Korir v Republic (Criminal Appeal E031 of 2021)
[2023] KEHC 17978 (KLR) (30 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17978 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E031 OF 2021

RL KORIR, J

MAY 30, 2023

BETWEEN

WESLEY KORIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number 40 of 2019 by Hon. L. Kiniale in the Principal Magistrate's Court at Bomet)

JUDGMENT

1. The Appellant was convicted by Hon. L. Kiniale, Principal Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* (SOA). The particulars of the Charge were that on unknown dates in November 2018 in Cheboin Location within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of TC, a child aged 17 years.

2. The Appellant pleaded not guilty to the charge before the trial court, and a full hearing was conducted. The prosecution called five (5) witnesses in support of its case.

3. At the close of the prosecution case, the trial court ruled that a *prima facie* case had been established against the Accused and he was put on his defence.

4. At the conclusion of the trial, the Accused was convicted of the offence of defilement and sentenced to serve 15 years in prison.

5. Being dissatisfied with the Judgment, the Accused appealed to this court on the following grounds: -

    i. That the trial magistrate erred in law by sentencing the Appellant to 15 years imprisonment whereas there was no sufficient evidence to warrant the said conviction and sentencing.

ii. That the trial magistrate erred in law and in fact in failing to take into consideration that the prosecution had failed to prove their case beyond reasonable doubt.

iii. That the trial magistrate erred in law and fact in proceeding to convict the accused despite the Prosecution's failure to prove the age of the complainant beyond reasonable doubt.

iv. That the trial magistrate erred in law and in fact by relying on contradicting testimonies of the Prosecution witnesses in finding the Accused guilty.

v. That the sentencing is harsh and excessive in the circumstances.

6. This being a first appellate court, I have a duty to re-evaluate the evidence on record. This was succinctly stated by the Court of Appeal for Eastern Africa in *Pandya v Republic* (1957) EA 336 where it stated: -

> "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 demeanor, 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 demeanor 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."

The Prosecution's Case.

7. The victim, TC testified as PW1. It was her testimony that she was born on 22nd June 2001. She told the court that the Accused was her boyfriend and that they had sexual intercourse severally. It was her testimony that she discovered she was pregnant in November 2018.

8. PW1 testified that they continued with the relationship until June 2019 when her relatives realized that she was pregnant. That after the Accused was called by her relatives, he denied knowing her. PW1 further testified that she went to Longisa County Hospital on 15th May 2019 to be examined. That she was seven and a half months pregnant at that time.

9. The victim's mother EC (PW2) testified that PW1 joined Form one in the year 2017. She stated that PW1 told her that the Accused had advised her to leave school and that he would buy her land. It was PW2's testimony that PW1 became pregnant in December 2018 and she thereafter refused to go to school. That PW1 told her it was the Accused who had impregnated her. She testified that PW1 was born in the year 2001 on a date she could not remember. That PW1 was a student at [Particulars Withheld] Girls High School.

10. PW2 testified that PW1 was taken to Longisa County Hospital for examination. She further testified that the Accused worked in Longisa town and that they were not related. She told the court she had no dispute with the Accused.

11. KK (PW3) testified that he was the brother to PW1. That on 17th June 2019, his mother PW2 called him and informed him that PW1 had been chased from school. That upon inquiring on the reason why, he was told that PW1 had not been chased from school but was required to give birth before returning to

school. He was told that his friend (Accused) had befriended the complainant. PW3 further testified that he went to report the matter at Longisa Police Patrol Base.

12. Dr. Nixon Kiplangat Mutai (PW4) testified that he was based at the Longisa County Hospital. That he examined PW1 and stated that she was aged approximately 18 years and that she was 30 weeks pregnant. PW4 further testified that there was no sign of drugs or alcohol and that she had normal head, neck, lower and upper limbs. It was PW4's testimony that on examination of the genitalia, there was an old broken hymen. PW4 stated that the complainant was approximately 18 years and that he did not conduct an age assessment.

13. No 112415 PC Eric Mwenda (PW5) testified that he took over the case from PC Caroline Nthenya. That on 2nd July, 2019 the complainant while accompanied by her parents reported that PW1 and the victim had sex with the Accused on diverse dates in November, 2018 and that PW1 was pregnant. PW5 testified that PW1 was a Form 3 student at [Particulars Withhed] Girls High School. PW5 stated that PW1 was referred to hospital and the examination did not reveal recent penetration but found a 7 month pregnancy.

The Accused /appellant's Case.

14. In his brief defence, the Accused, Wesley Korir (DW1) testified that he knew the complainant as T a neighbour. He denied having committed the offence and stated that he did not defile her.

15. On 18th October 2022, I directed that this Appeal be canvassed by way of written submissions.

The Appellant's/accused's Submissions

16. It was the Appellant's submission that the Prosecution failed to prove the age of the complainant. That the Prosecution failed to produce the complainant's original birth certificate hence the authenticity of the birth certificate could not be established. It was the Appellant's further submission that in offences such as the one he faced, age was an important aspect to be proved. He relied on Sections 64, 66 and 67 of the *Evidence Act*, *Edwin Nyambogo Onsongo v Republic* (2016) eKLR, *Hadson Ali Mwachongo v Republic* (2016) eKLR and *Alfayo Gombe Okello v Republic* Cr. App 203 of 2009 (Kisumu).

17. The Appellant submitted that the standard of proof was beyond reasonable doubt. reasonable doubt was proof which made the court firmly convinced the Accused was guilty. Further that reasonable doubt was a real and substantial uncertainty about guilt which arose from the available evidence or the lack of it. He relied on *Rex v Summers* (1952) 36 Cr App R 14; *Rex v Kritz* (1949) 33 Cr App R 169, (1950) 1 KB 82 and *Hepworth, R v Feamley*, (1955) 2 All E.R 918. That beyond

18. The Appellant further submitted that the burden of proving the case belonged to the Prosecution and that burden did not shift to the Appellant.

19. The Appellant submitted that a photocopy of the birth certificate could not be produced without accounting for the original one. That there was no proper explanation as to the absence of the original one. The Appellant further submitted that the photocopy of the birth certificate had no probative value.

20. It was the Appellant's submission that there was no age assessment conducted on PW1 hence her accurate age could not be established, thereby casting doubt that PW1 was a minor at the time of the alleged offence. He relied on *Joseph Kuoti v Republic* (2014) eKLR and *Francis Omuoroni v Republic* (2000) eKLR.

21. The Appellant submitted that the Prosecution failed to discharge their burden of proof and he humbly prayed that the Appeal be allowed, the conviction quashed and the Sentence set aside.

The Respondent's/prosecution's Submissions.

22. The Respondent initially filed submissions on 15th March,2023 opposing the appeal. Subsequently they withdrew the said submissions and filed submissions dated 21st March,2023 in which they conceded the appeal. They submitted that they were not opposed to the Appeal. That it was not contested that both parties engaged in coitus as the complainant delivered a child who belonged to the Accused according to the DNA examination.

23. It was the Prosecution's submission that the issue of age was a grey area in this case. That the PW1 stated that she was born on 22nd June 2001 and that her mother (PW2) contradicted the date indicated on the copy of the birth certificate when she testified that her daughter (PW1) was aged 15 years old. It was the Prosecution's further submission that PW4 complicated matters when he testified that he did not conduct an age assessment on PW1. That of more concern was the fact that PW1 testified that she was examined on 15th May 2019 while PW4 testified that he examined her on 1st July 2019.

24. The Prosecution submitted that in view of the inconsistencies mentioned, there was a serious need to produce the original birth certificate or call for an age assessment. That the production of the copy of the birth certificate as secondary evidence was prejudicial and that the trial court was in error in concluding that the defence should have objected to the production of the copy.

25. It was the Prosecution's submission that PW5 clearly stated that he was not involved in the investigations and that no proper basis had been laid as to why PC Caroline Nthenya who investigated the matter had not been called to testify. That this was contrary to settled practice and law and against Section 77 of the *Evidence Act*. It was the Prosecution's further submission that it was necessary for the investigating officer to appear to explain the inconsistencies.

26. The Prosecution submitted that the conviction was unsafe. It was their view that it was better to let go of 100 guilty persons than to convict one person whose guilt was in doubt. The Prosecution further submitted that the parents of PW1 were aware of the relationship between PW1 and the Accused. That the matter was only reported when the Accused denied the pregnancy and his wife became aware of the matter. The Prosecution therefore conceded the appeal and urged the court to allow it.

Analysis And Determination

27. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal filed on 8th August 2022, the Appellant's Written Submissions dated 11th November 2022 and the Respondent's Notice to Concede dated 21st March 2023 and the following issues arise for my determination: -

    i. Whether the Prosecution proved its case beyond reasonable doubt.

    ii. Whether the Defence places doubt on the Prosecution case.

    iii. Whether the Sentence was harsh and excessive.

i. Whether the Prosecution proved its case beyond reasonable doubt.

28. I begin the analysis by noting that the Respondents have conceded the appeal. However, I must consider whether the concession was merited bearing in mind that it was the Prosecution that dragged the Appellant to court, prosecuted and got a conviction.

29. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender must be proved. I therefore analyse the evidence with these ingredients of the offence in mind.

30. PW1 testified that the Accused was her boyfriend with whom they sexual intercourse severally. When PW2 who was the complainant's mother was cross examined, she testified that she knew the Accused as a neighbour. PW3 who was the complainant's brother testified that the Accused was his friend. The Accused on the other hand testified that PW1 was his neighbour. I am satisfied that the Accused and the family of PW1 were neighbours and that they knew each other from daily or regular interactions. Furthermore, PW1 could not fail to recognize someone with whom they have had regular sexual intercourse. It is my finding therefore that the evidence of recognition was sufficient enough to identify the Accused.

31. The English case of *R v Turnbull* (1977) QB 224 is useful in this regard. The court held as follows:-

> "If the quality (of identification evidence) is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution".

32. For the charge of defilement to be sustained, penetration has to be proved. Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. See *John Irungu v Republic* (2016) eKLR.

33. In the case of *Bassita v Uganda* S. C Criminal Appeal Number 35 of 1995, the Supreme Court in Uganda held that: -

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

34. In this case, PW4 who was the doctor based at Longisa County Referral Hospital clinical officer testified that when he examined PW1, he found that she was approximately 30 weeks pregnant. PW4 produced a P3 Form that was marked as P. Exh 2. The P3 Form indicated that PW1 had an old broken hymen and that there was no discharge, blood or venereal infections from the genitals. The P3 Form while proving that the complainant had been penetrated before, was inconclusive of when the penetration occurred. The court was therefore entitled to rely on the evidence of the victim. In the case of *Kassim Ali v Republic* Cr. App. No 84 of 2005 (Mombasa), the Court of Appeal stated that: -

> "... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

35. The Proviso to Section 124 of the *Evidence Act* allows a court to convict purely on the evidence of the victim if it is convinced and the same is recorded that the victim was telling the truth. Section 124 of the *Evidence Act* provides: -

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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 material 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.

36. Though not having the benefit of seeing PW1 testify, I have carefully gone through her evidence and I have noted that she stated that the Accused was her boyfriend with whom they had several sexual encounters and as a result she became pregnant. I have also gone through the trial court Judgment and I noted that the trial Magistrate stated that she was satisfied there was penetration as the complainant gave elaborate details on the nature of her relationship with the Accused and she was satisfied that the complainant knew the Accused very well and that they were in a relationship for a long time. I am convinced based on the testimony of PW1 that the Appellant did penetrate the complainant on various dates.

37. It is an uncontested fact that PW1 became pregnant. It is also salient to note that pregnancy is not required to prove of penetration as was stated by the Court of Appeal in *Evans Wanjala Wanyonyi v Republic* [2019] eKLR, that: -

> " An essential ingredient in the offence of defilement is penetration and not impregnation."

38. In this case however the medical examination showed that the complainant was seven and a half months pregnant and a subsequent DNA test showed that the Accused was the father of the complainant's child. The DNA test proved beyond any shadow of doubt that the Accused penetrated and impregnated the complainant.

39. Both parties in this appeal were conscious of the importance of age as an ingredient of the offence. Thus they urged at length that the age of the victim was not proven beyond reasonable doubt.

40. The importance of proving age was underscored by the Court of Appeal in the case of Hadson Ali Mwachongo v Republic (2016) eKLR as follows: -

> " The importance of proving the age of the victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In *Alfayo Gombe Okello v Republic* Cr. App 203 of 2009 (Kisumu) this Court stated as follows: -
>
> > In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of 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.

This must be so because dire consequences flow from proof of the offence under section 8(1)".

41. Similarly in the case of *Eliud Waweru Wambui v Republic* (2019) eKLR, the Court of Appeal reiterated that: -

> " There is no doubt that in an offence such as faced the appellant, indeed in most of the offences under the Act where the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt."

42. I have therefore keenly reviewed the evidence on age. PW1 testified that she was born on 22nd June 2001. PW5 who was the investigating officer produced a copy of the birth certificate marked as P.Exh 1 which indicated that PW1 was born on 22nd June 2001. That would mean that she was 17 at the time of the offence. PW2 who was the complainant's (PW1's) mother testified that PW1 was 15 years old at the time of the alleged offence. She also testified that PW1 was born in the year 2001 in a month she could not recollect.

43. The Appellant has argued that PW1's age was not proved because the Prosecution produced a copy of the birth certificate. The Respondent/Prosecution agreed with the Accused and even stated that there was an inconsistency on PW1's age because the complainant's mother testified that she was aged 15 years at the time of the offence.

44. I have gone through the proceedings and I have noted that the authenticity of the birth certificate was not challenged during the trial. Section 64 of the *Evidence Act* provides that the contents of documents may be proved either by primary or by secondary evidence. Section 65(1) of the *Evidence Act* defines Primary Evidence as the document itself being produced for the inspection of the court. Section 66 of the *Evidence Act* states as follows: -

> " Secondary evidence includes—
>
> (a) certified copies given under the provisions hereinafter contained;
>
> (b) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
>
> (c) copies made from or compared with the original;
>
> (d) counterparts of documents as against the parties who did not execute them;
>
> (e) oral accounts of the contents of a document given by some person who has himself seen it."

45. *In re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – Deceased* (2016) eKLR, Mativo J. (as he then was) stated that: -

> " Section 67 of the *Evidence Act* provides that documents must be proved by primary evidence except in the cases hereinafter mentioned. Section 67 is the basis of what is called the best evidence rule, which provides that documents must be proved by the best evidence. The allowance of secondary evidence is a concession by the law to allow the second best. The optimal will be the document itself or whatever would comprise the primary evidence. It is rarely the case that secondary evidence will be allowed where a party could have produced the original.....

The rule specifies that secondary evidence, such as a copy will not admissible if an original document exists and can be obtained."

46. It is my finding that the issue of the photocopies birth certificate was an afterthought by both parties and I further find the birth certificate (P. Exh 1) to be credible and admissible. Indeed, the record shows that the Respondent's witness produced the photocopy which was admitted by the court without objection by the defence. Failure to lay a basis for the production of the copy in my view pointed more to inadequate prosecution skill rather than lack of the document. The Court of Appeal stated in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR that: -

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." ...." we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (Emphasis mine)

47. In this case therefore I hold the view that even if I were to exclude the documentary evidence in the birth certificate, there was still the evidence of the mother who testified that the complainant was born in 2001 a date she couldn't remember. She also said that the girl was 15. This later statement to me shows a numerical error. In any case, both statements show that the victim was under 18 at the time of the offence. The complainant herself testified that she was 18 years old at the time of the case meaning she was 17 at the time of the defilement. By simple calculation, by the time of the alleged offence occurred in November 2018, PW1 was aged 17 years old, which I hereby find.

48. I therefore dismiss the suggestion that age was not proved. As shown above, it was proved beyond reasonable doubt. I find no material inconsistency or contradiction on the age of the Appellant as submitted by the Respondent in conceding the appeal.

49. Having established the age of the complainant, proof of identification and penetration, it is my finding that the Prosecution proved its case against the Accused in the trial court beyond reasonable doubt. The concession of the Appeal by the Prosecution in the higher court is consequently disallowed as it is not borne of evidence.

ii. Whether the Defence places doubt on the prosecution case.

50. I have considered the Appellant's defence in which he denied committing the offence. DW1 stated that he knew PW1 as a neighbour and that he did not commit the offence. He continued denying any sexual relations with the complainant even in the face of a DNA finding that he was the father of the complainant's child. He persisted in the denial without suggesting to the court that the complainant may have gotten pregnant through means other than sexual intercourse. This he did despite the fact that the DNA testing was ordered by the court and done on his application and insistence. I dismiss his defence as a figment of imagination. He knew the complainant beyond her name.

iii. Whether the Sentence was harsh and excessive

51. The principles which guide an appellate court in sentencing were set out in *S v Malgas* 2001 (1) SACR 469 (SCA). In this persuasive authority, the Supreme Court of Appeal of South Africa held that: -

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then

> substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

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

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

53. The penal section for a defilement of a child of 17 years is provided by Section 8 (4) of the *Sexual Offences Act* which states that: -

> A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

54. The aforementioned Section is couched in mandatory terms as it provided for a mandatory minimum sentence in the event of a conviction. Mandatory minimum sentences are not illegal and the same was clarified by the Supreme Court in the case of *Francis Karioko Muruatetu and another v Republic*, Petition No 15 & 16 (consolidated) of 2015 it was held that: -

> " We therefore reiterate that, this Court's decision in *Muruatetu* did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute".

55. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. An appellate court would only be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon a wrong principle.

56. The above position was enunciated in *Shadrack Kipchoge Kogo v Republic* Criminal Appeal No 253 of 2003 (Eldoret), in which the Court of Appeal stated:-

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

57. Similarly, the Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, (1954) EACA 270, pronounced itself on this issue as follows: -

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

58. The Appellant in this case was sentenced to 15 years which is, *prima facie*, the mandatory minimum sentence under the *SOA*. The facts and circumstances in this case however warrant a re-examination of the minimum sentence imposed.

59. It is clear to this court that the Appellant and the victim were in a long-standing sexual relationship which their respective parents were aware of. The victim's mother in her testimony stated that the daughter (victim) had told her (to her dismay) that the Accused wanted to buy land for her and settle her if she abandoned school. It also emerged from the evidence that the Accused's relatives were in the know concerning the relationship.

60. This court believes that the parents did counsel the victim and she disregarded their wise counsel. Indeed, the victim (PW1) categorically stated in her evidence as follows: -

> " I know the accused. He is my ex-boyfriend..... the accused was my boyfriend. I had sex with him in the month of November about 4 times ..... We continued with the relationship until June 2019 when my relatives discovered and realized that I was pregnant.....my parents knew in the year 2016 that I was engaged in sex and they warned me against it. I did not stop...."

61. The victim (PW1) further told the court that she came to learn that the Accused had a wife and he refused to take responsibility when she (PW1) fell pregnant. It therefore appears to this court that the otherwise budding relationship was rocked by the pregnancy and the refusal by the Appellant to take responsibility. In the mind of this court the panacea for a deceitful sexual relationship, refusal to marry the complainant and to raise the child of the unlawful sexual union is not a long jail term for the deceptive sexual partner. The legal remedy for broken romantic trust is unfortunately elusive. The remedy for breach of promise to marry lies outside the *SOA* while the clearer and available remedy for disowning a child lies in a suit for child maintenance.

62. In the peculiar circumstances of this case therefore, I associate myself with the considered view of Odunga J (as he then was) in the case of *Nyale v Republic* (2018) eKLR where he stated that: -

> " It is now clear that certain provisions of the *Sexual offences Act*, are a cause of concern in this country. The effect of the harsh minimum sentences imposed under the said Act on young people in this country is a serious cause of concern. Our jails are overflowing with young people convicted courtesy of the provisions of the said Act. While I appreciate that sexual offences do demean the victims of such crimes and ought not to be taken lightly, the general society in which we operate ought to be taken into account in order to achieve the objectives of punishment. Penal provisions ought to take into account the objectives intended to be achieved and should not just be an end in themselves otherwise they may end up being unjust especially where the penalties imposed do not deter the commission of crimes where both the victim and the offender do not appreciate the wrongdoing in question."(Underline mine)

63. I am guided by the Court of Appeal decision in *Evans Wanjala Siibi v Republic* (2019) eKLR where the higher bench made the following observation: -

> " Once again, the unfair consequences of a skewed application of that statute predominantly against the male adolescent is quite apparent: two youths caught engaging in sex receive diametrically opposite treatment. The girl is branded a victim and guided to turn against her youthful paramour while the boy, Juliet's Romeo, is branded the villain, hauled before the courts and visited with a lengthy jail term. We very much doubt that it conduces to good sense, policy and our own conceptions of justice and fairness that the law should be deployed in a manner so disparative and discriminative in effect. A supposed justice resting on the shaky foundation of injustice against the young boys hardly warrants the term."

64. In the end, I have come to the conclusion that the charge against the Appellant was proved and I uphold the conviction. On sentence however, I have come to the conclusion based on the circumstances of this case, that the justice of the case calls for a deviation from the minimum sentence. I therefore set aside the sentence imposed by the trial court and substitute therefor the period already served.

65. The Appellant is set at liberty forthwith unless otherwise lawfully held.

66. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 30TH DAY OF MAY, 2023.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant, MS. Kosgei holding brief for Mr. Yegon, for the Appellant, Mr. Wainaina holding brief for Mr. Njeru for the State and Siele (Court Assistant).