Nalianya v Republic (Criminal Appeal E038 of 2022) [2024] KEHC 10398 (KLR) (23 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10398 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E038 OF 2022

DK KEMEI, J

AUGUST 23, 2024

BETWEEN

JOB WAFULA NALIANYA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The Appellant, Job Wafula Nalianya, was charged before the Chief Magistrate's Court at Bungoma in Sexual Offences Case No. E101 of 2019 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that the Appellant, on 6th August 2016 at 1500 hours while at Bungoma West Sub-County within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of IS, a child aged Eight (8) years.
2. The Appellant also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006 The particulars were that the Appellant, on 6th August 2016 at Butonga Sub-Location Bungoma West Sub-County within Bungoma County, intentionally and unlawfully caused his penis to come into contact with the vagina of IS, a child aged Eight (8) years.
3. After a full trial, the learned trial magistrate found the Appellant guilty on the main count and sentenced him to serve life imprisonment.
4. Being dissatisfied with both conviction and sentence, the Appellant lodged this appeal filed on 14th April 2022. In his petition of appeal, the appellant raised the following grounds of appeal which are as follows: -
   i. That the Appellant pleaded not guilty to the said charges.

ii. That the learned trial magistrate erred in law and fact in conducting proceedings that violated the rights of the Appellant. (Article 49(i)(f).

iii. That the learned trial magistrate erred in law and fact in arriving at a decision basing on evidence that were full of contradictions and without analyzing the same.

iv. That the trial court acted with bias by relying on the Prosecution side in the decision making.

v. That the sentence imposed upon the Appellant is harsh and excessive in the circumstances.

5. Subsequently, while filing his written submissions the Appellant also adduced his amended grounds of appeal which are as follows: -

i. That the learned trial magistrate erred in law and facts by failing to note the age of the minor could not have been 10 years.

ii. That the learned trial magistrate erred in law and fact by failing to observe that the medical examination was conducted without his consent.

iii. That the learned trial magistrate erred in law and facts by procuring a harsh sentence of life imprisonment.

iv. That the learned trial magistrate erred in law and fact by failing to consider the Appellant's defence in her judgement.

6. The duty of a first appellate Court was stated by the Court of Appeal, in Gabriel Kamau Njoroge vs. Republic (1987) eKLR (Platt, Apaloo JJA and Masime Ag JA), in the following words:

> " ... it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."

7. The lower Court record indicates that the prosecution called Seven (7) witnesses in support of its case. After a brief voire dire examination, the Court formed the view that the complainant had the intelligence and knew the importance of telling the truth. The court proceeded to allow her to give her evidence under oath.

8. Evidence was led that the complainant recalled on 6th August 2016 at around 3.00 pm while heading to the posho mill from home he met a mad man. The complainant identified the Appellant in Court. She testified that the Appellant held her by the neck and took her into the maize plantation next to the road and ordered her to remove her school uniform and that she obliged. She told the Court she was wearing a black trouser and white full dress and after undressing, the Appellant removed his trouser, his thing he uses to urinate, laid on her and inserted his thing for urinating into her thing. She told the Court that the Appellant started to move it and then got up and went. She told the Court that she felt a lot of pain. She identified the Appellant in Court as the man who defiled her. She testified that she woke up, dressed up and went home. She was soiled and had blood. She stated that she had on a white and red pant and pink blouse. That when she got back home she found her mother and father. She further added that the Appellant took the money she had been given and that the maize bag she was heading with to the Posho mill was left at the scene. She added that she was rushed to Sirisia Sub-County Hospital and then to Bungoma District Hospital. At Bungoma District Hospital, she was

referred to Eldoret Referral Hospital where she received treatment. On cross-examination, she testified that she knows the Appellant as Job Paye and that he was the one who held her down and defiled her. She stated that his name is Job Paye or Job Wafula Nalianya. On re-examination, she stated that she simply recounted what happened to her and that Job Paye or Job Chepkutumi or mad man are one and the same person. She identified the perpetrator as the accused person before Court by pointing towards him in the dock.

9. PW2 was MS who testified that PW1 is his daughter and that she was born on 3rd November 2009. He produced PW1's birth certificate as an exhibit. He testified that on 6th August 2016 at 3 pm while at home he sent PW1 to the posho mill to buy some maize and make flour only for her to come back home with soiled clothes, crying and bleeding from her private parts. He stated that she had on a pink blouse and a dress white and black in colour. He identified the clothes as the ones in Court. He rushed PW1 to Sirisia Sub-County Hospital but they were referred to Bungoma District Hospital and later to Eldoret Referral Hospital. That PW1 was admitted at the hospital for four months and that he did not witness the incident. On cross examination, he stated that he did not see the Appellant commit the act and that he knew the Appellant from the point the incident occurred. He added that he knows the accused as Job Paye but that his real name is Job Wafula Nalianya.

10. PW3, Isaac Juma Busulu, testified that on 6th August 2016 while at Butonge market on a ladder building a house for a customer, he saw somebody in the maize plantation and did not understand what he was doing there. He stated that the maize plantation was about 50 meters from where he was and that there was only one person there. He recognized the person as Job, the Appellant herein. He stated that the Appellant was wearing blue jeans and a red t-shirt. After about 20 minutes, he heard a child had been defiled and on enquiring, he was informed that it was the Appellant herein. In the company of others, they went in search of Job and found him in his house and that he had blood stains on the fly of his jean trouser and mud on the knees. They arrested him and left him with one security and rushed PW1 to the hospital. He identified the Appellant as the person they arrested. On cross examination, he stated that he knows the Appellant as the Appellant takes care of cows for his neighbour and that he saw him in the maize plantation but did not see him committing the act. He added that the Appellant is not a mad person.

11. PW4, Joseph Wanyonyi Nadalo, testified that she knows the Appellant and knew him even prior to the incident that occurred on 6th August 2016. She testified she was informed of what he had done and that on 7th August 2016 when he visited the scene he saw dry blood stains and an empty bag. He referred to a photograph of the scene showing what he saw. On cross examination, he testified that he knows the Appellant very well and knows him as Job.

12. According to PW5, Elias Adoka, who testified that he is a clinical officer at Bungoma County Hospital. He testified that PW1 was seen on 16th August 2016 and on examination she was oozing blood from her private parts and who claimed that she had been defiled. He stated that the complainant had a 3rd degree rectal vaginal fistula. That they referred her to Eldoret Moi Teaching and Referral Hospital for further treatment. His prognosis was that a 3rd degree tear with recto vaginal fistula was due to defilement. On cross-examination, he stated that he took down her history and noted what he observed. He added after his examination of complainant, he concluded that she was defiled and that he does not know the culprit.

13. PW6 was Pamela Nafula Nyongesa, who testified that he is a clinical officer at Sirisia Sub-County Hospital. According to her, she is the one who filled the P3 form on 22nd August 2016. During the examination of complainant, she observed that she had changed her clothes and who informed her that she had been defiled on 6th August 2016. She observed that the complainant was bleeding a lot and that

they were unable to control the same and thus referred her to Bungoma County Referral hospital. On examination of complainant's genital area, she observed that she had a bleeding vagina with 3rd degree tear with fistula and that she opined that she had been defiled. She produced the P3 form as P exhibit 6. On cross examination, she stated that she established that the complainant was defiled and that she does not know who defiled the complainant herein.

14. PW7 was No. 86346 Corporal Sesaria Andino Bruno, who testified that he is currently attached to Kaloleni Police Station Kilifi County but that he used to be stationed at Sirisia Police Station in Bungoma County. According to him, on 6th August 2016 they were summoned to Butonge sub-location at around 5 pm with information that someone had defiled a minor. On arrival, they found the suspect had been taken to AP post at Butonge while the victim was taken to Sirisia Hospital. He proceeded to record the statement of PW3 who informed him that he saw the Appellant running away thus prompting him to raise an alarm and that the members of the public arrested him. On 7th August 2016, he proceeded to the scene where he noted blood mixed with soil on the spot. He took photographs of the scene and produced the same in Court as P Exhibit 4a to 4c He produced the complainant's copy of birth certificate and baptismal card that indicated that she was 8 years old at the time of the incident, as P Exhibit 5 and P Exhibit 11 respectively. He produced the complainant's black and white dress; pink sweater, 5kg maize bag and certificate of photograph, as P Exhibit, 2, 3 and 12 respectively. He added that the incident occurred at 3 pm when there was sunlight and that PW3 saw the Appellant in that same maize plantation. On -cross examination, he stated that the Appellant was apprehended by members of the public and taken to Butonge AP Camp and that PW3 saw the Appellant running away from the maize plantation. He added that the complainant identified the appellant.

15. By a ruling dated 10th August 2021, the Appellant was found to have a case to answer after the court found that the Prosecution had established a prima facie case and accordingly put him on his defence. He gave a sworn evidence and in which he stated that on 5th August 2016 he was in Kisumu as he operates his boda boda there and on returning on 6th August 2016 he saw a lot of people at Butonge market and he was informed that someone had defiled a child. He proceeded home and on his way three people followed him wanting to know where he was from. He was later attacked because he is tall as the child had indicated that the person who defiled her was tall. On cross examination, he stated that he travelled from Kisumu to Butonge on 6th August 2016 using his motor bike and that he travelled alone. On arriving at Butonge, he was informed that the child of one M had been defiled and that he did not know any M. He added that his brother enabled him to go to Kisumu.

16. The appeal was canvassed by way of written submissions. Both parties filed and exchanged their respective written submissions.

17. Upon a careful reconsideration and evaluation of the evidence on record, and taking into account all the submissions made by both the Appellant and the Respondent and further upon careful consideration of the law, the following issues arise for determination: -

    i. Whether in the final analysis the prosecution proved the case against the appellant beyond any reasonable doubt.

    ii. Whether the sentence meted out on the Appellant was excessive in the circumstances.

18. This being a first appellate Court and as is expected, is obliged to analyse and evaluate afresh all the evidence adduced before the trial Court and draw its conclusions while bearing in mind that it neither

saw nor heard any of the witnesses. (See Okeno vs. Republic [1972] EA 32) where the Court of Appeal set out the duties of a first appellate court as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

19. Similarly, in Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " 1) An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> 2) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

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

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

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

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

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

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

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

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

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

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

21. On the 1st issue, the key ingredients for the offence of defilement are therefore, age of the victim, the fact of penetration and whether the appellant herein was properly and positively identified as the culprit. See the case of Dominic Kibet Mwareng V Republic [2013] eKLR in which the above ingredients were highlighted.

Proof of age of the Complainant.

22. It was the complainant's evidence that she was aged 10 years at the time of the alleged incident. PW7, the investigating officer testified produced in Court PW1's copy of birth certificate and baptismal card that proved that she was 6 years old 8 months and 34 days at the time the incident occurred which was on, 6th August 2016. (P Exhibit 5 and 11).

23. In the case of *Hilary Nyongesa Vs Republic Eldoret Criminal Appeal, No. 123 of 2009* the court stated that:

> " Age is such a critical aspect in Sexual Offences that it has to be conclusively proved.... And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim."

24. In the case of Kaingu Elias Kasomo -V- R Malindi Cr. App. No. 504 of 2010 the Court of Appeal stated that:-

> " the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence.......... Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the *Sexual Offences Act*, the practice has been that age assessment of defilement victims is carried out by dentists. The said assessments while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial court heard the minor's evidence and saw her. The court was convinced that she spoke the truth."

25. In *Musyoki Mwakavi –VS- Republic Machakos High Court Criminal Appeal No. 172 of 2012*, the court was of the view that:-

> " ...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense...".

26. In the case of Edwin Nyambaso Onsongo Vs Republic (2016) eKLR, in which the court cited the case of Mwolongo Chichoro Mwanyembe Vs Republic, Mombasa Criminal Appeal No.24 Of 2015 (UR) the Court of Appeal held that: -

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the

parents or guardian or medical evidence, among other credible forms of proof." "... we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.

27. It is also worth noting that Rule 4 of the Sexual Offences Rules of Court Rules recognizes that:

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

28. It is clear from all the authorities cited above that a birth certificate, baptismal card, the medical records and the evidence given by the complainant herself or her parents are conclusive proof of age of the complainant. The trial Court herein made reference to the evidence of the minor and the availed birth certificate and baptismal card as sufficient proof that the complainant was 6 years old at the time of the incident and the age as quoted in the charge sheet, 8 years, did not prejudice the Appellant as 6 years or 8 year fall within a similar age bracket when considering the aspect of sentence. It is therefore sufficient to say that the age of the minor was proved beyond any reasonable doubt.

Proof of penetration

29. It is the complainant's evidence that she was defiled by the Appellant. She stated that the Appellant accosted her while she was on her way to the posho mill, grabbed her by the neck and led her into the maize plantation where he took off her clothes and took off his trouser and inserted his penis into her vagina.

30. PW5 and PW6 stated that they examined the minor in different facilities and noted that her hymen was torn, she had extreme vaginal bleeding and a 3rd degree tear with fecal matter into her vagina. He also noted that she had fistula. They both concluded that she was defiled and as a result experienced a septic 3rd degree tear thus rectal vaginal fistula.

31. The Appellant denied having defiled the minor.

32. Section 2 Of The *Sexual Offences Act* provides that: -

> " Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

33. In George Owiti Raya Vs Republic [2013] eKLR it was held that: -

> " There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul-smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane."

34. In the case of Erick Onyango Ondeng V. Republic (2014) eKLR the Court of Appeal held as follows on the aspect of penetration:

> " In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

35. In his Judgment in the present case, the trial court held that

> "......the complainant's evidence was corroborated by that of PW5 and PW6 who were clinicians who saw the complainant.
>
> PW5 state that we examined the complainant and she had blood oozing from her vagina and suffered 3rd degree tear with recto-vaginal fistula and referred her to Moi Teaching Referral Hospital.
>
> They concluded that it was a case of defilement and classified the injury as grievous harm.
>
> Similarly, PW6 made the same finding and referred the complainant for further treatment at Bungoma Referral Hospital. She concluded that she classified injuries as grievous harm."

36. From the above, it is clear that the minor had been engaged in sexual activity and that the clinical officers (PW5 and PW6) confirmed the same. I am thus satisfied that penetration was proved by the prosecution to the required standard.

37. As an appellate Court, i am satisfied that the conclusions reached by the learned trial magistrate on the question of penetration were sound, and i accordingly confirm the same.

Whether the Appellant was positivity identified by the minor as her assailant.

38. It was the complainant who witnessed the Appellant defile her and that makes her a sole eye witness and the victim of the sexual assault. This Court cautions itself on the danger of relying on the uncorroborated evidence of the complainant whilst relying on the dictates of Section 124 of the *Evidence Act*. Section 124 of the *Evidence Act* is on the following terms:

> " 124. Corroboration required in criminal cases
>
> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

39. As noted in The Kenya Judiciary Criminal Procedure Bench book, ibid at paragraph 95 the exception to requirement for corroboration is circumscribed as follows:

> " 95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (lsaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of2009; *Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No. 111 of 2011*)."

40. There are reasons within the meaning of Section 124 Proviso of the *Evidence Act* for this Court to believe that the complainant was telling the truth in view of her being the sole eye witness to the heinous ordeal. The section is an exception to the rule for corroboration to evidence of children which, is based undoubtedly on the good sense and principle of best interests of the child and the usual occurrence of sexual offences in circumstances where there may be no witness other than the victim, but which must in the interest of fair trial of accused persons be used sparingly and only where the circumstances fit the situation contemplated in the law that there is no other evidence available but a sexual offence crime should not go unpunished for lack of corroboration of the victim's sole evidence. It is a cardinal principle of the law on corroboration that evidence which itself requires corroboration cannot corroborate other evidence. I find that the exceptional provision of Section 124 of the *Evidence Act* was properly invoked in this case. Further, it was the evidence of PW3 that while scaling a ladder at a certain building, he was able to see the Appellant inside a maize plantation and that he rushed to the scene where he saw some bloodstains and soil and that he together with other villagers flushed out the Appellant from his house where they found that the fly area his jeans trouser had some bloodstains as well as soil on the knee area. It is thus clear that the Appellant was the assailant.

41. On the ground that the trial learned magistrate did not consider the defence of the Appellant, at page 49 of the of the record, the trial magistrate considered the defence and stated that she rejected his defence as the evidence as availed by the Prosecution in support of the charge was overwhelming and pointed at nothing but the guilt of the Appellant. The trial court did consider the defence of the appellant and gave reasons for rejecting it. I have considered the defence tendered. It was a mere denial as the evidence of PW3 suggests that he was indeed seen at the scene of the crime prior to the incident. When PW7 visited the scene, he found the maize bag which the complainant was heading with to the posho mill and that there was blood mixed with soil as per P exhibit 5. There was absolutely no reason why the young girl could frame the Appellant yet there was no grudge between him and her family. It is also noted that the incident took place during the day and that the complainant had no difficulty in identifying the appellant whom she had known previously. In the circumstances, it is my finding that the finding on conviction by the learned trial magistrate was quite sound and ought to be upheld.

Whether the sentence imposed by the Hon. Magistrate was harsh and excessive.

42. In respect of this limb, it must be noted that the sentences provided in terms of Section 8(1) and (2) of the *Sexual Offences Act* provides that: -

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

    8(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.

    8(3) ....

43. In the instant case, the Appellant was sentenced to life imprisonment. In mitigation, he stated that the period he spent in custody be considered during his sentencing. It is to be noted however, that the Appellant behaved irresponsibly and betrayed the trust the community had in him of protecting its young people, especially the girl child but went against the same and became a predator.

44. In Wanjema v Republic [1971] EA 493, the predecessor of this Court stated that: -

> " [The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account

some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

45. In a recent decision by the Supreme Court in Petition No. E018 of 2023 Republic v Joshua Gichuki Mwangi, Koome CJ & P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ overturning the Court of Appeal judgement granting Judges and Magistrates power to hand sex offenders lesser sentences, affirming mandatory sentences as provided in the *Sexual Offences Act*. The Court held that:

SUBPARA i.

Judges of the Court of Appeal acted ultra vires and without jurisdiction by assuming original jurisdiction on constitutional matters which were not raised at the High Court while canvassing the minimum mandatory sentences question;

i. In departing from the decision on minimum mandatory sentences for sexual offences as stated in *Muruatetu & another v Republic S.C Petition 15 & 16 of 2015*) [2021] KESC 31 (KLR)(Muruatetu directions) the learned judges of the Court of Appeal violated the principles of stare decisis and proceeded to determine that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*;

ii. Mandatory minimum sentences do not deprive judicial officers of the power to exercise judicial discretion. However, minimum sentences set the floor rather than the ceiling when it comes to sentences with that which is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence.

iii. That the Court of Appeal on the issue of the constitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. Thus, creating inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system.

iv. The Respondent who had been released should serve the remainder of his sentence from the date of conviction by the trial Court.

The erudite Judges reaffirmed that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. Thus, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law."

46. In the instant case, the Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* 2006 which provides that upon conviction the offender shall be sentenced to life imprisonment

47. The victim of defilement was aged six (6) years old at the time of the offence, hence the victim has been psychologically scarred for the better part of her life. Her innocence was stolen by a person who ought to be her protector. The sentence provided for under Section 8(2) of the *Sexual Offences Act*

is life imprisonment. It is instructive that the complainant had to be hospitalized for four months undergoing reconstructive surgery since her sexual organs were severely damaged as she suffered fistula. Accordingly, I find no reason to interfere with the judicial discretion of the trial Court on sentence.

48. In the result the appeal fails. The appeal against conviction and sentence lacks merit and is dismissed.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF AUGUST 2024.

D. KEMEI

JUDGE

In the presence of:

Job Wafula Nalianya Appellant

Miss Kibet for Respondent

Kizito Court Assistant