**Owandho v Republic (Criminal Appeal E024 of 2022)**
**[2023] KEHC 178 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 178 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT SIAYA**

**CRIMINAL APPEAL E024 OF 2022**

**RE ABURILI, J**

**JANUARY 20, 2023**

**BETWEEN**

**NICHOLAS OWINO OWANDHO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal against the judgement by the Hon. S.W. Mathenge on the 28.2.2022 & subsequent sentence passed on the 4.08.2022 in the Principal Magistrate's Court in Bondo in Sexual Offence Case No. E012 of 2021)***

**JUDGMENT**

## Introduction

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) (3) of the *sexual Offences Act* no.3 of 2006. The particulars of the charge were that that on the 24th January, 2021 at about 2000 hours in Rarieda sub-county within Siaya County he intentionally caused his penis to penetrate the vagina of MA a child aged 13 years. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

2. The appellant pleaded not guilty to the charge and the matter proceeded to trial where the prosecution called 5 witnesses in an effort to prove their case beyond reasonable doubt. At the close of the prosecution's case, the accused was placed on his defence and he gave a sworn testimony.

3. In his judgement, the trial magistrate found that the prosecution failed to prove its case against the accused on the main charge of defilement but instead found that the prosecution had proved its case beyond reasonable doubt on the alternative charge of committing an indecent act with a child. The trial magistrate proceeded to convict the appellant and subsequently sentenced him to a 10 years' imprisonment.

4. Aggrieved by the trial court's finding, the appellant filed his petition of appeal dated 10th August 2022 on the 17th August 2022. The appellant's petition of appeal raised the following grounds of appeal;

    i. That the trial court failed to observe that the sentence imposed is/was manifestly harsh and disproportionate.

    ii. That the court be pleased to consider that the ingredients forming the offence was not proved beyond reasonable doubt.

    iii. That the court be pleased to consider that the investigation tendered was shoddy.

    iv. That the trial court did not consider the circumstances that surrounded the veracity of the offence.

    v. That the trial court failed to consider that the p3 form contradictive in nature in terms of the dates the complainant was taken to hospital.

    vi. That the appellant hereby beseeches the superior court to indulge into the same and or be pleased to reduce the sentence proportionately as enshrined in the article 50 (2) p of *the constitution*.

    vii. That the trial court failed to consider the appellant's defense statement which was cogent and reasonable.

    viii. That I wish to be present at the hearing of this appeal and or be supplied with trial record to enable me erect more grounds.

5. The parties agreed to dispose of the appeal by way of written submissions.

**The Appellant's Submissions**

6. The appellant submitted that the prosecution conducted poor investigations and that he gave a good alibi in good time which alibi painted a picture of a well-orchestrated plan to fix him.

7. It was his submission that the prosecution case was not enough to warrant a conviction and that his conviction and subsequent sentencing was an infringement of his constitutional rights as enshrined in Article 27 and 50.

8. The appellant submitted that being semi illiterate, he failed to understand the mitigation process, its importance and value. He submitted that he was a first offender, in his prime being 27 years old and with a young family who need his care and guidance and thus this court ought to reduce his sentence.

**The Respondent's Submissions**

9. The respondent submitted that the offence the appellant was charged with was proven to the required standard as the age of the minor, penetration and identification were all proved. It was further submitted that the inconsistencies if any were minor and inconsequential.

10. It wa submitted that the appellant's defence was considered as is evident at page 38 of the record and the same was properly dismissed as it lacked merit.

11. Regarding the appellant's sentence, it was submitted that the evidence adduced by the prosecution proved the offence of defilement but the appellant was convicted of an indecent act with a minor and subsequently sentenced to a sentence of 10 years which looking at the circumstances of the case appeared to be fair.

12. The respondent thus submitted that the appeal should be dismissed.

**Role of the Court**

13. The role of this appellate Court of first instance is well settled. It was held in the case of Okeno v R (1977) EALR 32 and further in the Court of Appeal case of Mark Oiruri Mose v R (2013) eKLR that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

**Evidence before trial Court**

14. PW1, MA the complainant testified that on the 24.1.2021 at about 7pm she and her sister were sent by their mother to a shop next to the stage to buy milk and charcoal and that they met the appellant who gave them a lift on their way back home on his motorcycle.

15. The complainant testified that she and her sister boarded the appellant's motorcycle but the appellant failed to stop at their home and instead he proceeded to his home where he asked the complainant's sister to alight before speeding off with the complainant. It was her testimony that the appellant stopped in a bush where he started touching her breasts, buttocks and private parts. She testified that she tried to struggle with the appellant and that she screamed but nobody came to her rescue.

16. PW1 testified that the appellant tore her skirt and blouse, wrestled her to the ground and did bad things to her. She further testified that the appellant removed his thing, penis, and did bad things to her. She testified that the appellant lay on top of her and started touching her breasts. She further testified that she got up, took her pants and wanted to run away when the appellant told her not to tell anybody but she ran home and arrived at about 8pm and informed her mother.

17. PW1 testified that she was taken to Ong'elo Health Centre where the doctor examined her and then she went to Aram Police Station, took a P3 form and recorded her statement. PW1 reiterated that after the appellant removed his penis, he did something bad, that he started touching her breasts, caressing her and kissing her.

18. It was her testimony that the appellant was like her father and that she could identify him as it was not so dark.

19. In cross-examination PW1 reiterated that she knew the appellant and denied that the appellant gave them fuel to take to his home where they found his wife. She further admitted that after the defilement there were 2 meetings to see whether the appellant could be helped before the matter proceeded to court. She denied that they went to the police to have the appellant give them money. She stated that when the appellant defiled her he told her that they would be meeting often and that he would be giving her something. It was her testimony that she did not scream because the appellant told her that he would give her a memory card which she told her mother about.

20. PW2 RA, the complainant's sister corroborated PW1's testimony and further stated that when sent to the shop, they found the appellant next to the stage and told him to escort them home using his motorcycle which he agreed to. She stated that when they reached their home, she was asked to alight from his motorcycle but when her sister M.A. was trying to alight, the appellant sped off only to return home at 8pm when saying that the appellant had raped her.

21. In cross-examination, PW2 stated that she sat at the far back of the motorcycle. She stated that she went home alone and that the complainant came after a while crying. She denied going to the appellant's house with maize flour.

22. PW3 No. 246687 P.C. Woman Tabitha Ojwang the investigating officer testified that on the 25.1.2021 at about 9am, the complainant arrived in the company of her sister and one AA and stated on interrogation that she had been defiled by the appellant after she and her sister had requested for a lift and on arrival at their destination, the appellant allowed only the complainant's sister to alight before speeding off with her. She testified that she arrested and charged the appellant.

23. In cross-examination, PW3 stated that the P3 forms from the hospital confirmed that the complainant had been defiled.

24. PW4 R.A testified that the complainant, her daughter, was 13 years old having been born in 2008. It was her testimony that on the 24/1/2021 at about 7pm she sent the complainant and her sister PW2 to buy charcoal and milk and only PW2 returned and informed her that having sought a lift from the appellant, when the complainant tried to alight, the appellant sped off.

25. It was her testimony that the complainant subsequently returned home and informed her that she had been raped so they went and reported to Aram Police Station and were given a P3 form which was subsequently filled. She further testified that the appellant was her brother in law.

26. In cross-examination, PW4 denied having any case with the appellant. She further denied discussing any payment with the appellant's father or ever wanting money from the appellant.

27. PW5, Vincent Akello, a clinical officer at Ongielo Health Centre produced the P3 filled by his colleague George Omboka who was away on duties. PW5 testified that on examination, the complainant had normal external genitalia with torn hymen with lacerations just below the vaginal openings and a sticky whitish discharge. PW5 testified that from the examination, a conclusion was made that the minor was defiled.

28. In cross-examination, PW5 denied that the doctor being on contract was bribed. He reiterated that it was confirmed that defilement took place.

29. Placed on his defence, the appellant testified that on the material evening, he was taking flour to his mother and a customer wanted a ride so he gave the flour to his nieces and nephews to take home then gave them a short lift and took his customer to his destination before going home.

30. The appellant testified that some minutes to 9pm, his in law arrived and started insulting him and a quarrel ensued before a neighbour came and removed her from the appellant's home. He testified that he was arrested on Friday where he told the police the story and that on Saturday, both families went to the police station to speak on the issue which did not take off as the complainant was not present.

31. He testified that the complainant told P.C. Tabitha that she was ready to withdraw the case. The appellant testified that his in-law was not happy and had been treating him badly. He further stated that the complainant wanted Kshs. 5,000.

32. In cross-examination, the appellant admitted that he had another defilement case with PW4 instituted in 2019. He further admitted to interacting with PW1 and PW2 on 4.1.2021. He further stated that he took them close to their home. He further reiterated that PW4 wanted a bribe from him.

33. DW2 Irene Awuor testified that she was the appellant's neighbour and that the 2 ladies passed at about 7.30pm. It was her testimony that at about 9pm she heard people insulting each other and as she headed to the place the noise was coming from, the person stopped the insults and left.

34. In cross-examination, DW2 stated that she saw the girls, AA and MA passing by her door on the 29/12/2020. She further stated that it was the girls' mother who was hurling insults.

35. DW3 Felix Omondi a motorcycle rider with the appellant testified that on that day he was with the appellant who bought Unga that he was to take home and wanted to take him to Chianda. He testified that the appellant had an argument with the complainant and told her to take the Unga home and on returning at about 8pm, they found the complainant's mother hurling insults in the appellant's home. He testified she was calmed down by a neighbour and left.

36. In cross-examination, DW3 admitted that he could not recall the date, month or year of that day but that it was at 7pm. He testified that he knew the girls and that one was MA and AA while he knew their mother as RA. He further testified that he was with the appellant till 8pm.

37. DW4 Solomon Okongo testified that he was the appellant's uncle and that the appellant's mother had asked him to stand surety for the appellant which he did as his mother told DW4 that the charges brought against the appellant were fake and only allegations.

**Analysis and Determination**

38. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the written submissions by both parties and the applicable law in this appeal. The issues for determination emanating therein are as follows;

    a. Whether the prosecution's case was proven beyond reasonable doubt and

    b. Whether the appellant's sentence was excessive and harsh.

39. In addition to the aforementioned issues for consideration, I will also consider the grounds raised in the appellant's petition and supplementary petition as well as the submissions.

**Whether the prosecution proved its case beyond reasonable doubt**

40. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006.

41. The ingredients of the offence of defilement were set out in the case of George Opondo Olunga v Republic [2016] eKLR, where it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim. The prosecution was under a duty to establish or prove all the above elements of defilement beyond reasonable doubt. That duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution witnesses.

42. On the identity of the appellant, the complainant testified that she knew the appellant well as he was like a father to her. The same was reiterated by PW2. To this end it is my finding that the appellant was identified beyond reasonable doubt.

43. Regarding the complainant's age, the complainant testified that she was 13 years old having been born in 2008. The same was corroborated by PW3, the investigations officer who produced a baptismal card for the complainant as PEx 3 showing that the complainant was born on 10/1/2008. PW4, the complainant's mother also testified that the complainant was 13 years old having been born in 2008.

44. In the circumstances, I find that the baptismal card was proof beyond reasonable doubt of the complainant's birth date and thus her age. I find that the prosecution proved this element of age of the complainant beyond reasonable doubt.

45. On the issue of penetration, "Penetration" is defined under Section 2 of the Act to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person". The complainant testified that she had sexual relations with the appellant when she stayed with him on the 17th and 18th November 2020.

46. In the case of Alex Chemwotei Sakong v Republic [2018] eKLR the court went to a great extent in expressing what penetration entails in a sexual offence as follows;

> " Penetration is defined under section 2 of the *Sexual Offences Act* to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJ A) in the case of Mark Oiruri vs. Republic Criminal Appeal 295 of 2012 [2013] eKLR in which they opined thus:
>
> "...and the effect that the medical examination was carried out on her on 16th November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ..."

47. From the medical evidence adduced, the complainant had normal external genitalia with torn hymen with lacerations just below the vaginal openings and a sticky whitish discharge. In the case of EE v Republic [2015] eKLR, Riechi J. stated that: -

> " An important ingredient of the offence of defilement is that there must have been penetration. Penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement".

48. With respect to proof, the Supreme Court of Uganda held in the case of Bassita vs. Uganda S.C. Criminal Appeal Number 35 of 1995, that: -

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt".

49. In this case, the complainant testified that the appellant touched her breasts, buttocks and private parts. She testified that she tried to struggle with the appellant and that she screamed but nobody came to her rescue. It was her testimony that the appellant tore her skirt and blouse, wrestled her to the ground and did bad things to her. She further testified that the appellant removed his thing, penis, and did bad

things to her. She testified that the appellant lay on top of her and started touching her breasts. She further testified that she got up, took her pants and wanted to run away.

50. I have considered all the above. I note that the law does not require the presence of spermatozoa as proof of penetration. The Court of Appeal in the case of Mark Ouiruri v Republic (2013) eKLR, expressed itself on this matter as follows: -

> " ...and the effect that the medical examination was carried out on her on 16th November 2008, five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event, the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and the penetration need not be deep inside the girl's organ...."

51. Clarity on this issue was given by the Court of Appeal even prior to the enactment of the *Sexual Offences Act* (2006) in the case of Benjamin Mwangi & Another v Republic [1984] eKLR, where the Court rendered itself as follows:

> " The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape."

52. Taking all the above into consideration, I am satisfied as was the trial magistrate that the prosecution failed to prove that penetration occurred.

53. Turning to the alternative charge brought against the appellant, In the *Sexual Offences Act*, "an indecent act" is defined as follows:

> " indecent act" means an unlawful intentional act which causes-
>
> (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
>
> (b) Exposure or display of any pornographic material to any person against his or her will."

54. I have considered the appellant's alibi and find the same an afterthought and this is because in the evidence adduced by the appellant, DW2 Irene Awuor testified that she saw the girls on the 29/12/2020. This is roughly a month prior to the offence happening. DW3 Felix Omondi on his part could not recall the date, month or year when he witnessed the event.

55. In my view, the prosecution evidence when juxtaposed against that of the appellant prove the offence of committing an indecent act. For these reasons I find and hold that the prosecution proved its case beyond reasonable doubt against the appellant on the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* of the *Sexual Offences Act* No. 3 of 2006.

**Whether the appellant's sentence was excessive**

56. The appellant pleaded in his grounds of appeal and submitted that his 20-year sentence was excessive in view of Article 50 (2) (p) of *the constitution*. Article 50 (2) (p) of *the Constitution*, 2010, which provides that:

> " Every accused person has the right to fair trial, which includes the right.
>
> (p) to the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentence:"

57. In Alister Antony Pariera v State of Maharashtra, as quoted in the case of Margrate Lima Tuje v Republic [2016] eKLR the court held that:

> " Sentencing is an important test in matters of crime. One of the prime objectives of the criminal law is the imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused in proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances"

58. Section 11 (1) of the *Sexual Offences Act* states that:

> " Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term not less than ten years."

59. The appellant herein was sentenced to 10 years in line with the provisions of the aforementioned law. The evidence on record in my view is consistent with the commissions of the alternative offence of Committing an Indecent Act with a child. Accordingly, a 10-year sentence would suffice for the appellant in the circumstances.

60. The question however is whether the sentence as stipulated in the law is a mandatory minimum or whether the trial court and therefore this court has discretion to interfere with the same.

61. Section 8 (3) of the *Sexual Offences Act* provides that:

> " (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."

62. The section spells out mandatory minimum sentences but the language in the sections 8(2) and 8(3), (4) and (11) are different in that in section 8(2), the section provides that:

> " ((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."

63. In subsection 3, the words "is liable" are used while in sub section 2, the words "shall upon conviction be sentenced to imprisonment for life" are used. The question is whether the language in subsection 3 and 4 imposes mandatory sentences of whether the court has discretion in sentencing.

64. This Court had the opportunity to discuss these sections in Fredrick Owino Kangala v Republic [2022] eKLR and elaborately cited other decisions on the same subject. I find no harm reproducing what I sated in the above case here as follows at paragraphs 54-63:

"

" 54. Generally, the circumstances under which an appellate court interferes with the sentence by the trial court are set out in S v Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

Equally, in Mokela v The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

In the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, the predecessor of the Court of Appeal stated as follows on this issue:

> "The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

Odunga J citing the above decisions had this to say in the case of Josiah Mutua Mutunga & another v Republic [2019] eKLR:

> "10. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case." (R - v- Shershowsky (1912) CCA 28TLR 263) while in the case of

Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:

> "sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)."

The learned Judge further referred to the Court of Appeal decision in Bernard Kimani Gacheru v Republic [2002] eKLR where it was restated that:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

In Shadrack Kipchoge Kogo v Republic Eldoret Criminal Appeal No. 253 of 2003 the Court stated:

> "Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.

Section 8(1), (2), (3) and (4) 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.

In the same case of Josiah Mutua Mutunga & another v Republic at Machakos High Court, the Court observed, comparing the wordings in the provisions of section 8 of the *Sexual Offences Act* on sentence and stated that:

> "It is true true that section 8(3) and (4) of the *Sexual Offences Act* applies the phrase is liable upon conviction to imprisonment for a term of not less than twenty years and fifteen years respectively. Sir Henry Webb C.J. in Kichanjele S/O Ndamungu v Republic (1941) 8 EACA 64 had this to say on the proper construction of the words "liable to":
>
> "The wording used throughout the code is "shall be liable to" but a consideration of the various sections shows in our judgment, that the use of the words "shall be liable to" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated." [emphasis added]

In Opoya v Uganda [1967] EA 752 Sir Clement DeLestang V.P. stated:

> "It seems to us beyond argument that the words "shall be liable to" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."

A similar position was accepted in D W M vs. Republic (supra) where the Court held that:

> "As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the *Sexual Offences Act* that the offender "Shall be liable to imprisonment for life" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

In this case, the relevant provisions use the phrases "is liable, upon conviction to..." and "not less than" in the same breath. As correctly observed by Odunga J in the Josiah Mutua Mutunga & another v Republic case, the two provisions suffer from the malady of poor legal draftsmanship since the two phrases imply, in legal terms, diametrically opposed positions. This is so because in criminal law, where there is an ambiguity in phraseology of sentencing, the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence, as was concisely put by Mativo J it in Elizabeth Waithiegeni Gatimu v Republic [2015] eKLR that:

> "The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child

of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea."

This court is in agreement therefore that the twin subsections must be read as if the sentences provided are the maximum sentences. For that reason, and taking into account the circumstances of this case, I hold the view that the use of the words "is liable upon conviction" in section 11(1) of the *Sexual Offences Act* gives room for the exercise of judicial discretion in sentencing."

65. Just like in the above decision, I have no doubt in my mind that Sexual Offences by their very nature are heinous and traumatizing to the victims especially the minors. It is a dehumanizing offence which brings indignity to the victim of the offence. It leaves stigma on the victims. This is the reason why the sentences provided for in law are harsh and appear in nearly all cases, to be mandatory minimums in nature. This position was appreciated in Tito Kariuki Ngugi v Republic [2008] e KLR where it was stated that:

" The appeal against sentence has also no merit. The Appellant...caused her trauma which she will have to live with for the rest of her life."

66. In my humble view, the sentence imposed upon the appellant by the trial court was the maximum sentence. Considering my observations and the fact that the appellant was a first offender and appreciating what the Court of Appeal in Charo Ngumbao Gugudu v Republic [2011] eKLR, had to say regarding imposition of maximum sentences that:

" It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence. It is true that the complainant suffered serious injuries..."

67. I find the ten-year imprisonment meted on the appellant to be excessive in the circumstances and calls for interference. I set aside the ten years' imprisonment meted on the appellant and substitute it with a prison term of Five (5) years to be calculated from the date of arrest of the appellant on 29/01/21, in view of the fact that the appellant was granted bond but he never raised it until the trial was concluded. This is in line with the provisions of section 333(2) of the Criminal Procedure Code which provides that:

" (2) Subject to the provisions of section 38 of the Penal Code, every sentence shall be deemed to commence from, and to include 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." See Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR and Bethwel Wilson Kibor v Republic [2009] eKLR."

68. In the end, I find the appeal against conviction to be devoid of merit. I dismiss it and uphold the appellant's conviction. I allow the appeal against sentence. I set aside the sentence of ten years' imprisonment imposed on the appellant and substitute it with a prison term of five (5) years to be calculated from the date of his arrest on 29/01/2021 in line with section 333(2) of the Criminal Procedure Code as he was held in custody during the trial.

69. Orders accordingly. File closed

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 20TH DAY OF JANUARY, 2023**

**R.E. ABURILI**

**JUDGE**