**JOL v Republic (Criminal Appeal E019 of 2022)**
**[2023] KEHC 1107 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1107 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT SIAYA**

**CRIMINAL APPEAL E019 OF 2022**

**RE ABURILI, J**

**FEBRUARY 22, 2023**

**BETWEEN**

**JOL ALIAS E ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in Bondo Principal Magistrate's Court SO Case No. 10 of 2020 by Hon. S.W. Mathenge, Resident Magistrtae on 19th May, 2022)***

## JUDGMENT

1. The Appellant herein JOL alias "E" was charged 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 of the charge were that on 3rd February 2018 at around 1400h in Rarieda subcounty within Siaya County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of FAO; a girl aged 9 years old. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No 3 of 2006.

2. The Appellant pleaded not guilty to the charge and the case proceeded to trial where the prosecution called 5 witnesses to prove their case. When the prosecution closed its case, the accused was placed on his defence and gave sworn testimony.

3. In her judgment, the trial magistrate found that the prosecution had proved its case beyond reasonable doubt against the Appellant and proceeded to convict the Appellant and subsequently sentenced him to serve life imprisonment.

4. Aggrieved by the conviction and sentence, the Appellant filed this Petition of appeal in which he raised the following grounds of appeal:

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

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

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

iv. That the court be pleased to consider any aspect or condition that shall not occasion prejudice;

v. 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 Article 50 (2) (p) of the *Constitution*; and

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

5. The appeal was canvassed by way of written submissions.

**The Appellant's Submissions**

6. The Appellant who was self-represented in this appeal submitted that the sentence meted upon him was harsh, excessive and unconstitutional. He cited the case of *Philip Mueke Miangi & another v Republic* Petition E017 of 2021 at Machakos High Court where Odunga J held that minimum mandatory sentences issued over *Sexual Offences Act* No 3 of 2006 was unconstitutional.

7. It was also the Appellant's submission that the prosecution case was a product of formulated, fabricated and mingled evidence with the intention of convicting an innocent Kenyan. He submitted that the court had not taken into consideration his case against the Complainant's parents.

9. The Appellant further submitted that the prosecution case was not properly investigated as the P3 form indicated that he was HIV+ unlike the Complainant who was HIV-.

8. The Appellant submitted that there were contradictions in the evidence; for instance; when PW1 testified that Ochieng came and found the Appellant defiling her but did not see the Appellant doing it. In addition, the Appellant submitted that the testimony of PW3 was contrary to that of PW1.

9. The Appellant further submitted that there was poor and shoddy evidence that never supported the charge sheet thus the conviction was unlawful. Particularly, the Appellant pointed out that no evidence supported that the Appellant had defiled FAO; there was no DNA test proving such allegation, neither was the Appellant linked to the matter. He submitted that penetration was never proved by the prosecution on the power of PW1-5's testimonies.

10. The respondent never filed any submissions.

**Analysis and Determination**

11. I have considered the petition, grounds of appeal and the submissions in support of the appeal. In my view, the main issue for determination is whether the Appellant's conviction was sound and whether the sentence imposed was harsh, excessive and unconstitutional.

12. Before I determine the issue above, I must outline the role of this court on a first appeal as is now settled. It is the duty of this court to reevaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion, bearing in mind that it neither saw nor heard the witnesses

testify. The case of *Okeno v Republic* [1977] EALR 32 as cited in *Charles Ratemo v Republic* Criminal Appeal E035 of 2021 [2022] eKLR outlined the duties of the 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 v 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 v 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 v Sunday Post* [1958] EA 424." 70.Similarly, in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows: - "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

13. See also *Kariuki Karanja v Republic* [1986] KLR 190.

14. Revisiting the evidence adduced before the trial court, the appellant was tried and convicted for defiling an eight (8) year and 9 months old child, F.A.O. (full name withheld for legal reasons).

15. PW1 the Complainant, testified on oath after voire dire examination and stated that she was 11 years old. It was her testimony that on 03.02.2018 at about 1.30 p.m., she and her sister G had taken the cattle to the water. On their way, they had met the Appellant who instructed them to also take his cattle to the watering hole. When they were behind the home of the appellant, the Complainant told G that she wanted to go back to the Appellant's house as he had promised them something nice. On reaching his home, she found the Appellant bare chested. The Appellant asked the Complainant to fetch his trouser from the bedroom. The Appellant then came after her in the bedroom, covered her mouth, undressed her and as the Complainant testified, 'he took his dudu and placed it in my dudu.'

16. She testified that Ochieng found them but did not see the Appellant doing it. She then went home and started to feel unwell. She told G what had happened and G told their mother. She stated that the Appellant had defiled her. When her mother informed the headteacher, the teacher took her to hospital. The Complainant's mother then reported the incident at the police station.

17. On cross examination, PW1 reiterated that it was her mother who had reported the incident at the police station. That she had gone to the police station the following day and that although she could not remember the date, she identified the Appellant as having been the one who defiled her.

18. PW2, G, also a minor and the Complainant's sister testified on oath after voire dire examination and corroborated the Complainant's narrative. A being only 8 years old, she understood what had happened. She stated that on their way to taking the cows to the water, they met the Appellant who told them to take his cows to the water as well. She then told PW1 to go get the good thing that the Appellant had promised them. She herself did not go to the Appellant's house.

19. PW2 testified that PW1 returned at around 2-3 p.m. shivering. She asked for a mat to sleep on; stating that she had a headache. According to PW2, it was she who had informed their mother on what had happened.

20. On cross examination, PW2 stated that it was false that she and her sister would take the Appellant's cows without his asking them to do so. She stated that she had not been told what to say by their mother.

21. LAO, PW1 and PW2's mother testified as PW3. She stated that she had been away attending a burial at Gem. She stated that she had instructed PW1 and PW2 to take the cows to the lake at 2 p.m. On PW3's return at 5 p.m., she found the Complainant lying next to the house; shaking. Noting that she had a fever, she gave her some medication.

22. It was the next day that PW2 informed her that the Appellant had done something to the Complainant. PW3 questioned the Complainant, who then related the story of how the Appellant had promised them something nice and she had gone to pick it up from him; when he defiled her. She then she examined the complainant's private parts and saw white substances. She took the Complainant to school and informed the teachers who took her to the dispensary at Nyagako. Later the matter was reported to Aram Police station. PW3; knowing who the Appellant was; directed the police to his house; where he was arrested.

23. On cross examination, PW3 stated that she had laid out the story as narrated to her by her two daughters. She stated that the white substance she observed was blood stained. She denied that she was falsely accusing the appellant or that her and her husband were fighting over a piece of land.

24. PW4 No 111548 PC Kelly Maingi testified that on 30.01.2020 at about 1400hrs, OCS Inspector Kher informed her of the case involving the Appellant, a defilement case that had been reported on 05.02.2018. PW4 informed the Complainant's mother that the Appellant had filed an appeal to the case and subsequently it was to be heard afresh. On cross examination, she stated that she had accompanied the investigating officer to arrest the Appellant for the charges of defilement only.

25. PW5 Gilbert Ambila the clinician at Madiany Sub-county Hospital testified that the Complainant had reported sexual assault by a person known to her that had occurred on 03.02.2018 at 2 p.m. at [Particulars Withheld] village. PW5 reported that her underpants had a dry yellowish discharge, she had lacerations on the right cheek and lacerations on both labia majora and minora. Her hymen was torn and she had a yellowish discharge on her genitalia. He filled her P3 form. He produced into court as exhibits the P3 form, PRC Form, treatment notes and Laboratory request report. His findings were that there was penetration. On cross examination, PW5 reiterated that he had examined the complainant.

26. Placed on his defence, the appellant gave sworn testimony and denied committing the offence, he stated that on 1/2/2018 he left home for Wichlum and returned on 5/2/2018 at 6.00pm and the next day, he was arrested. That earlier on, he had a case with the complainant's mother over malicious damage to his property and he produced three photographs of a semi-permanent house with broken glass window and an OB number. He denied in cross examination that he was in the village when the incident happened on the material day. He stated that he had gone to Wichlum to work for Wiliam Ojwang

who had since died but that he had no evidence that he worked for the said William. He stated that he had a grudge with the complainant's mother from 2011 and that they had burnt his house over a land dispute but that there was no court case over the same.

**Determination**

27. Having considered the Appellant's grounds of appeal, the evidence adduced before the trial court, the Appellant's submissions as well as the applicable law in this appeal and the evidence adduced for the prosecution and the defence proffered by the appellant, I find the following issues are ripe for determination.

    a. Whether the prosecution's case against the appellant was proved beyond reasonable doubt;

    b. Whether the Appellant's sentence was excessive, harsh and unconstitutional.

    28. In addition to the aforementioned issues for consideration, I will also consider the grounds raised in the Appellant's Petition of Appeal and in his submissions.

**Whether the Prosecution proved its case beyond Reasonable Doubt**

29. 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* No 3 of 2006. As was noted in *DS v Republic* [2022] eKLR, 'the offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator.'

30. The prosecution had the task of proving all the elements of the offence of defilement beyond reasonable doubt. That burden never shifted even if the appellant elected to remain silent or offered an alibi defence as the accused person enjoyed the right to remain silent, to adduce and challenge evidence and not to give any self-incriminating evidence.

31. On the identity of the Appellant, the Complainant testified that she knew the Appellant prior to the offence as he was her uncle and well known to her. When narrating the event to her mother PW3; the Complainant stated that it was the Appellant who had defiled her. She pointed out the Appellant in court and was unwavering that it was the Appellant who had defiled her. PW2 knew the Appellant as a neighbour and PW3 corroborated the fact by stating that the Appellant had been their neighbour for a long time.

32. The Appellant did not deny knowing the Complainant. He testified that he knew the complainant's mother as she had married his nephew. In his defence, he stated that he was not home on the day the incident occurred and that there was a case between him and the Complainant's parent, the reason why the whole situation had arisen.

33. However, it is clear and without a doubt that the Complainant recognized and identified the Appellant, having known him. Her knowledge of him was confirmed by PW2 and PW3. The incident took place in broad daylight at 2pm and therefore there was no possibility of mistaken identity considering the testimony of the two minors as detailed on what they were doing on the material day and how they met the appellant on their way to water their animals, how he requested them to go pick and water his animals as well and how they obliged only for him to take advantage of the minors by telling them that he would give them something good and that the victim herein should go pick it upon which he defiled her.

34. The Appellant's defence on identification and recognition cannot be substantiated. From the foregoing elaborate analysis, I therefore find that the Appellant was positively identified and recognized by the victim and her sister beyond reasonable doubt.

35. On proof of age, the complainant's mother testified and produced the complainant's birth certificate as PEX.3 which indicated that the complainant was born in May 2009 and that she had been 9 years old at the date of the incident in 2018. Her age was therefore proven beyond reasonable doubt.

36. Regarding penetration, "penetration" is defined in section 2 of the Sexual Offences Act as, 'the partial or complete insertion of the genital organs of a person into the genital organs of another person;'

37. The Complainant testified that the Appellant defiled her. He had asked her to get his trousers from the bedroom which she couldn't find. He then followed her, covered her mouth and removed her clothes. In her own words, the Appellant 'took his dudu and placed it in my dudu.' She identified her dudu as the one used for urinating and pointed at her vaginal area. She testified that his dudu was in his shorts.

38. PW5, the clinician corroborated the testimony of PW1. He examined the Complainant and concluded that she had been defiled.

39. In his defence, the Appellant stated that he was not in [Particulars Withheld] village when the offence occurred. He stated that having been contracted by William Ojwang Obende, he left [Particulars Withheld] village on 01.02.2018 at 0700h heading to work at Wichlum Beach and did not return till 05.02.2018 at 1800h. However, he stated that William Ojwang Obende was deceased. Thus, there was no one who could corroborate his alibi. The appellant further testified in defence that there was a dispute between him and the Complainant's mother over a piece of land hence the instigation of the case.

40. Section 124 of the *Evidence Act* is on corroboration and exempts the requirement for corroboration in sexual offences cases. The section stipulates that:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declaration Act*, where the evidence of the victim 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 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."

41. The evidence of the Complainant on the fact of her being defiled was corroborated by PW5, the clinician as indicated in PEX2; the P3 report.

42. The Appellant in his defence stated that he was away at work when the offence happened. It was the Appellant's further defence that there was a feud between him and the Complainant's mother concerning land, which was the cause of this case against him.

43. I have considered the appellant's defence of alibi as against the evidence of the prosecution witnesses on the time that the offence took place and the identification of the appellant by the two minors. Whereas the accused was under no duty to prove his alibi defence, I am satisfied that the evidence by the prosecution witnesses was so strong that it sufficiently displaced the defence of alibi. In addition, whereas the appellant claimed that the case was framed against him because he had a land dispute and

a case of malicious damage with the victim's mother, I find that even if there was such dispute, the evidence against the appellant to the effect that he defiled the minor was so strong as to displace the allegation that he was framed because of an existing dispute with the complainant's mother.

44. Just like the trial court did believe the complainant's testimony, I have no reason to doubt the same as corroborated by the medical records showing that she was defiled. From the evidence on record, a land dispute could not have defiled the minor unless the appellant decided to defile the minor in revenge over an existing land dispute with her mother, which is no defence at all.

45. I am therefore satisfied that the prosecution proved all the elements of the offence of defilement against the appellant herein beyond reasonable doubt and that his defence was a sham.

46. The Appellant submitted that there were contradictions in the evidence; for instance, when PW1 testified that Ochieng came and found the Appellant defiling her but did not see the Appellant doing it. In addition, the Appellant submitted that the testimony of PW3 was contrary to that of PW1.

47. I have reread the evidence on record as testified by PW1 who, in her evidence in chief, she stated that while the offence was taking place, Ochieng called the Appellant stating that he wanted a bicycle to fetch water. When Ochieng came, he found the Appellant defiling her but he did not see the Appellant doing it. I find no material contradiction in that evidence by the minor who did not say that Ochieng saw her being defiled. She simply stated that when Ochieng came calling the appellant, she was being defiled. She did not say that Ochieng entered the house and saw her being defiled.

48. In the Appellant's submissions on appeal, he submitted that the prosecution case was a product of formulated, fabricated and mingled evidence with the intention of convicting an innocent Kenyan. He submitted that the court had not taken into consideration his case against the Complainant's parents. I have considered that submission vis avis the evidence on record as a whole. The narrative by the Complainant was consistent with PW2's and PW3's testimony. She positively identified the Appellant as the perpetrator who was well known to her. In addition, the testimony and report of the clinician proved that the Complainant was defiled. On the other hand, the Appellant's defence which was considered and dismissed by the trial magistrate as unsustainable and a mere denial was in my view, a sham.

49. It was the Appellant's position that the investigations tendered was shoddy and that the evidence never supported the charge sheet thus the conviction was unlawful. Particularly, the Appellant submitted that no evidence supported that the Appellant had defiled FAO; that there was no DNA test proving such allegation and that neither was the Appellant linked to the matter. He submitted that penetration was never proved by the prosecution on the power of PW1-5's testimonies.

50. The trial magistrate believed that the minor was telling the truth and this evidence was supported by PW2 and the clinical officer who examined her and confirmed that she had been defiled. In my humble view, DNA test was not necessary to corroborate the clear evidence of recognition of the appellant by PW1 and PW2 who knew him very well and the offence took place in broad daylight.

51. The Appellant further submitted that the prosecution case was not properly investigated as the P3 form indicated that he was HIV+ unlike the Complainant who was HIV-. I have examined the P3 form produced for the complainant and it does not indicate the HIV status of the minor. The presentence report on the appellant states that he was under ARv. No P3 form for the appellant was produced. Furthermore, it is not the HIV infection of the minor that would be proof of defilement.

52. In the end, I am satisfied that the prosecution proved its case against the Appellant beyond reasonable doubt on the charge of defilement contrary to section 8 (1) as read with 8 (2) of the *Sexual Offences Act*

No 3 of 2006. I find that the conviction of the Appellant was proper and sound. It is hereby upheld. The appeal against conviction is accordingly dismissed.

**Whether the Appellant's Sentence was Excessive, Harsh and Unconstitutional**

53. The Appellant pleaded in his grounds of appeal and reiterated in his submissions that the sentence imposed on him was manifestly harsh, disproportionate and unconstitutional. He beseeched this court to reduce the sentence proportionately as enshrined in Article 50 (2) (p) of the *Constitution*.

54. Article 50 (2) (p) of the Constitution stipulates that:

> 'Every accused person has the right to a fair trial, which includes the right 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.

55. Criminal law theorists believe that sentences serve two purposes. First, they serve the goal of deterring future crime by both the convict and by other individuals contemplating a committal of the same crime. Second, a sentence serves the goal of retribution, which posits that the criminal deserves punishment for having acted criminally. When sentencing, a judge must impose the least severe sentence that still achieves both goals, while also considering the need for societal protection.

56. In his mitigation, the Appellant stated that his wife had epilepsy, his mother was old, he had been in remand since 2018 and that he had reformed. However, the pre-sentencing report indicated that the Appellant was not remorseful and posed a danger to the victim.

57. The offence the Appellant was charged with carries a life imprisonment sentence upon conviction. The relevant section 8 (2) of the *Sexual Offences Act* provides that:

> '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.'

58. It follows that the sentence of life imprisonment imposed on the appellant upon conviction was lawful.

59. On the unconstitutionality of this sentence, the Appellant in his submissions cited the case of *Philip Mueke Maingi & another v Republic* Petition E017 of 2021 at Machakos High Court where Odunga J held that minimum mandatory sentences issued over *Sexual Offences Act* No 3 of 2006 was unconstitutional.

60. In the case of *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) cited by the Appellant; the Petitioners stated that their grievance stemmed from the fact that the *Sexual Offences Act* prescribed minimum-maximum sentencing provisions which fetter the discretion of judges in imposing alternative sentences or order. This, it was pleaded, had resulted in teeming up of a large number of prisoners who were serving various minimum-maximum sentences under the *Act*. According to the Petitioners, the impact of such sentencing also offended the constitutional dictates of fair trial and the benefit of equal treatment in law.

61. The Petitioners further argued that the mandatory-minimum sentences ought to have been construed with such adaptation, qualifications and exceptions in order to be in line with the Constitution and the individual's dignity. It was pleaded that such sentence offended section 216 of the *Criminal Procedure Code* that permitted the court, in passing sentence to receive such evidence as would inform itself as to the sentence to be passed.

62. Such argument was in line with the Supreme Court's decision in the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR which declared section 204 of the *Penal Code* unconstitutional, although the apex Court was quick to point out that the holding did not disturb the validity of the death sentence as contemplated under Article 26(3) of the *Constitution*. The Petitioners believed that the same finding could be attached to the minimum sentences in the *Sexual Offences Act*. However, the directions given on 6th July 2021 clarified that the 2017 case was in regard to the death penalty alone.

63. This is what Odunga J's stated, briefly :

> [90] It is clear that minimum mandatory sentences, prima facie, do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment than the minimum prescribed, would be more appropriate in the circumstances...
>
> (91) ...It is however my view that such reasoning may be taken to mean that there is lack of faith in the judicial system to mete appropriate sentences, a proposition that is dangerous in a system that believes in the rule of law. The fact that a trial court may err in imposition of sentences ought not to be a reason for taking away judicial discretion and handing it over to the legislature. The judicial system provides for appellate process where parties are dissatisfied with decisions of the lower court. To remove from the Courts, the power to mete appropriate sentences merely because the lower courts or any other court for that matter are not imposing "sensible sentences" in my view amounts to judicial coup. All the tiers of the judiciary cannot be said to be wrong and if they arrive at the same decision then everyone must live with that decision however unpalatable it might appear since according to the law, that is the right decision.

64. The learned Judge's argument is that the courts ought to have discretion when meting out sentences rather than being defined and locked in by the mandatory sentencing provisions in the *Sexual Offences Act*. He found that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of the *Constitution*. However, according to Odunga J, the Court was at liberty to impose sentences prescribed thereunder so long as the same were not deemed to be the mandatory minimum prescribed sentences.

65. In *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, the Supreme Court had a different approach to life sentences. They held that it was up to the legislature to revise the provisions on life sentences as it is the legislature that drafted them in the first place. This is what they had to say:

> (89) In order to determine whether this Court can fix a definite number of years to constitute a life sentence, we first turn to the provisions on the rights of detained persons as enshrined under Article 51 of the *Constitution*, which reads:
>
> > 51.
> >
> > (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.
> >
> > (3) Parliament shall enact legislation that—

(a) provides for the humane treatment of persons detained, held in custody or imprisoned; and

(b) takes into account the relevant international human rights instruments."

(90) It is clear from this provision that it is the Legislature, and not the Judiciary, that is tasked with providing a legal framework for the rights and treatment of convicted persons. This premise was also attested to by the High Court in the case of *Jackson Maina Wangui & Another v Republic* Criminal No 35 of 2012; [2014] eKLR (Jackson Wangui), where the Court held at paragraph 72 and 76 that—

> "As submitted by the petitioner, however, what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one's natural life or a term of years. In our view, that is also the province of the legislature.
>
> 76. .... As to what amounts to life imprisonment, that is a matter for the legislative branch of government. It is not for the courts to determine for the people what should be a sufficient term of years for a person who has committed an offence that society finds reprehensible to serve."

(94) We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.

66. The Constitutional Court of Uganda in *Susan Kigula & 416 Others v Attorney General*, Const. App. No 6 of 2003 stated that:

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

67. The principles underpinning sentencing are that the sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.

68. Discretion to sentence thus lay with the trial court in the first instance. In *Bernard Kimani Gacheru v Republic* [2002] eKLR, the judges on appeal stated 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 stated is shown to exist.'

69. In the trial court, it is noted that during the sentencing hearing, the trial magistrate took into consideration the offence, mitigation and the pre-sentencing report. The trial magistrate therein stated that, 'the report gives a recommendation that the accused person is not suitable for a non-custodial sentence because he is not remorseful and that he poses a danger to the victim.' The trial magistrate then proceeded to sentence the Appellant to life imprisonment.

70. In my view, the trial court exercised discretion, having considered the Complainant's age, the circumstances of the case together with aggravating and mitigating factors. My finding is that the fears that Odunga J in the Maingi case had, that courts were not exercising discretion does not apply in the instance as the trial court did in fact consider the aggravating and mitigating factors.

71. Moreover, this court will not so easily interfere with the exercise of discretion of the trial court unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or considered, some wrong material, or acted on a wrong principle.

72. Construing the mandatory-minimum sentences with such adaptation, qualifications and exceptions in order to be in line with the Constitution and the individual's dignity and particularly in light of Article 50 (2) (p) of the *Constitution*, I find that it is necessary to interfere with the sentence imposed by the trial court. In doing so, I have considered the mitigating and aggravating factors of the case where the minor aged 8 years was defiled by a 42-year-old man, old enough to be her grandfather. The appellant from the presentence report was on ARv meaning he could easily have infected the minor with the HIV/AIDS although there was no testing of the minor for HIV to determine her status after the ordeal.

73. In the end, I hereby set aside the life imprisonment imposed on the appellant and substituted it with a term imprisonment of thirty-five (35) years, to be calculated, considering the period that he had spent in custody before he was released on bond during the first trial and the prison term that he already served when his appeal was pending before this court before an order for retrial was made.

74. For avoidance of doubt, the appellant was arrested on 6/2/2018 according to the charge sheet dated 3/2/2020 on retrial, he was tried vide Bondo PM SO number 4 of 2018, convicted and sentenced to serve thirty years imprisonment on 26/10/2018. He appealed to this court vide HCRA 60 of 2018 which appeal was allowed and a retrial ordered hence Bondo PM SO No 20 of 2020, I do sentence the Appellant to 30 years imprisonment beginning when the Appellant was first in. Defence exhibit No3 show s that the appellant was released on bail pending trial on 8th March 2018 and later after conviction, he remained in prison custody until this court ordered for a retrial and there is no evidence that he was later released on bail pending the retrial.

75. Accordingly, this appeal against conviction is found to be devoid of merit. It is hereby dismissed. The appeal against sentence is allowed to the extent that the life imprisonment is hereby set aside and substituted with thirty-five (35) years imprisonment to be calculated, considering the period spent in custody, noting that between 8th March 2018 and his first conviction on 26/10/2018, he was on bond. The custody period shall therefore be from 6/2/2018 to 7th March 2018 plus the prison term that he initially served from date of sentencing on 26/10/2018 to the date that he was sentenced the second time on 9/5/2022.this is in line with section 333(2) of the *Criminal Procedure Code*.

76. File closed. I so order.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 22ND DAY OF FEBRUARY, 2023**

**R.E. ABURILI**

**JUDGE**