



REPUBLIC OF KENYA



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**Rotich v Republic (Criminal Appeal E044 of 2021)
[2023] KEHC 2396 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2396 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E044 OF 2021
RL KORIR, J
MARCH 28, 2023**

BETWEEN

KENNETH ROTICH ALIAS AARON KIPKIRUI APPELLANT

AND

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence of Hon. Lilian Kiniale in Sexual Offence Case No. 44 of 2020 at the Principal Magistrate's Court at Bomet delivered on 28th July 2021)

JUDGMENT

1. The Appellant was charged with two counts of the offence of attempted defilement contrary to section 9 (1) as read with section 9(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the first count of attempted defilement were that on the 16th day of July 2020 at [Particulars withheld] location within Bomet County, intentionally attempted to cause his penis to penetrate the vagina of MC, a child aged 7 years.
2. 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. The particulars of the alternative charge were that on the 16th day of July 2020, at [Particulars Withheld] location within Bomet county intentionally touched the vagina of MC, a child aged 7 years.
3. The particulars of the second count of attempted defilement were that on the 16th day of July 2020, in Tegat location within Bomet County, intentionally attempted to cause his penis to penetrate the vagina of SC, a child aged 6 years.
4. The Appellant was charged with 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. The particulars of the charge were



that on the 16th day of July 2020 in Togat location within Bomet county intentionally touched the vagina of SC, a child aged 6 years.

5. The Appellant was arraigned in court on July 23, 2020 to take plea on the two counts and the respective alternative charges. He pleaded not guilty on all charges and the matter proceeded to full trial.
6. The Prosecution called seven (7) witnesses and at the close of their case, the court found that the Appellant had a case to answer and was consequently placed on his defence. He elected to give sworn testimony and called no witnesses.
7. At the end of the trial, the Appellant was convicted of the two counts of the offence of attempted defilement contrary to section 9 (1) and 9 (2) of the *Sexual Offences Act* and sentenced to serve 15 years for each count to run concurrently.
8. Being dissatisfied with the conviction and sentence, the Appellant filed a Petition of Appeal dated December 3, 2021 on December 2, 2021 in which 8 grounds of appeal were raised as follows: -
 1. That the learned trial magistrate erred in law and in fact in that, she gave undue weight to the Prosecution's case and least weight to the defence case.
 2. That the learned trial magistrate erred in law and in fact in that, she shifted the burden of proof to the Appellant and went ahead to convict the Appellant in the absence of proof beyond reasonable doubt.
 3. That the learned trial magistrate erred in law and in fact in failing to consider that the evidence by the prosecution was incredible.
 4. That the learned trial magistrate erred in law and in fact in convicting the Appellant on evidence that was clearly inconsistent, contradictory and uncorroborated.
 5. That the learned trial magistrate erred in law and in fact in that, there were gaps and discrepancies regarding the evidence tendered.
 6. That the learned trial magistrate erred in law and in fact by failing to evaluate the testimony of the complainants.
 7. That the complainant's mother's testimonies were unreliable, untrue and could not be relied upon to support the conviction.
 8. That the honourable magistrate meted out a sentence that was too harsh in view of the circumstances of the case.
 9. The Court issued directions on July 27, 2022 for the parties to canvass the appeal by way of written submissions.

Appellant's Submissions

10. Counsel for the Appellant submitted that the ingredients of the offence of attempted defilement were never proven by the Prosecution. Firstly, that the first complainant who testified as PW1 was stood down and was unable to testify through her mother (the intermediary) thereby denying the Appellant an opportunity to cross-examine her and test the truthfulness of her testimony. Counsel cited the Court of Appeal case of *MM vs Republic* (2014) eKLR C
11. Counsel further submitted that there was no witness who testified to having seen the Appellant with either or both of the complainants, that there were no torn clothes or underwear presented before the



- court, that the second complainant PW4 only testified that the Appellant did ‘tabia mbaya’ to them but never described what the same entailed and that the evidence presented before court was entirely hearsay.
12. Counsel submitted that the Prosecution failed to prove the mens rea of the offence as defined by section 388 of the *Penal Code*. It was their submission that the complainants did not identify the Appellant as the person who committed the act of defilement because when asked who defiled them, they only looked down. Counsel cited the cases of *Kitsao Katana Yeri vs R*, Malindi High Court Criminal Appeal Number 36 of 2018 and *Mutie Muoki Mutuku vs R*, Machakos High Court Criminal Appeal No 104 of 2017.
 13. On identification, Counsel submitted that no identification parade was conducted, that the manner of investigations conducted and arrest of the Appellant proved that there was a vendetta. Counsel further submitted that the mothers of the victims were only informed that it was the Appellant who defiled the victims, which according to law, was insufficient in proving identification. On this, Counsel cited *Mabat Mohammed Olow vs R*, Garissa High Court, Criminal Appeal No 13 of 2014.
 14. Thirdly, Counsel submitted on the issue of failure by the Prosecution to call material witnesses and stated that the Prosecution evidence was full of glaring inconsistencies making the subsequent conviction unsafe. That failure of the Prosecution to call the boy who was mentioned by PW2 was fatal to their case as it raised doubts as to whether it was only the Appellant who could have been responsible for the crime. Counsel cited *Elijah Kamau Ngigi vs. R* Nyahururu High Court, Criminal Appeal No 209 of 2017 and *Omar Nache Uche vs Republic*, Marsabit High Court Criminal Appeal No 11 of 2015 in this regard.
 15. Lastly on sentence, Counsel submitted that the Appellant was a first offender and was entitled to some degree of mercy. It was their submission that the trial magistrate did not consider the Appellant’s mitigation and passed a harsh sentence. On this, they cited the case of *Mohamud Omar Mohammed vs R* Garissa High Court Criminal Appeal No 2 of 2020 and *Patrick Muli Mukutba vs Republic* Machakos High Court Criminal Appeal No 58 of 2017. It was their submission that the numerous inconsistencies and doubt ought to be considered in favour of the Appellant.

The Respondent’s/Prosecution’s Submissions

16. The Respondent’s submissions are dated September 20, 2022 and filed on September 21, 2022. They submitted that the trial court made no error in finding that all the ingredients of the charge were proven by the Prosecution. Firstly, that proof of age of the victims was demonstrated by observation of the court, the testimonies of the victim’s mothers and their clinical cards.
17. Secondly, on the ingredient of an act of attempted penetration, the Prosecution submitted that the elements of the offence are similar to defilement save for the aspect of penetration. That the second complainant PW4 was found fit to take an oath after a *voir dire* was conducted and that her evidence demonstrated that the Appellant had defiled her. Prosecution Counsel further submitted that the testimony of the clinical officer indicated that the victims had been penetrated to some degree and that the Appellant should have been charged with the more serious offence of defilement.
18. On identity of the Appellant, the Prosecution submitted that PW4 the second complainant testified that the Appellant was a frequent visitor at home while PW2, the first complainant’s mother testified that the Appellant was a close relative. The Appellant himself confirmed that he was known to the parties. Thus, identification was positive.



19. The Prosecution urged the Court to dismiss the appeal because the Appellant's defence was an afterthought.
20. The duty of a first appellate court was explained by the Court of Appeal in *Njoroge vs Republic* (1987) KLR 19 at pg 22 as follows: -

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect (see *Pandya V. R* [1957] E.A 336, *Ruwalla vs. R.* [1957] E.A 570).”

Issues for Determination

21. Having perused the Petition of Appeal, the trial Record and the respective submissions of the parties, I have isolated the following issues for my determination:
 - i. Whether the offence of attempted defilement was proven by the Prosecution to the required standard.
 - ii. Whether the sentence was legal and appropriate.

i. Whether the offence of attempted defilement was proven by the prosecution to the required standard.

22. The *Sexual Offences Act* provides for the offence of attempted defilement under section 9 as follows:-

"9. Attempted defilement

- (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
- (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.
- (3) The provisions of section 8(5), (6), (7) and (8) shall apply mutatis mutandis to this section."

23. In the case of *John Gatheru Wanyoike vs Republic* [2019] eKLR, the court held that: -

“It is clear that the elements of the offence of attempted defilement are similar to those of defilement save that there was no penetration. The prosecution must prove that the child was a minor, that there was an act to cause penetration, which was not successful, and that there was positive identification of the accused defiler.”

24. Thus, this Court will analyse the evidence from the trial Record to determine the following ingredients of the offence of attempted defilement: -
 - a. Whether the age of the complainant was proved.



- b. Whether there was an act to cause penetration, which was not successful.
- c. Whether the Appellant was positively identified by the minors as their assailant.

a. Whether the age of the complainant was proved.

25. It is an accepted principle that the age of a victim in sexual offences is a paramount ingredient which can be proven by documentary evidence, observation or common sense, by the testimony of a parent or medical evidence (age assessment). This principle is pegged on the fact that, from the establishment of the age of a victim comes the requisite punishment prescribed by the law. In *Alfayo Gombe Okello vs Republic* Cr App No 203 of 2009 (Kisumu) the Court of Appeal stated as follows: -

“....In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1).?”

(See also the case of *Kaingu Kasomo vs Republic* Criminal Appeal No 504 of 2010.)

26. In the present case, the Prosecution adduced evidence of the age of the victims in the form of their health cards. The first victim (PW1)’s health card indicated that she was born on September 23, 2014 while the 2nd victim (PW4) was born on February 26, 2014. By the time of the incident therefore, PW1 was 6 years old and 10 months while the 2nd victim PW4 was 7 years and 5 months old. Both were minors in law and therefore the ingredient of age was adequately proven.

b. Whether there was an act to cause penetration, which was not successful.

27. It was the Prosecution’s case that the Appellant attempted to defile the two minors at the same time. This was demonstrated by the evidence of SC the second victim (PW4) who testified that the Appellant offended her and did bad manners to her. She testified that the Appellant also did bad manners to MC. This is the only testimony that describes the offence in question and links the Appellant to the offence.

28. It follows then that, the Court must thoroughly test this evidence from the minor before it can draw any conclusions from it. Section 124 of the *Evidence Act* provides exceptions to when the Court can convict on the sole evidence of a minor in the absence of medical evidence. The Court of Appeal sitting in Nyeri in the case of *George Kioji vs Republic*, Criminal App No 270 of 2012 held as follows:-

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

29. In this case however, I have found that there was medical evidence adduced by PW5 Julius Magut. The said evidence demonstrated that the two victims were penetrated. In respect of MC, PW5 testified that she had bruises on the vulva and the outer wall of her vagina, that her hymen was not intact and that pus and epithelial cells were present. He formed the opinion that there was partial penetration as there was contact with her vagina and produced PW1’s PRC Form (P Exh5) and Treatment Notes (P Exh6).



30. PW5 also testified that he examined PW4 the second victim (SC) and found that her labia minora had bruises and lacerations but that her hymen was intact. He found that although there was no deep vaginal penetration, there was partial penetration. PW5 produced PW4's P3 Form (P Exh3), PRC Form (P Exh7) and Treatment Notes (P Exh8).
31. The second ingredient of the offence of attempted defilement requires that there must be an unsuccessful act of penetration on the victim, or an attempt to penetrate. The term 'attempt' is defined under section 380 of the *Penal Code* as follows: -
1. Where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfilment manifests his intentions by some overt act but does not fulfil his intentions to such an extent as to commit the offence, he is deemed to attempt to commit an offence.
 2. It is immaterial except so far as regards punishment whether the offender does all that of necessity on his part for completing the commission of the offence or whether the complete is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention.
 3. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."
32. In analysing the facts of this case, I have noted that the Appellant was charged with an attempt to defile the victims. At the same time, precedent has already demonstrated that the ingredients of this offence are similar to that of defilement save for the absence of penetration which is substituted by the ingredient of an attempt to commit an act of penetration.
33. It is therefore not sufficient for the Prosecution to demonstrate that there was an intention to commit the act (*mens rea*). They must be able to establish the *actus reus* through evidence that the Accused person had the intention to put his plans into action by some overt act or that they began committing the said act, which would lead to the actual commission of the act if successful or if completed.
34. In *Keteta vs R*, (1972) EA 532, 534, Madan Ag CJ (as he then was), opined that:
- "A mere intention to commit an offence which is in fact not committed cannot constitute an attempt to commit it. There must also be an overt act which is immediately and remotely connected with the offence intended to be committed and which manifests the intention to commit the offence. A remotely connected act will not do."
35. The above suggests that it would be proper to categorize the offence of attempted defilement as an inchoate offence. An actual commission of an offence and attempt to commit an offence (inchoate crimes), are distinguishable. In the case of *Moses Kabue Karuoya vs. Republic* [2016] eKLR Mativo J (as he then was) expounded the distinction as follows:-
- "In the case of *Bernard K Chege vs Republic* this court had the occasion to address its mind and to define in detail ingredients of incomplete offences also described as inchoate offences. Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of inchoate crimes are criminal conspiracy, criminal solicitation, and attempt to commit a crime, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime. An inchoate offense



requires that the accused have the specific intent to commit the underlying crime.... When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt or to prepare to commit the offence. The essential ingredients of an attempt to commit an offence have been laid down in the following words:-

‘In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An ‘attempt’ is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded’.

Thus, for there to be an attempt to commit an offence by a person, that person must:-

- a. Intend to commit the offence;
- b. Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;
- c. Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence,

But in fact, he does not commit the whole offence. For the offence of or attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond reasonable doubt....

....For the prosecution to prove the offence of preparation to commit a felony, they must establish that the accused had the intention to commit the offence. It must be shown that the appellant had put in motion his intention by making preparations to commit the offence. The prosecution must establish that the appellant made the attempt to put into effect his intention. The question that calls for determination is whether or not the conduct of the appellant constituted an overt act sufficiently proximate to constitute preparation to commit an offence."

36. Flowing from the above principles, it is my considered view that the evidence adduced before the trial court did not reveal that there was an attempt to defile the victims. The testimonies of PW4 and PW5 reveal that an act of penetration was committed against the minors. This means that in an attempt to prove the second ingredient which is an unsuccessful act of penetration, the Prosecution evidence instead proved penetration to the required standard.

37. Section 2 of the *Sexual Offences Act* defines penetration as: -

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”



38. In the case of *George Owiti Raya vs Republic* [2013] eKLR, it was held that:-
- “There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia....it remains therefore that there can be penetration without going past the hymen membrane...It matters not whether the complainant’s hymen was found to be intact, suffice it that there was evidence of partial penetration.”
39. Similarly, in *Erick Onyango Ondeng vs Republic* (2014) eKLR, the Court of Appeal held thus:
- “In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”
40. Evidently, penetration need not be complete. Partial penetration is sufficient to prove the offence of defilement. I have re-examined the evidence of the second victim, PW4. She stated as follows: “Aaron offended me. He did bad manners to me. He also did bad manners to (particulars withheld).” The trial court then observed that the child refused to answer when she was asked to explain what ‘tabia mbaya’ or bad manners entailed. This evidence leads me to believe that the minors were defiled. Though she did not explain what the “bad manners” meant this Court infers that she meant from her testimony, penetration.
41. In *Muganga Chilejo Saba vs. Republic* (2017) eKLR, the Court of Appeal held that:
- “Naturally, children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms such as, ‘alinifanyia tabia mbaya’.
42. In light of the definition of penetration and the principles in the cited case law above, coupled with the medical evidence from PW5 and the exhibits produced which demonstrated that there were lacerations and bruises on the minors’ private parts, the evidence in this case proved that an act of penetration had occurred and not an attempt to penetrate.
43. In Cross & Jones *‘Introduction to Criminal Law’*, (Butterworths, 8th Edition, 1976), P Asterley Jones and R I E Card state as follows at page 354:
- “...[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted....”
44. In the present case, it is clear that an attempt to defile was made and that attempt was successfully carried out leading to the actual commission of the offence. Therefore, it is my finding that the appropriate charge in this case ought to have been defilement and not attempted defilement.
45. Lastly is the issue of identification. As already stated above and from the evidence on Record, it is only the testimony of PW4 the second victim which points to the Appellant. The other witnesses who were called by the Prosecution merely reported what the victims had told them.
46. I have re-examined the evidence of the two minors. The first victim PW1 was unable to testify in the trial court and could neither identify the Appellant nor raise her head in court to look at him. She was called upon to testify a second time with the help of her mother PW2 and was unable to do so.



47. As for the second victim, PW4, the trial court conducted a *voir dire* and noted that she was able to answer questions well and truthfully but could not give sworn testimony owing to her tender age. She testified that she knew the Appellant as he would sometimes come to their home and stated that he was the one who defiled them. The trial court also noted that the victim was unable to look at the Appellant and would go quiet or look down during her examination-in-chief.
48. PW6, AC testified that she was 11 years old and that the two victims were her sisters. She stated that while they were outside playing, the Appellant passed by them and the second victim SC (PW4) saw him and informed her (PW6) at that point that the Appellant had done bad manners to her.
49. From the demeanour of the two victims (PW1 and PW2) in this case, it is evident that they knew the Appellant. Their conduct when asked to identify him implies fear. The first victim was completely unable to testify and it can be deduced that she must have either been very traumatized or fearful of the Appellant. The second victim who was the older one of the two was confident enough to testify about their ordeal, albeit still fearful of the Appellant.
50. The testimony of PW6 further confirms to this Court that PW4 the second victim was telling the truth. Her testimony indicated that PW4 was able to identify the Appellant who was well-known to her. Further, it is only when PW4 saw the Appellant pass by that she informed PW6 that they had been defiled. This means that she could not have been influenced or coerced by anyone to say what she said as alleged by the Appellant in his defence. I find the evidence of PW4 the second victim believable and I am satisfied that she properly recognized the Appellant as the one who defiled her and PW1.
51. It is the determination of this Court that the Prosecution evidence tendered in the lower court was not only cogent but sufficiently proved the charge of defilement and not attempted defilement. However, the provisions of the law are such that an appellate court may only convict a person of an offence that is cognate and minor to the offence with which he or she was charged with. The *Black's Law Dictionary* 9th Edition at page 1186 defines a cognate offence as:-

“A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.”

52. Section 179 of the *Criminal Procedure Code* provides as follows:
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 he was not charged with it.
53. The above definition and legal provisions connote that a court of law can only convict for a minor offence even though the person was not charged with it, where the evidence demonstrates the ingredients of that minor offence. However, the court may not convict an accused person of a more serious offence even if the evidence demonstrates so.
54. In this regard, the Court of Appeal expressed itself thus in *Kalu vs. Republic* (2010) 1 KLR:-
- “With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the



heading: ‘Convictions for Offences Other than those Charged’ and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder.” (emphasis added)

55. In the present case, the facts demonstrate that the offence in question was defilement which is more serious than attempted defilement. As already stated by the law above, this Court is barred from proceeding to convict the Appellant of the more serious offence for which he was not charged.
56. Following the above, this Court can only uphold the conviction of the trial magistrate which I hereby do.

(ii) Whether the sentence was legal and appropriate.

57. I now move to consider the sentence meted by the trial magistrate in this case. As already stated, section 354 (3) vests this Court with the powers to review the sentence meted by a subordinate court. The Appellant in this case was sentenced to serve 15 years imprisonment for each count and the sentences were to run concurrently.
58. In sentencing a convicted person, the court is bound to consider several factors. Ngugi J. (as he then was) in the case of *Benson Ochieng & Another vs. Republic* [2018] eKLR held as follows: -

“Re-phrasing the Sentencing Guidelines, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years imprisonment). These are the following:

- a. Circumstances Surrounding the Commission of the Offence: The factors here include:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - v. _____
 - vi. Were there multiple victims?
 - vii. _____
- b. Circumstances surrounding the Offender. The factors here include the following:



- i. The criminal history of the offender: being a first offender is a mitigating factor;
 - ii. The remorse of the Applicant as expressed at the time of conviction;
 - iii. The remorse of the Applicant presently;
 - iv. Demonstrable evidence that the Applicant has reformed while in prison;
 - v. Demonstrable capacity for rehabilitation;
 - vi. Potential for re-integration with the community;
 - vii. The personal situation of the Offender including the Applicant's family situation;
 - viii. health; disability; or mental illness or impaired function of the mind.
- c. Circumstances surrounding the Victim. The factors to be considered here include: -
- i. The impact of the offence on the victims (if known or knowable);
 - ii. Whether the victim got injured, and if so the extent of the injury;
 - iii. Whether there were serious psychological effects on the victim;
 - iv. The views of the victim(s) regarding the appropriate sentence;
 - v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;
 - vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and
 - vii. Whether there been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime.”

59. I have noted that from the trial Record, the Prosecution indicated that the Appellant was a first offender. In his mitigation, the Appellant stated that he would like to continue with school and that his mother used to depend on him. Counsel for the Appellant submitted that the Court should consider the fact that the Appellant was a first offender.

60. I have perused the Appellant's Age assessment dated 17th November 2020 which confirms that he is an adult between the age of 18-25 years. I have considered this against the age of the two minors. They were children of tender years and therefore persons of a vulnerable group and whose innocence was snatched.

61. I observe that the Appellant himself was not remorseful during mitigation in the trial court and has not expressed any remorse in seeking the reduction of his sentence in this appeal.



62. In the end, I uphold both the conviction and sentence. The Appeal is thus dismissed.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF MARCH, 2023.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant, Ms. Boiyon holding brief for Mr. Njeru for the State, Ms. Chirchir for the Appellant and Susan/Siele (Court Assistants)

