Kibet v Republic (Criminal Appeal E070 of 2022)
[2024] KEHC 16848 (KLR) (19 August 2024) (Judgment)

Neutral citation: [2024] KEHC 16848 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E070 OF 2022

RN NYAKUNDI, J

AUGUST 19, 2024

BETWEEN

TITUS KIMNGETICH KIBET ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Eldoret by Hon. Emily Kigen in Eldoret Criminal Case Number E251 of 2021 and delivered on 17th May 2022)

JUDGMENT

Representation:

M/s Rioba Omboto & Co. Advocates for the Appellant

Mr. Mark Mugun for the ODPP

1. The Appellant was charged with defilement contrary to section 8(1) as read together with section 8(2) of the *Sexual Offences Act* No.3 of 2006. Initially the Appellant was charged with defilement contrary to section 8(2) as read together with section 8(4) of the *Sexual Offences Act* No. 3 of 2006, which issue the trial Magistrate dealt with and held that the charge sheet was curable in the reading of the judgement thereto.

2. When the Accused was brought before the trial court he pleaded guilty to the charge and was sentenced to serve life imprisonment. Being aggrieved, the Appellant lodged a Petition of Appeal to this Honourable Court against the conviction and sentence of life imprisonment for the offence of defilement contrary to section 8(1) as read together with section 8(2) of the *Sexual Offences Act*. The appeal is premised on the following grounds: -

a. That I am aggrieved the trial court erred in law and fact as it failed to hold that the charge sheet was fatally defective.

b. That the Trial Court erred in law and fact as it failed to observe that the witness evidence was inconsistence and uncorroborated.

c. That the Trial Court erred in law and fact by failing to hold that this case was not proved beyond doubt.

d. That the Trial Court erred in law and fact by convicting on manifestly insufficient persecution evidence.

e. That the Trial Court erred in law and fact by failing to consider the Appellant defense evidence.

f. That I am aggrieved the trial court erred in law and fact as it failed to hold that the evidence of identification and recognition was not conclusive.

g. That the trial Magistrate erred in law and fact by shifting the burden of prove from the prosecution backyard to the Appellant when the evidence failed to link him to the offence.

3. This Appeal was vehemently opposed by the prosecution.

Appellant's case summary

4. The Learned Counsel for the Appellant submitted 3 issues for determination by this Honourable Court as follows:

i. Whether the charge sheet is defective?

5. On this issue, Learned Counsel for the Appellant submitted that the Appellant was charged with Defilement contrary to section 8(2) as read with section 8(4) of the *Sexual Offences Act* of 2006. Further, the Appellant was charged with an alternative charge being an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* no. 3 of 2006. Counsel stated that it's the Appellant's submission that the charge sheet is defective as the Appellant has been charged under section 8(2) as read with section 8(4) of the *Sexual Offences Act* and that the victim of the offences was a minor aged 9 years old and the charge sheet ought to have been premised on section 8(1) and 8(2) and not under section 8(2) as read with section 8(4) of the Act. That failure to invoke the correct provision of the Law led to the passing of an illegal sentence on the Appellant.

ii. Whether the prosecution proved their case beyond reasonable doubt.

6. The learned Counsel for the Appellant submitted that the Appellant faces a charge of defilement whose offence of the defilement is rooted on three main ingredients being the age of the victim, (must be a minor), penetration and proper identification of the perpetrator and that the essential ingredients in the offence of defilement is penetration and the big question which the counsel posed is when the defiled minor supposed to be examined? He stated that it is trite law that the victim is supposed to be examined immediately after the incident probably before taking a shower or changing clothes.

7. In this particular case the minor was allegedly defiled on 16/08/2021, reported to police 20/08/2021 and taken to hospital on 26/08/2021 and P3 form filled on 27/08/2021 and make it to 10 days. He relied on the case of Joseph Kipkoech Tangus Vs Republic (2015) eKLR where it was held "the delay of reporting the incident as seeking medical attention was not explained. An unexplained delay of six or eight days in a case of this nature is too long unless there is an eye witness to corroborate the evidence."

iii. Whether the sentence of Life imprisonment should stand

8. The learned counsel for the Appellant submitted that the Appellant instituted the appeal on the basis of the mandatory nature of his life sentence which has been declared unconstitutional and further that it is inhumane and against the principles of sentencing to sentence the Appellant to life imprisonment. He relied on the following cases to advance his arguments on this issue;

    a. Julius Kitsao Manyeso Vs Republic (2023) eKLR

    b. R Vs Bieber (2009) 1WLR 223

9. The counsel for the Appellant finally submitted that it is the Appellant's submission that the conviction and sentence to Life "imprisonment" is unconstitutional and that it is inhumane and goes against the provisions of Article 25 and 27 of *the Constitution* of Kenya.

Prosecution case Summary

10. The learned Counsel for the prosecution listed 3 issues for determination by this Honourable Court as follows:

a. Whether the Charge sheet is defective

11. Counsel submitted that in his grounds of appeal and submissions, the Appellant contended that the charge sheet is defective for the following reasons:

    a. The appellant was charged under section 8(2) of the *Sexual Offences Act*;

    b. The appellant was charged under section 8(4) of the *Sexual Offences Act*;

    c. The evidence was at variance with the charge sheet;

    d. The particulars of the offence are unrelated and irreconcilable to the above-mentioned sections of the law.

12. He stated that the principle governing charge sheets is that an accused should only be charged with an offence known in law. This must be disclosed and stated in a clear and unambiguous manner so that the accused pleads that specific offence and can prepare his defence based on that specified charge. It otherwise becomes duplicitous. The rule against duplicity arises from the provisions of section 134 of the *Criminal Procedure Code*. The section provides:

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

13. He relied in the case of Cherere s/o Gukuli v Republic [1955] 22 EACA to support his argument. He also relied in the book, "Essentials of Criminal Procedure" by Law Africa Publishing Limited at page 78, by Patrick Kiage (now Judge of Court of Appeal) where he describes a duplex charge sheet as follows: "Any count that charges within it more than one specific offence is said to be bad for duplicity. It is also said to be duplex. It is a fundamental mistake and not normally curable. The reason for this is that when a charge is duplex and an accused person goes through a trial, the fairness of the process is fundamentally compromised as it is not clear to him what the exact charges that confront him are. As

a result, he may not be able to prepare a proper defence and this is clearly prejudicial and may amount to a failure of justice."

14. The prosecution counsel also stated that Turning back to the case at hand, the charge sheet reads as follows:

> " Charge: Defilement contrary to section 8(2) as read together with section 8(4) of the *Sexual Offences Act* No 4 of 2006.
>
> Particulars of the Offence: Titus Kimngetich Kibet on the 16th Day of August 2021 in Keiyo South sub-county within Elgeyo Marakwet Count, intentionally and unlawfully caused your genital organ (penis) to penetrate the genital organ (vagina) of SJ a girl aged 9 years."

15. He submitted that they will be the first to admit that it is indeed incontrovertible that the charge sheet suffered from the following three material defects:

    a. The accused was charged with two specified offences within the same count. These are penal, and not definitive sections of the law. Section 8(2) being the penal section prescribing a penalty of life imprisonment for a person charged with defilement of a child the age of 11 years old or under. Section 8(4) is the penal section that prescribes imprisonment for a term of not less than 15 years for any person convicted of defiling a minor aged between 16-18 years old.

    b. The evidence adduced on age was in dissonance with the specified offence.

    c. The particulars of the charge did not support any of the specified sections of the law.

16. On account of the apparent defects, learned prosecution counsel posed the next question to be answered is whether the provisions of section 382 CPC can be invoked to cure the defect. Together with that, the other issue to be determined is section 179 CPC can be invoked, as was by the trial magistrate, to sustain the charge. Counsel made reference to section 382 CPC and the case of Benard Ombuna v Republic [2019] eKLR.

17. The prosecution counsel further submitted that the complainant's age is a crucial element of the offence of defilement, not only for purposes of establishing the charge, but also a relevant factor in the sentence to be imposed. It must be stated with specificity and proved beyond doubt, as a key ingredient of the offence of defilement. It was his submission that looking at the trial court record, despite it being a key ingredient, it is apparent that the Appellant did not pose any challenge on the issue of the complainant's age and that this may be down to the fact that he already knew the complainant was aged 9 years old, or he was unaware that the age was a key ingredient, or his defence was genuinely prejudiced by the defect in the charge sheet.

b. Whether section 179 CPC was properly invoked.

18. Learned Counsel for the prosecution submitted that the aforementioned section 179 of the CPC reads thus:

    1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

    2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although not charged with it.

19. He also relied on the case of Francis Kahindi Mwaiha v Republic [2015] eKLR to buttress his argument. He continued by stating that it is obvious that the intention of section of section 179 CPC was to allow a court to sustain a conviction on a charge that is:

    a. Minor; and

    b. Cognate to the more serious offence that the accuse was initially charged with.

20. A conviction under section 8(2) *Sexual Offences Act* attracts a mandatory sentence of life imprisonment and that under section 8(4) of the *Sexual Offences Act* attracts a sentence of not less than 15 years' imprisonment. Further, the prosecution counsel submitted that it is clear therefore that the offence under section 8(4) is minor and cognate to that one under section 8(2) and therefore, it behooves them as officers of this Honourable Court to concede that it was improper for the trial court to invoke section 179 and 382 CPC to cure the defect in the charge.

c. Whether section 214 CPC was duly complied with.

21. The learned prosecution counsel submitted that the Republic readily admits that it appears that the first time the defect in the charge sheet was noticed was when the learned trial magistrate was pondering over her judgement and they also hastily concede that the defect in the charge sheet was amended or corrected for the first and only time, in the judgement of the trial court. In amending the charge, the trial court was alive to the fact that there was a problem as to the age of the complainant vis-à-vis the sections which the Appellant was charged with. He made reliance to section 214 of the CPC and the case of Jon Cardon Wagner v Republic & 2 Others [2011] eKLR to buttress his argument on this.

22. It was also the prosecution counsel's submission that going by the foregoing, it would appear that the trial court erred in curing the defective charge sheet by amending it at the time of delivering the judgement and that the Appellant was not given a chance to recall or further cross-examine any of the witnesses, if he so desired, before the judgement was delivered.

d. Justification for Re-Trial

23. The prosecution counsel relied in the case of Fatehali Manji v Republic [1966] EA 343 when dealing with the same issue of re-trial, which gave the following guideline:

    i. In general, a retrial will be ordered only when the original trial was illegal or defective;

    ii. it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial;

    iii. even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;

    iv. each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it."

24. He also put reliance in the case of Muiruri v Republic [2003] KLR 552. Further, counsel submitted that they have already conceded to the fact that there were illegalities or defects in the original trial as the appellant was arrested in 2021 and arraigned in court immediately thereafter and convicted in 2022 which was less than 2 years ago.

Analysis and Determination

25. I have perused and considered the submissions filed by the Appellant as well as the submissions filed by the Director of Public Prosecutions.

26. This being a first appeal, the primary duty of this court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions as to whether or not to uphold the decision of the trial court. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. The Supreme Court of India explained the duty of a first appellate court in K. Anbazhagan v State of Karnataka and Others Criminal Appeal No. 637 of 2015 as follows: -

> " The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

27. Having considered the grounds of appeal, and evidence adduced before the trial court, I shall proceed to determine the issues as follows;

    a. Whether the Charge was defective

    b. In that regard, I shall first deal with the issue of defective charge sheet. The law on the same is stipulated under section 234 of the *Criminal Procedure Code* which provides that:

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

    c. Further, in the case of; Thomas Mutune v Republic [2020] eKLR, the Court of Appeal stated as follows:

> The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence which such an accused is charged with should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence to the charge. This principle of the law has a constitutional under pinning. However, whatever the irregularity, it is not to be regarded as fatal unless there is prejudice to the person who is charged. It is the substance that the court must seek to ascertain. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection

of innocence. Neither can be done if the shadow is mistaken for the substance and the ball is lost in the labyrinth of insubstantial technicalities."

d. Furthermore, in the case of Jason Akumu Yongo v Republic [1983] eKLR the Court of Appeal stated as follows:

> In our opinion, a charge is defective under section 214(1) of the *Criminal Procedure Code* where: a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; orb)it does not, for such reasons, accord with the evidence given at the trial; orc)it gives a misdescription of the alleged offence in its particulars."

e. Similarly, in the case of Benard Ombuna v Republic [2019] eKLR the Court of Appeal stated as follows:

> 15. In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

f. In addition to the afore legal principles, section 382 of the *Criminal Procedure Code* states that:

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, 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..."

g. However, in this instant case, I note that the learned Counsel for the Appellant stated that the charge sheet is defective as the Appellant had been charged under section 8(2) as read with section 8(4) of the *Sexual Offences Act* and that the victim of the offences was a minor aged 9 years old and the charge sheet ought to have been premised on section 8(1) and 8(2) and not under section 8(2) as read with section 8(4) of the Act. It was his contention that failure to invoke the correct provision of the Law led to the passing of an illegal sentence on the Appellant.

h. On the other hand, the prosecution Counsel submitted that in his grounds of appeal and submissions, the Appellant contended that the charge sheet is defective for the following reasons; the appellant was charged under section 8(2) of the *Sexual Offences Act*; the appellant was charged under section 8(4) of the *Sexual Offences Act*; the evidence was at variance with the charge sheet and the particulars of the offence are unrelated and irreconcilable to the above-mentioned sections of the law.

i. The Prosecution counsel also submitted that they would be the first to admit that it is indeed incontrovertible that the charge sheet suffered from the following three material defects: the accused was charged with two specified offences within the same count. These are penal, and not definitive sections of the law. Section 8(2) being the penal section prescribing a penalty of life imprisonment for a person charged with defilement of a child the age of 11 years old

or under. Section 8(4) is the penal section that prescribes imprisonment for a term of not less than 15 years for any person convicted of defiling a minor aged between 16-18 years old; the evidence adduced on age was in dissonance with the specified offence and the particulars of the charge did not support any of the specified sections of the law.

j. Thus the key issue is whether the charge sheet was defective in such a manner that the accused was prejudiced by the trial and/or outcome. In the instant matter, the manner in which the charge is framed clearly states the offence, particulars of the charge which indicates: date, time, place when the offence was allegedly committed. Thus all the particulars are clearly spelt out in the charge sheet.

k. In addition, the Appellant fully participated in the trial answering to the charge to defence case. Therefore, it is the finding of the court that, the particulars of the charge were adequate to have informed the appellant of the offence he was charged with and he indeed pleaded not guilty thereto when the same was read out and fully participated in the case. Thus he was not prejudiced in any way and the argument on defective charge is dismissed.

a. Whether the life imprisonment sentence should stand.

l. Mandatory minimum sentences be either in *Sexual offences Act*, or the penal code or any other prescribed minimum penalty in Kenya as a formal punishment is no longer tenable following the new advent of jurisprudential case law by the apex courts. In this instance, the court of Appeal has pronounced itself severally on this issue of mandatory minimum sentences as can be appreciated in the case of Julius Kitsa Manyeso v Republic determined as follows:-

> the reasoning in Francis Karioki Muruatetu & Another v Republic eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination unfair and repugnant to the principles of equality before the law under Article 27 of *the constitution*," Further that an indeterminate life sentence is in our view also inhumane treatment an violates the right to dignity under Article 28...an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

m. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it's entirely so as to arrive at appropriate sentence. The Court of Appeal in Thomas Mwambu Wenyi v Republic [2017] eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira v State of Mahareshtra at paragraph 70-71 where the court held the following on sentencing:

> Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of

proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

n. Also in the case of Francis Karioko Muruatetu & Another v Republic (Supra) where the Supreme Court stated the guidelines and mitigating factors in a re-hearing on sentence were discussed. The judiciary has also developed Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 which should be considered.

o. I am in full agreement with the decision of Mativo, J (as then was) in Edwin Wachira & Others Versus Republic; Mombasa High Court Petition No. 97 of 2021 that "To the extent that the provisions of sections 8(2), (3), (4), 11 (1), 20 (1) and 3(3) of the *Sexual Offences Act* deprive the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case, then the said provisions offend the notion of a fair trial contemplated under Article 50(1) of *the Constitution* of Kenya, 2010."

p. A glimpse of the Appellant's Appeal clearly calls for a re-hearing of the sentence imposed. Article 50 (2) (p) of *the constitution* provides as follows:

> Every accused person has the right to a fair trial, which includes the right—
>
> p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

q. Article 50(6) further provides for conditions under which one can petition for a new trial, which in this case is a new trial only on sentence. The provision speaks in the following terms.

> (6) A person who is convicted of a criminal offence may petition the high court for a new trial if: -
>
> a. The person's appeal, if any, has been dismissed by the highest court to which the person is entitle to appeal, or the person did not appeal within the time allowed for appeal; and
>
> b. New and compelling evidence has become available.

r. The foregoing provisions are instructive in matters brought before the high court for a new trial. The Appeal before me seeks a new trial only on sentence. So that then my mandate is to view the Appeal through the lens of Article 50 (2)(p) and (6) and determine whether the same is proper for a new trial only on sentence.

s. There are circumstances under which the court can alter or decline to vary the sentence meted out. That is entirely at the discretion of the court. I have gone through the record of the court's decision in the criminal trial, the judgment and sentence. I have noted the circumstances under which the offence was committed. I have also read the sentencing record of the court. The petitioner's counsel offered mitigation which the court considered before it sentenced the petitioner to the only sentence then allowed in law. In other words, the mitigation did not mean anything and that is precisely what the Supreme Court called unfair trial since with or without mitigation the court would still impose death penalty.

t. The offence of defilement contrary to the provisions of Section 8(1) and 8(2) attracts life imprisonment. I am of the considered view that life imprisonment is such indeterminate sentence

that deprives one off humane treatment and courts are now embracing sentences that will achieve the objectives of sentencing. The Court of Appeal in the case of *Manyeso v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR)

> we are of the view that the reasoning in Francis Karioko Muruatetu & another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

u. In R v Bieber [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows:

> The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...".

v. From the foregoing authorities, it is evident that mandatory sentences and particularly life imprisonment is unlawful. I form the opinion that life imprisonment in its nature is pegged on the accused's balance of years until death. It results to ambiguity for both the society and the accused person. Such indeterminacy undermines the goals of rehabilitation and is inconsistent with the principles of justice and fairness which are at the heart of our criminal justice system.

w. Having said so, I have considered The Sentencing Policy Guidelines, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.

x. In Dismas Wafula Kilwake v Republic [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:

> [W]e 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.

y. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors.

z. Section 333(2) of the *Criminal Procedure Code* provides that in sentencing, where an accused person was in remand custody the period spent in custody should be taken into account. It reads:

> Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to conclude the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

aa. I have considered the Appeal and all the information available. Given that mandatory sentences are now outlawed same as indeterminate sentences, I am inclined to interfere with the life sentence imposed and substitute it with a lesser sentence of 25 years' imprisonment. The Appeal therefore succeeds on the issue of life sentence and in considering the provisions of section 333(2) of the CPC the sentence shall run from the date of conviction at the trial court.

DATED SIGNED AND DELIVERED AT ELDORET, THIS 19TH DAY OF AUGUST 2024

.....

R. NYAKUNDI

JUDGE