of this Court in ***Duncan Kamau Njenga & Another v. Republic, Cr. App. No 253 of 2004*** and ***Nzinqo v. Republic (2004) 2 KLR 1*** and submitted that Gikonyo, J. had no jurisdiction to hear the appeal as a single judge and that his conviction was therefore a nullity.

On the fourth and final ground of appeal, the appellant submitted that the mandatory minimum sentences prescribed by the Act are illegal and unjustified. Relying on ***Article 161*** of the Constitution, the appellant submitted that in discharge of its mandate, the Judiciary is only subject to the Constitution and the law and is not subject to the control or direction of any person or authority. It was the appellant's contention that the responsibility of the legislature is to set the maximum sentence for each offence and leave it to the Judiciary to determine the appropriate sentence, depending on the circumstances of each case. Prescription of mandatory minimum sentences by the legislature, it was submitted, was an undue interference with judicial discretion and amounted to usurpation of the sentencing role of the Judiciary. The appellant further urged that mandatory minimum sentences prescribed by the Act ignore individual facts and mitigating circumstances of each offender, the possibility of his or her rehabilitation, and the fact that imprisonment should be a punishment of last resort.

The appellant urged us to follow the reasoning of the Supreme Court of Uganda in ***Susan Kigula & 417 Others v. Attorney General, Const. App. No. 3 of 2006,*** which held the mandatory death sentence to be unconstitutional in Uganda on the basis that by prescribing the mandatory death sentence, Parliament had violated the Constitution by interfering with the administration of Justice, which is a preserve of the judiciary. In his view, the same principle and reasoning should apply to mandatory minimum sentences. He also cited the judgment of the Supreme Court of South Africa in ***S v. Zinn*** and submitted that mandatory minimum sentences deny the courts the opportunity to consider a triad of interests while determining a suitable sentence, namely the seriousness of the offence, the personal circumstances of the offender, and the public interest.

Lastly the appellant relied on the judgment of the Supreme Court in ***Francis Karioko Muruatetu & Another v. Republic (2017) eKLR***, which declared unconstitutional the mandatory death sentence prescribed for the offence of murder. He submitted that on the same footing, the mandatory minimum sentences prescribed by the Sexual Offences Act were unconstitutional because they prescribed the same sentence in all cases without regard to mitigating circumstances or the particular circumstances of each case.

Mr. Mule, learned counsel for the respondent, opposed the appeal on the basis of his written submissions in which he addressed the grounds of appeal in the appellant's self-drawn memorandum of appeal filed on 24th February 2016 instead of the amended memorandum of appeal filed by the appellant's counsel on 29th August 2018. As far as those submissions are relevant to the complaints raised by the appellant, the respondent's contention is that the case against the appellant was not founded on identification by strangers, but on recognition by witnesses who knew him well. Counsel relied on ***Richard Gathecha Kinyaru & Another v. Republic, Cr App. No. 82 of 2013*** and submitted that recognition is more reliable, satisfactory and assuring than identification by a stranger, because it is based on personal knowledge.

The respondent further submitted that the prosecution proved the offence of defilement beyond reasonable doubt because the appellant was positively identified as the perpetrator of the offence; the age of the victim was established, including by medical evidence, as was the fact of penetration. Accordingly the appellant urged us to find the appeal bereft of merit and to dismiss the same.

We have carefully considered the record of appeal, the judgments of the trial and the first appellate courts, the grounds of appeal, the submissions by learned counsel and the authorities that they cited. The first ground of appeal is whether the appellant's conviction is vitiated by what he contends to be failure by the trial court to comply with section 200(3) of the Criminal Procedure Code. That provision provides as follows:

> ***"(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

The record shows that the appellant took plea on 25th October 2009 before Ng'arng'ar, SRM, and the matter was assigned to Court No. 1 for mention before Nyakundi, CM, on 9th November 2009. On the latter date, Nyakundi, CM, set the hearing on 11th November 2009 when he conducted a *voir dire* examination to determine whether MA should give sworn or unsworn evidence. He adjourned the case for further mention on 18th November 2009, to enable the prosecution prepare for the testimony of a vulnerable witness as required by the ***Children's Act***. So on that day Nyakundi, CM, dealt only with the *voir dire* examination and did not take any evidence pertaining to the commission of the offence with which the appellant was charged. On 18th November 2009, the case was re-allocated to Ng'arng'ar, SRM, for hearing on 3rd December 2009.

The record indicates that the actual hearing commenced on 8th March 2010 before Ng'arng'ar, SRM, when MA testified as PW1. She gave sworn evidence because it is patently clear from the *voir dire* examination conducted by Nyakundi, CM, which is on record, that she appreciated the nature of an oath and the duty to tell the truth. The rationale behind section 200(3) is to ensure that the case is determined, as much as is practicable, by a judge or magistrate who had the opportunity of hearing and seeing the witnesses as they testified, so as not to lose the advantage of observing their demeanor and assessing their credibility. That fact was emphasized by this Court in ***Ndegwa v. Republic (1985) KLR 535*** when it stated:

> ***"It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanor and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanor of all the witnesses in the case. A fatal vacuum in this case in our opinion...for these reasons we have stated, in our view the trial was unsatisfactory."***

(See also ***David Geoffrey Gitonga v. Republic [2016J eKLR*** and ***Abdi Adan Mohamed v. Republic [2017])***

All the witnesses in this case testified before and were heard by Ngargar, SRM who ultimately wrote and delivered the judgment. He had the advantage of seeing and hearing the witnesses, observing their demeanor and assessing their credibility.

But there is an additional and compelling reason why we cannot sustain this ground of appeal. MA was 14 years old at the time she testified, a fact that was medically proved. She was therefore not a child of tender years in respect of whom a *voir dire* was mandatory. ***Section 19(1)*** of the ***Oaths and statutory Declarations Act***, cap 15 Laws of Kenya provides as follows:

> ***"where, in any proceeding before any Court... any child of tender years called as a witness does not, in the opinion of the Court ...understand the nature of an oath, his evidence may be received, though not given on oath if, in the opinion of the Court...he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth..."***

The predecessor of the Court in ***Kibageny v. Republic [1959) EA 92***, defined a child of tender years to mean in the absence of special circumstances, any child of any age or apparent age, of under fourteen years. This Court reiterated that view in Patrick ***Kathurima v. Republic*** (*supra*) and ***Maripett Loonkomok v Republic (2016) eKLR.*** To the extent that MA was not below 14 years of age, a *voir dire* examination was not mandatory. Accordingly we are satisfied that there was no violation of section 200(3) of the Criminal Procedure Code and the first ground of appeal has no merit.

The second ground of appeal relates to the *voir dire* examination of PW2, which the appellant contends was not satisfactory. PW2 was 13 years old when he testified and therefore a child of tender years within the meaning of section 19(1) of the Oaths and Statutory Declarations Act. It was therefore necessary to conduct a *voir dire* examination to determine whether he should give worn or unsworn evidence.

In ***Mohamed v. Republic [2008] 1 KLR (G&F) 1175*** and ***Patrick Kathurima v. Republic*** (supra), although this Court recommended verbatim recording of the questions put to the child in a *vior dire* examination and his or her answers thereto, it nevertheless states that it was not mandatory. There is no prescribed and rigid procedure for conducting a *voir dire* examination; the most important thing is that it must establish whether the child of tender years understands the nature of an oath and the duty to tell the truth. In ***James Mwangi Muriithi v Republic [2016] eKLR***, after noting that section 19 of the Oaths and Statutory Declarations Act does not provide a format for *voir dire* examination and that the format has evolved through case law, this Court stated:

> ***"In Sula versus Uganda [2001] 2EA 556 the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then makes its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion***

thereafter."

In this appeal, although the actual question put to the witness by the trial magistrate were not recorded, from the examination the trial magistrate elicited from PW2 that he was 13 years old and a standard 4 pupil at [particulars withheld] Primary School. He attended the ***[particulars withheld] Church*** near Elgon View and knew that it was important to tell the truth otherwise he would burn in hell. From the answers the trial magistrate recorded that PW2 was intelligent enough, understood the duty to tell the truth, and allowed him to give sworn evidence.

For our part, we are satisfied from the record, as the trial magistrate was, that PW2 understood the oath and the duty to tell the truth. The mere fact that the trial court did not record the questions put to PW2, though it was desirable to do so, is not enough to vitiate the *voir dire* examination, because the answers by the witness confirm he understood the nature of the oath and the duty to tell the truth. This ground of appeal too is bereft of merit.

The next ground of appeal is whether the first appellate court was properly constituted when it heard the appellant's appeal. We would have expected the appellant, who was represented by counsel, to have raised this question with the first trial court, for the issue to be settled at that early stage. As he is the one alleging that the court was not properly constituted, the burden was upon him to establish his assertion, which he has failed to do. We must also point out that the record does not bear out his claim that Mabeya, J. who did not participate in the hearing of the appeal, wrote and signed the judgment. The correct position is that it was Gikonyo, J. who heard the appeal and wrote and signed the judgment on 20th April 2014. Upon his transfer from Bungoma, it fell on Mabeya, J. to deliver the judgment prepared by Gikonyo, J., which he did and signed on 20th May 2014. ***Section 200(1) (a)*** of the Criminal Procedure Code, which applies *mutatis mutandis* to the High Court, allowed Mabeya, J. to deliver the judgment as he did. The provision states as follows:

> ***"Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may:***
>
> ***(a) deliver a judgment that has been written and signed but not delivered by his predecessor."(*Emphasis added).**

We are satisfied that there is no merit in this ground of appeal and hereby dismiss it.

The last ground of appeal relates to the mandatory minimum sentences set by the Sexual Offences Act. In ***Hadson All Mwachongo v. Republic*** (2016) ***eKLR,*** this Court stated as follows regarding the sentences prescribed by the Sexual Offences Act:

> "***The Sexual Offences Act provides for punishment for defilement in a graduated scale. The younger the victim, the severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is imprisonment for life. Defilement of a child of 12 years to 15 years attracts 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment."***

To fully appreciate the relevant provisions of the Act, it is necessary to produce in full section 8(1) to (4) of the Act:

> ***"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.* "(Emphasis added).**

For defilement of a child of eleven years or less, the Act provides that the accused person ***"shall...be sentenced to imprisonment for life",*** whilst for defilement of a child between twelve and fifteen years, the offender ***"is liable...to imprisonment for a term of not less than twenty years".*** Lastly, for defilement of a child between sixteen and eighteen years, the Act prescribes that the accused person ***"is liable...to imprisonment for a term of not less than 15 years."*** Therefore, while for the first age bracket the offender "***shall"*** be sentenced to life imprisonment, in the other two age brackets, the offender ***"is liable"*** to imprisonment for ***not less than*** the prescribed number of years. Other than the fact that the Act uses different language, the rationale for the use of the different language is not readily apparent to us.

Since the enactment of the Sexual Offences Act, the above provisions have been interpreted and applied by all the levels of the courts as imposing mandatory minimum sentences. The effect is that irrespective of the circumstances under which the offence is committed and irrespective of any mitigating circumstances, the Act purports to tie the hands of the courts, so that in all cases they must pass the same sentence predetermined by the legislature, based only on the age of the victim.

We have no doubt in our minds that the legislature has the power and legitimate interest to signal the seriousness of an offence by prescribing stiff penalties. The issue however, that is raised in this ground of appeal is whether the legislature can legitimately tie the hands of the judiciary by prescribing rigid and mandatory sentences in all cases without any regard to peculiarities of each individual case.

In ***State v. Tom, State v. Bruce (1990) SA 802 (A), Smalberger, JA***, writing for the majority of Supreme Court of South Africa, made the following pertinent observations about sentencing in general and mandatory sentences in particular:

> ***"The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court ... That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law...***
>
> ***A mandatory sentence runs counter to these principles. (I use the term "mandatory sentence" in the sense of a sentence prescribed by the legislature which leaves the court with no discretion at all -either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence... Harsh and inequitable results inevitably flow from such a situation. Consequently judicial policy is opposed to mandatory sentences...as they are detrimental to the proper administration of justice and the image and standing of the courts.***

And in ***Mithu Singh v. State of Punjab***, ***1983 AIR 473,*** the Supreme Court of India grappled with the same issue when the constitutionality of a provision of law prescribing a mandatory sentence of death was challenged. In holding that the provision was unconstitutional, the Court stated as follows:

> ***"...a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example 'Theft, Breach of Trust' or 'Murder'. The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hall-marks of justice. The mandatory sentence of death prescribed by section 303, with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. In the times in which we live, that is the lawless law of military regimes. We, the people of India, are pledged to a different set of values. For us, law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead."***

The Constitutional Court of Uganda took a similar approach in ***Susan Kigula & 417 Others v. Attorney General*** (supra) when it emphasized that it is the duty of the courts to pass appropriate sentences on persons convicted of crime and that sentencing is an exercise of judicial function rather than of legislative function. The court concluded as follows:

> ***"The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the Constitution."***

Here at home in a judgment rendered on 14th December 2017 in ***Francis Karioko Muruatetu & Another v. Republic***, ***SC Pet. No. 16 of 2015***,the Supreme Court concluded that the mandatory death sentence prescribed for the offence of murder by ***section 204*** of the Penal Code is unconstitutional. While appreciate that the decision had nothing to do with the Sexual Offences Act, we cite it because of the pertinent observations that the apex Court made regarding mandatory sentences. The Court expressed itself thus:

> ***"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 an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right."*** (Emphasis added)

In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.

Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

In this case the victim, MA was 14 years old. The appellant was armed with a *panga*, which he did not use to injure the victim. He was alone in the commission of the offence and was a first offender. He informed the trial court that he was responsible for supporting 10 people including his wife, father and two of his brother's children. The trial court noted that he was remorseful, but felt constrained to impose upon him the sentence prescribed by the Act, which, like the first appellate court, it found to be mandatory. The defilement must have been a horrifying experience for the victim. In these circumstances, a sentence of imprisonment for 10 years would be adequate.

Accordingly we allow this appeal as regards sentence alone. We set aside the sentence of 20 years imprisonment and substitute therefor a sentence of fifteen (15) years imprisonment with effect from the date of sentence by the trial court. It is so ordered.

Dated and delivered at Kisumu this 28th day of March 2019.

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR