Makokha v Republic (Criminal Appeal E110 of 2021)
[2023] KEHC 3929 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3929 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E110 OF 2021

JRA WANANDA, J

APRIL 28, 2023

BETWEEN

AUSTIN WAFULA MAKOKHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Bungoma Chief Magistrate's Court Sexual Offence Case No. 52 of 2020 with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act*. The particulars of the offence are that on diverse dates between 10/09/2019 and 13/11/2019 at [particulars withheld] in Bungoma Central sub-County of the Bungoma County, he intentionally caused his penis to penetrate the vagina of NJ a child aged 15 years.

2. He was charged with the alternative offence of committing an indecent act with the child contrary to section 11(1) of the *Sexual Offences Act*.

3. The prosecution called 4 witnesses while the Appellant was the only defence witness.

Prosecution evidence

4. PW1 was the complainant (the alleged victim). Since she was a minor, she was taken through a voire dire examination after which the trial Court concluded that she understood the importance of telling the truth and could be sworn, which she did.

5. She stated that at the time of giving evidence (4/08/2020) she was a Form 2 student at [Particulars withheld] and was 15 years old, she was born on 14/03/2005. She then identified a copy of her birth certificate which was then produced. She further stated that she resides with her parents, she knew the Appellant, he resides at Mukweya, he is her boyfriend, he made her pregnant, they started the friendship in December 2018, they used to make love, on 10/09/2019 the Appellant invited her

to his place and informed her that he would give her money, she went to the home and found the Appellant's mother and himself, the mother welcomed her and prepared for her tea, they had supper in the Appellant's house, the house of the Appellant's mother is different, after supper she had sex with the Appellant, they slept with the accused on his bed, he told her to make love with him, he promised that if they made love he would get her a good thing, he removed her dress and also removed his clothes, they then had sex, he put his penis inside her vagina, she felt pain but just remained quiet, when he finished he put on his clothes, he then asked him to give her the good thing he had promised to give her but he did not reply, he called a bodaboda cyclist who took her home, she did not inform anybody what transpired.

6. She stated further that on 13/11/2019, the Appellant again invited her to his home, he told her that he was from work and she should go and collect the phone he had bought for her, she went to his place, it was in the evening, she found his mother again and some small children, they had supper in the Appellant's house while the others had supper in the kitchen, after supper they went to sleep on his bed and they had sex, he took his penis and put it in her vagina, she complained because she did not want, she left and he was annoyed, he had already put his penis inside her vagina, she just slept up to morning, in the morning they took breakfast, he gave her transport, he did not give her the phone he had promised her, after one month, she realized that she was pregnant, she called the Appellant and informed him but he said that he did not know about the pregnancy, he did not talk to him again.

7. She added that she became sick in March 2020, she was taken to hospital by her mother at Nzoia Medical Clinic, she was admitted, the doctors informed her parents that she was pregnant, when the parents enquired about her pregnancy she informed them that the one who made her pregnant was called Austin (Appellant) from Mukweya, he gave them directions to the Appellant's home, her father went to the Appellant's home to discuss the matter and also reported it at Mukweya police station, she was called at Mukweya police station, she went and recorded her statement, she went to Chwele District Hospital where the doctor examined her, she was issued with a P3 form. At this point, she identified the Appellant by pointing at him. She further stated that she had never had any sexual relationship with any other person other than the accused, she was 9 months' pregnant at the time of giving evidence, (i.e., 4/08/2020).

8. In cross-examination, she stated that she had a young sister who knew about her relationship with the Appellant, the sister was however not a witness in the case, she did not record her conversation with the Appellant on phone, the Appellant's mother saw her at the home of the Appellant, she knew the Appellant as Austin, she came on a motorbike to his home, she knew the rider person as a boda boda operator, she did not know the name of the boda boda operator, she did not know the registration number of the motor bike, the Appellant had told her that he was a police officer, he did not report to anybody about the sexual intercourse she had with him, she used a phone owned by her friend by the name Gloria to call the Appellant, she knows his house, he had promised to give her money but he did not, she had sex with him and she got pregnant, he was the only one with whom she had sex, she did not have his photograph with him at his house, there was blood when he did it for the first time but she had nothing to show it, the Appellant had removed the stained clothes, the blood did not go to her clothes but it went onto the beddings, in the morning the Appellant took the beddings for washing, on the second occasion of sex with him there was no blood, on the first occasion, after the sexual act she did not go to hospital.

9. In re-examination, she stated that the beddings remained at the Appellant's house, the Appellant woke up in the morning took the beddings and went and washed them, after the first sexual intercourse with the accused she did not put on her pant, she went and bathed then put on a fresh panty, she did not see blood thereafter.

10. At this point, the trial Magistrate recorded the following

> " I found the complainant very composed. Her evidence was clear, precise and consistent as to what had happened, her testimony was not shaken on cross-examination and that she never faltered in her response to questions put to her. I believed that she was telling the truth."

11. The next witness was PW2. He described himself as a Clinician working at Chwele Sub-county Hospital as the in-charge, he had worked for 10 years, he had the P3 form and treatment notes for the PW1, he filled the P3 form on 05/06/2020, that PW1 was seen at the facility on 03/06/2020, her complaint was that she was involved in sexual intercourse three times with a person she knew and she got pregnant, it was in November 2019, on examination it was established that PW1 was a minor, she was shy but sure of what she was saying, she had no injury but was pregnant, she had started attending clinic, she had no injury on the vagina and no hymen, there was no indication of infection, the pregnancy test was positive, her pregnancy was classified as maim, the pregnancy was 28 weeks, approximately 7 months, he had in Court the treatment notes for PW1 who was 15 years old, what is in the P3 form is similar to what is in the treatment notes, his conclusion was that PW1 was defiled as she was below 18 years old and pregnant. He then produced the P3 from and treatment notes as exhibits.

12. In cross-examination, he stated that he did not examine PW1, that she was examined by his colleague, he was however in the hospital on 03/06/2020 when the treatment notes were made and the P3 form filed on 05/06/2020. In re-examination, he stated that he is the one who filled the P3 form, he examined PW1, she came with her parent.

13. PW3 gave her evidence on 25/01/2021. She stated that she is PW1's mother, PW1 was 16 years old at the time of giving evidence having been born on 14/03/2005, on 20/04/2020 PW1 had pain and asked the mother to take her to hospital, she took her to Nzoia Medical Clinic in Chwele where PW1 was admitted, scanning was ordered, the result was that she was pregnant, on 24/04/2020 is when scanning was done, when they returned home she inquired from PW1 as to who was responsible for the pregnancy, PW1 stated that it was the Appellant who resided at Muhoya, PW3 did not know the Appellant.

14. She further stated that on 29/04/2020 she went to look for the Appellant's father by the name Joseph Makokha at the market, when she found the Appellant's father he referred her to the Appellant's mother as he did not want to hear of it, she went to the Appellant's mother, the Appellant's mother admitted that she knew PW1 and confirmed that PW1 used to visit them at home, on 18/05/2020 she went to the Appellant's home to see the Appellant's father, the father asked her to go and arrest the Appellant and jail him, she did not find the Appellant at that time, on 29/05/2020 she reported the matter police at Muhoya police post., she was referred to Chwele police station to take a P3 form, she went there and took the Form, she then took the Form to Chwele Hospital and it was filled and she returned the P3 form to the police station, in the month of June 2020 she was called by the police, she went with PW1, PW1 was asked if she knew the accused, PW1 informed the police that she knew him as he had been her boyfriend for a long time and that he is the one who made her pregnant.

15. PW3 stated that she did not know the Appellant, she was seeing him for the first time, she did not know even the Appellant's father, she had no grudge with them, the complainant gave birth, the baby is 4½ months old. At this point, she identified the Appellant by pointing at him on the screen. In cross-examination, he reiterated that she had not know the Appellant at any earlier time, PW1 identified the Appellant as the person who made her pregnant, she was informed of the pregnancy when it was 5 months old, PW1 was in a boarding school, she was seeing the Appellant for the second time, she did not know the plot at Kolanyo that the Appellant or his father had, PW1 informed her that she

got impregnated in December 2019 and that in March, PW1 had come back home during the corona virus outbreak.

16. PW4 was the prosecution's last witness. He stated that he was attached at Mahoya police post under Chwele police station, he was the investigating officer in this case, on 29/05/2020 PW1's father reported to the police post that the Appellant had defiled his daughter, they recorded the report and took his statement, they issued a P3 form which was taken to Chwele Sub-county Hospital, the father brought back the filled P3 form which showed that PW1 was pregnant, since PW1 was below 18 years it was a case of defilement, they started looking for the Appellant, on 06/06/2020 they went to the Appellant's home and found his parents, they we were directed by the Appellant's father, the Appellant's home is very near to the police post, on 12/06/2020 the Appellant came to the post at Mukoya to see a friend and he was brought to office, they informed him of the offence he had committed, he denied, they called PW1's father and asked him to come with PW1, PW1 came and identified the Appellant as the person who impregnated her, they then arrested the Appellant . At this point, he identified PW1 by pointing at him on the screen.

17. He further stated that they put the Appellant in the cells, charged him and put him in remand, the incident happened when PW1 went to visit the Appellant at his home, they went to the scene, PW1 showed them the house where they used to spend, it was a small house with two rooms, the Appellant was residing in their home and the home also has the house of the Appellant's parents.

18. In cross-examination, he reiterated that PW1 identified the Appellant as the perpetrator, she went with them and showed them the Appellant's home, she identified the Appellant as the person responsible for the pregnancy, when the Appellant went to the police post to see his friend he did know the offence he had committed, when they went to the Appellant's home they did not find him, the door was opened by his parent, did not find the Appellant with any other offence other than a matter in court 8 being handled by PW4's colleague for defilement, he had never found the Appellant with PW1, the Appellant was not photographed on the act.

Defence evidence

19. At the close of the prosecution case, the trial Court ruled that the Appellant had a case to answer and put him to his defence.

20. In his defence, the Appellant stated that he resides at Chwele, he was a student at a Technical School, that on 08/06/2020 he was doing some work at home, the college was closed due to corona, he was planting trees, around 11.00 pm when he went home his mother informed him that some police officers came to look for him, he went to the police station to enquire what was happening, he was instructed to sit down and wait, he then saw a police vehicle which came and took him to Bungoma police station, he was charged, they had a grudge with his father's brother arising from a land issue. In cross-examination, he stated that the name of his said father's brother is Anthony Wanjala, that PW3 is the complainant's father called Martin, he did not know the complainant, she had no reason to file the complaint against him, on 13/11/2019 he was attending a crusade in Nairobi, it was by international ministry preaching and healing church, it was led by pastor Abiud Makokha, it was at Baba Dogo Sama, he had another case in court, it had been determined, he was convicted and sentenced to 5 years imprisonment, he did not know PW3, he saw him in court for the first time.

21. Upon concluding giving his evidence, the Appellant was allowed to give oral submissions. He submitted that although PW1 testified that she called him on phone, the phone number was not mentioned, PW2 admitted that she was told that it was the Appellant who committed the offence, he did not see it happening, although PW2 stated that when she went to the Appellant's home his father

responded that the Appellant be jailed, he did not have a father, the investigating officer did not witness the incident, it was the Appellant who went to the police station, on the date of the incident he was not at home and thereafter he was at home until he was arrested, how come he was at home and it is alleged that he committed an offence? the doctor said nothing was found in the victim to show that she was defiled and he was having disagreements with the man who visited his mother.

Trial Court's Judgment

22. At the end of the trial, the Learned Magistrate found that the charge of defilement was proved, convicted the Appellant and sentenced him to serve 25 years imprisonment.

Grounds of appeal

23. Being dissatisfied with the decision, the Appellant filed the Petition of Appeal on 09/11/2021 containing 7 grounds. He subsequently filed an Amended Grounds of Appeal and Submissions on 14/11/2022.

24. In the Amended Grounds of Appeal, he cited on 25 grounds as follows:

    i. That the trial magistrate erred in law and fact by convicting the Appellant of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 and awarded un prescribed sentence of 25 years.

    ii. That the trial magistrate erred in law and fact by basing a conviction on prosecution evidence not corroborated.

    iii. That the prosecution evidence was marred with contradiction, inconsistencies, discrepancies and glaring gaps.

    iv. That the trial magistrate erred in law and fact by basing my conviction on prosecution case not proved beyond reasonable doubt.

    v. That I was not supplied with all the documents the prosecution was to rely on during the case e.g investigation diary. This amounts to violation of my constitutional right to fair trial as enshrined in Article 50(2) of *the Constitution*.

    vi. That the 3 ingredients of defilement e.g penetration, age of the victim and identity of the perpetrator was not proved to the required lawful standard.

    vii. That the pregnancy is not proof of defilement.

    viii. That the medical evidence in P3 Form, treatment note form and P.R.C form exonerates me the appellant from the present offence.

    ix. That my arrest was improper and an afterthought.

    x. That vital/crucial witnesses were not produced in court to testify.

    xi. That no D.N.A test was conducted to me the appellant complainant and the new born child to ascertain the truth of complainant's allegation amounting to a new compelling evidence for retrial under article 50(6)(b) of *the constitution*.

    xii. That no medical evidence was produced in Court to link me to the pregnancy. I did not impregnate the complainant.

xiii. That the period I spent in remand custody under Section 333(2) of the CPC was not considered by the trial magistrate.

xiv. That report from the government chemist was produced in court to link me to alleged white discharge or new born baby.

xv. That the trial magistrate erred in law and fact by failing to warn himself against the danger of convicting the appellant on uncorroborated evidence of the complainant.

xvi. That no blood stained pant was produced in court as exhibit to prove that it belonged to the appellant.

xvii. That the complainant was un-credible witness and untrustworthy hence her evidence cannot be relied upon.

xviii. That the trial magistrate erred in law and fact by demonstrating that he was biased and prejudicial against me the appellant. As a result, I the appellant was greatly jeopardized hence miscarriage of justice.

xix. That the trial magistrate erred in law and fact by dismissing my alibi defence which was trustful, cogent to warrant my acquittal.

xx. That I was not examined for to ascertain the truth of the complainant's allegations.

xxi. That the 25 years sentence I am serving which was imposed on me by the trial magistrate is not only unconstitutional but also against the law and in violation of Article 25(a) of *the Constitution*.

xxii. That broken hymen is not proof for defilement.

xxiii. That during the alleged defilement, I was a college student aged 18 years.

xxiv. That the 25 years I am serving lacks discretion. This appellate court to exercise discretion.

xxv. That the trial magistrate erred in law and facts by disregarding the probation report which was positive to secure a non-custodial sentence.

Appellant's submissions

25. The Appellant reiterated the arguments contained in his grounds of appeal and quoted several case law authorities. Basically, his submissions was that the prosecution failed to prove the ingredients of the offence of defilement, penetration was not proved, it is inconceivable that the complainant's parents only noticed the pregnancy when it was at the late stage of 7 months, the case was based on mere suspicions, no medical evidence linked him to the offence, the failure to conduct a DNA test to establish paternity was fatal to the prosecution case, the probation report was not considered, the medical officer who testified was not the one who examined him, the broken hymen is not evidence of defilement, the complainant's age was not established, the sentence of 25 years lacked discretion, the prosecution witnesses were not credible and that their evidence was contradictory and inconsistent.

Respondent's submissions

26. On its part, the Respondent also quoted several case law authorities and basically submitted that the Respondent's age of 15 years was proved, that penetration and the identity of the Appellant as the defiler were also proved, the complainant's evidence was believable, the Court was therefore entitled to rely on such evidence even if the complainant was the sole eye-witness, conduct of a DNA test is not

mandatory and was also not necessary in this case, the sentence of 25 years imprisonment was lawful and merited and commensurate to the offence, the Appellant was a repeat offender, that the probation report was not favourable to the Appellant.

Analysis & Determination

27. In determining this appeal, this Court will be concerned with whether there is evidence proving the case beyond reasonable doubt. The elements to be established are the age of the complainant, whether penetration took place and whether the identity of the appellant as the defiler was established. Pregnancy of the complainant is only relevant in as far as it is proved that it was caused by the appellant as a result of the alleged defilement.

28. I mention this because the Appellant seems to be challenging the pregnancy as an ingredient of defilement. The issue is not pregnancy per se but defilement resulting in pregnancy.

a. Age of the complainant

29. I find that the complainant's age has been proved beyond reasonable doubt. The production of a copy of her birth certificate as proof of her date of birth is sufficient evidence of her age. In November 2010 when the defilement is alleged to have taken place, she was 13 years old and by the time that Judgement in the lower court was delivered in December 2011, she was 14 years.

b. Penetration

30. The medical evidence showed that PW1 (the complainant) was pregnant. It was also stated that she has since gave birth. The Court takes judicial notice of the fact that a pregnancy occurs as a result of sexual activity. My conclusion therefore is that sexual activity with penetration took place thereby proving penetration.

c. Identity of the defiler

31. The issue that now remains for determination is whether the appellant is the person who engaged in the sexual intercourse with PW1 as a result of which she became pregnant. If this is the case, then the appellant will be found to have defiled PW1. This is because she was a minor and did not therefore have the legal capacity to give consent for the intercourse.

32. There is on record evidence of PW1 as the sole witness, that the Appellant is the person who defiled her. The trial court handled this issue and found the evidence of the complainant credible after recording that her demeanour left no doubts in the court's mind.

33. I have laboured with this issue noting that some crucial witnesses do not appear to have been brought to testify. I have in mind potential witnesses such as the friend to PW1 whose phone it is alleged PW1 used to communicate with the Appellant. There was also PW1's younger sister whom PW1 alleged was aware of her love affair with the Appellant. There are also the Appellant's parents, particularly his mother, whom PW1 alleged used to welcome PW1 to the home whenever she visited the Appellant. It does not appear that efforts were made to call these crucial witnesses.

34. However, I also note that even the Appellant himself did not call her said mother as his witness. Denial by the mother of PW1's alleged visits to the home could have substantially weakened the prosecution case. I however chose not to speculate why neither party deemed her to be a crucial witness.

35. There is also the matter of failure or hesitation to conduct a DNA test on the baby to establish paternity. I note from the record that at some point, after the prosecution case, the Appellant requested for and

was granted permission to conduct the DNA test. However, he never conducted the test on grounds that he alleged was his inability to afford the cost.

36. In this regard, Section 36 of the *Sexual Offences Act* provides as follows:

> "(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

37. With knowledge of existence of the above provision, it is beyond me as to why the prosecution did not, even without need for the Appellant to request, on its own deem it necessary to conduct such DNA test. Had the test been conducted and had it confirmed the Appellant to be the father, then the issue of identity would have been easily laid to rest in this case. I am aware that DNA proof is not a mandatory requirement in defilement cases but where a baby has been born allegedly as a result of such defilement, why would a prosecutor not utilize it to lessen his burden of proof in Court?

38. For the foregoing reasons, I would have at this point ruled that the prosecution failed to prove the charge. However, there is the matter of the evidence of PW1. As already stated, after PW1 concluded giving her evidence, the trial Magistrate recorded the following

> "I found the complainant very composed. Her evidence was clear, precise and consistent as to what had happened, her testimony was not shaken on cross-examination and that she never faltered in her response to questions put to her. I believed that she was telling the truth."

39. I have carefully analysed the above record by the Magistrate and the reasons leading to it.

40. That the law requires corroboration of evidence by minors is clear from section 124 of the *Evidence Act*. However, there is a proviso to that section that there need not be corroboration if the Court believed that the minor told the truth and recorded its reasons. The section and the proviso provide as follows:

> "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. In Erick Onyango Ondeng' v Republic [2014] eKLR, the Court of appeal held as follows:

> "In Bukenya & Others vs Uganda (supra), the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case; ....

> While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso to Section 124 of the *Evidence Act* and the medical evidence must be borne in mind as well as Section 143 of the *Evidence Act* (Cap 80) which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In this appeal, it is not clear to us what value the evidence of V would have added to the evidence of PW2, which the court found trustworthy, as well as the medical evidence. In our opinion, V would have been a peripheral witness as she was said to merely have happened by when the appellant was with PW2 on a different occasion."

42. From the foregoing, it is clear that the proviso to Section 124 of the *Evidence Act* allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

43. The trial Magistrate found that PW1 truthfully identified the appellant as the person who was responsible. I too agree that indeed PW1 was very consistent noting that she mentioned and identified the same Appellant to her parents, to the police, to the medical staff and also to the Court. Her testimony was not shaken and her explanations were also very vivid, graphic and candid. She had the same version for anyone who cared to asked. She pointed out the Appellant's home when she was asked to do so by her parents and pointed out the same place to the police as well. She insisted that she was a virgin when she met the Appellant and that she had never had sexual intercourse with any other person apart from the Appellant. The Appellant was therefore someone known to her.

44. Although the Appellant alleged that he was framed because there was some grudge between him and someone else over some land dispute, he did nor clearly explain the nature of the dispute nor explain the role of the parties herein in the dispute. His explanations were also inconsistent and contradictory. For instance, he stated that he did not know PW1 or her family before and that he had never seen PW1. How then did he have a land dispute or a grudge with people that he had never met and did not know?

45. Regarding the Appellant's alibi evidence that he was away in Nairobi on one of the dates that he is alleged to had sexual intercourse with PW1, first, that does not address the second or other sexual encounters alleged by PW1 and secondly, he did not produce any evidence or call any witness to support the alibi.

46. The trial Magistrate found that there was sufficient evidence implicating the appellant as the perpetrator of the offence. I agree that evidence in support of a criminal case must not leave any doubt in the mind of the court and that criminal cases must be proved beyond all reasonable doubt. I however also agree with the trial Magistrate that this was not the case herein since, through PW1, the prosecution adduced sufficient evidence which was corroborated by the medical evidence and demonstrated that the Appellant defiled minor.

47. The Appellant has also raised the issue that he was 18 years old on the date when he is alleged to have committed the offence. I want to believe that he is raising this as a matter of mitigation as a ground for seeking reduction of the sentence and not as a matter of seeking to nullify the trial on the ground that he was a "child" but was prosecuted as an "adult". I say so because if indeed he was 18 years old, then he had already attained the age of adulthood under Kenyan law and was no longer a "child".

Finding

48. In the circumstances, despite the slight gaps and omissions in the prosecution case touching on the "identity" ingredient that this Court had pointed out, in the end this Court concurs with the trial Magistrate that such omissions do not by themselves materially weaken the strong and believable evidence given by PW1. I therefore find that all the 3 ingredients of the charge of defilement were established against the Appellant.

Sentence_

49. I now consider whether to revise the sentence of 25 years imprisonment imposed herein. In doing so, I have to determine whether the sentence was lawful or harsh and excessive. In Macharia v Republic, [2003] 2 EA 559, the Court Court expressed itself as follows:

> " The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1964 in the case of Ogola s/o Owour v Republic [1954] EACA 270 wherein the predecessor of this Court stated:
>
> "The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James -vs- Republic (1950) 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factors. To this we should also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case. See R v Shershawsky [1912] CCA 28 TLR 263"

50. Having referred to the principles applicable, I now turn to Section 8(3) of the *Sexual Offences Act* which provides as follows:

> " (3) A person who commits am 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."

51. In this case I have taken into account the circumstances of the offence, the fact that there was no use of force or violence on the victim, the sentencing guiding principles, the authorities cited and the minimum sentence of 20 years provided in the Act. I have also taken into account the emerging jurisprudence encouraging judicial officers to exercise judicial discretion even where mandatory and minimum sentences are stipulated. I have also considered the Appellant's mitigation and I believe that he has now learnt his lesson. Having done so, I am persuaded to alter the sentence downwards. I however note that it was recorded that the Appellant was a repeat offender. I therefore hereby reduce the 25 years prison sentence to 10 years.

52. On the issue of whether the sentence should run from the date of arrest or the date of conviction or sentencing, I note that the trial magistrate did not mention whether she took into consideration the time spent by the accused person in custody as required by law., Section 333(2) of the Criminal Procedure Code provides as follows:

> "

"(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."

53. On the same issue, the Court of Appeal in Bethwel Wilson Kibor v Republic [2009] eKLR stated as follows:

> "By proviso to section 333(2) of Criminal Procedure Code, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

54. On its part, The Judiciary Sentencing Policy Guidelines [2014] also provides guidance on this as follows:

> "The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

55. From the Charge Sheet, I note that the Appellant was arrested 12th June 2020. Although he was given bail, it seems that he remained in custody as it appears that he was unable to raise the bail even after it was reviewed downwards. He was then convicted and the sentence was delivered on 4th November 2021.

56. The period between arrest and sentence is therefore about 17 months. This period ought to be therefore factored and reduced from the 10 years prison sentence that this Court has now imposed.

Final Order

57. In the end, I issue the following orders:

i. The conviction is upheld.

ii. On the sentence, I hereby reduce the sentence of 25 years' imprisonment imposed by the trial Court to a sentence of 10 years imprisonment.

iii. The 10 years prison sentence shall be computed as from the date of the Appellant's arrest as appears in the Charge Sheet, namely, 12th June 2020.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2023

.....

JOHN R. ANURO WANANDA

JUDGE