Langat v Republic (Criminal Appeal E024 of 2022)
[2023] KEHC 26909 (KLR) (15 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26909 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E024 OF 2022

RL KORIR, J

DECEMBER 15, 2023

BETWEEN

IKE CHERUIYOT LANGAT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number 53 of 2020 by Hon. Omwange J. in the Magistrate's Court at Sotik)

JUDGMENT

1. The Appellant was tried and convicted by Hon. J. Omwange, Senior Resident Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between 18th and 19th September 2020 in Konoin Sub County, within Bomet County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of VC, a child aged 15 years.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that were that on diverse dates between 18th and 19th September 2020 in Konoin Sub County, within Bomet County, the Appellant intentionally and unlawfully touched the vagina of VC, a child aged 15 years with his penis.

3. The Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The Prosecution called four (4) witnesses in support of its case.

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

5. At the conclusion of the trial, he was convicted on the charge of defilement and sentenced to serve twenty (20) years in prison.

6. Being dissatisfied with the Judgment dated 2nd June 2022, Ike Cheruiyot Langat appealed against the trial court's conviction and sentence on the following grounds reproduced verbatim:-

   i. That, I pleaded not guilty at the trial and still maintain the same.

   ii. That the learned trial magistrate erred in both law and fact by relying on uncorroborated evidence.

   iii. That the learned trial magistrate erred in law and in fact by relying on evidence adduced by the prosecution side which was inconsistent and full of irregularities.

   iv. That the trial magistrate erred in law and in fact by failing to analyse that the entire evidence was manufactured, manipulated and framed to meet the predetermined goal of fixing the Appellant.

   v. That the learned trial magistrate erred in law and fact by failing to analyze the entire evidence adduced by the Prosecution, hence I was medically examined and DNA was done as stipulated in section 36(1) of the *Sexual Offences Act* No. 3 of 2006 despite my early arrest.

   vi. That the learned trial magistrate erred in both law and fact by rejecting my plausible defence without any further explanation of it.

   vii. That I pray to be present during the hearing of this Appeal.

7. The Appellant further filed Amended Grounds of Appeal on 6th December 2022 and relied on the grounds reproduced verbatim as follows: -

   i. That the learned trial Magistrate erred in the law and fact by failing to observe that the evidence relied upon by the Prosecution rules for framing charge sheet were not comply thus violated section 137 of the CPC Cap 75 Laws of Kenya.

   ii. That the learned trial Magistrate erred in law and fact by failing to observe the evidence of PW1 and PW3 were not credible and worthy to be relied upon to convict the Appellant.

   iii. That the learned trial Magistrate erred in law and fact by meting an excessive sentence and failed to consider the Appellant's mitigation.

8. This being the first appellate court, I have a duty to re-evaluate the evidence on record. The Court of Appeal in the case of Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR held that:-

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."

The Prosecution's Case.

9. It was the Prosecution's case that the Appellant defiled V.C (PW3) on 18th September 2020. VC testified that on the material day at around 11pm, the Appellant went to her home and they had sex. PW3 further testified that the Appellant was her boyfriend.

10. VC testified on cross examination that on 19th September 2020, they were interrupted by her mother (PW1) before they could have sex with the Appellant.

11. Eliud Langat (PW2) who was the clinical officer testified that he examined the minor (PW3) on 21st September 2020 and found that she had minor lacerations in the vaginal wall and that she had a whitish discharge from her genitalia. It was PW2's further evidence that he found epithelial cells and he concluded that there was evidence of penetration.

The Appellant's Case.

12. The Appellant, Ike Cheruiyot Langat testified that on 18th September 2020 he was at his business place selling potatoes when V.C came to buy some potatoes on credit and when he refused to sell to her on credit, her mother (PW1) came by and threatened him with dire consequences. That on 19th February 2020, he went to V.C's house to be in the company of Kevin and Felix but they were not there.

13. It was the Appellant's testimony that he decided to go to the neighbour's (Mercy) house. That the neighbour closed the house when he was inside and begun screaming. It was the Appellant's further testimony that the allegations in this case were meant to frame him.

14. Shadrack Yegon (DW2), Kennedy Kipngeno (DW3) and Evans Cheruiyot (DW4) all testified as the Appellant's witnesses and stated that on 19th September 2020, the Appellant was arrested in M's home and not at VC's home.

15. On 17th October 2022, I directed that this appeal be dispensed off by way of written submissions.

The Appellant's Submissions.

16. The Appellant submitted that the court relied on uncorroborated evidence in convicting him. The Appellant submitted that the court relied on uncorroborated evidence in convicting him. It was the Appellant's submission that the provisions of Section 137 of the *Evidence Act* were contravened. That the police did not follow the strict rules of drafting a charge sheet as the age of the complainant in the charge sheet was supposed to be 16 years and one month and not 15 years. It was his submission that the Prosecution failed to stick to the law yet they had sufficient time to amend the charge sheet.

17. The Appellant submitted that allegations against him were not founded on good intent. He pointed out that the Prosecutor requested the trial court to step down PW3 for a few minutes with the intent of coaching her.

18. Further, it was his further submission that the evidence of PW1 and PW3 was doubtful as no neighbour came to witness all the drama and that the arresting officer did not come to the trial court to testify.

19. The Appellant testified that PW1 and PW3 implicated him because he had a grudge with PW1 after he refused to give her potatoes on credit. That there was a time that he gave PW1 a loan and she did not pay back and this led to his being framed for an offence he did not commit.

20. It was the Appellant's submission that no voir dire examination was conducted on the minor before she commenced her testimony. That failure to conduct the voir dire examination on the minor meant a failure of the case against the Appellant.

21. The Appellant submitted that there was no conclusive evidence of the minor's age as no age assessment was done. That what was produced in court contradicted the age stated in the charge sheet. He further submitted that no birth certificate was adduced in evidence and that failure to establish age meant the case had failed. He relied on Francis Omuroni vs Uganda CR A 2/200 and Alfayo Gombe Okello vs Republic Criminal Appeal No. 203 of 2009.

22. It was the Appellant's submission that the investigating officer did not visit the scene of crime and that nothing was derived from the crime scene. It was his further submission that he was not positively identified. That dock identification was misleading and only lead to a miscarriage of justice.

23. The Appellant submitted that a long standing broken hymen did not prove penetration. That the victim's hymen was broken a long time ago and that it could be broken by other factors. He further submitted that some girls are not born with a hymen and he relied on P.K.W vs Republic (2012) eKLR.

24. It was the Appellant's submission that this court considers his mitigation and the circumstances of the case. It was his further submission that the Prosecution did not prove its case beyond reasonable doubt and that he should be freed.

The Prosecution's/Respondent's Submissions.

25. The Respondent submitted that PW1 stated that the complainant was born on 28th October 2014 and that when the offence was committed, she was 15 years and 10 months old. That a copy of the birth certificate (P. Exh 3) was produced to confirm her age and further that her age was corroborated by PW3, the complainant, PW2 and PW6.

26. It was the Respondent's submission that the Appellant and PW3 had sexual intercourse on 18th September 2020. That PW3 informed the court that they had sex with the Appellant approximately 10 times in a period of two months and that on 19th September 2020, PW3's mother interrupted them before they could have sex.

27. The Respondent submitted that the clinical officer examined the victim and found that she had stains in her underwear and that she had minor lacerations in her vagina and whitish discharge from her genitals. That she had epithelial cells and the clinical officer concluded that the complainant had been defiled. It was the Respondent's further submission that the clinical officer produced a P3 Form, a PRC Form and treatment notes to back his evidence.

28. It was the Respondent's submission that PW1 had testified how he found the Appellant hiding under the complainant's bed on 19th September 2020 and that he was arrested in the same house with the complainant.

29. The Respondent submitted that PW3 informed the court that the Appellant was her boyfriend and that they had sex about ten times within a two-month period hence they knew each other very well. That PW1 knew the Appellant very well and even mentioned him by his name. The Respondent further submitted that in his defence that the Appellant indicated that he knew both PW1 and PW3. That it was clear that the Appellant's identification was beyond doubt.

30. It was the Respondent's submission that the Appellant's defence was not convincing and that he was unable to challenge the overwhelming evidence adduced by the Prosecution's witnesses.

31. It was the Respondent's submission that the 20 year sentence was the minimum sentence as provided for by the law for a person who defiled a child aged between 12 and 15 years. It was their further submission that the Appeal lacked merit and ought to be dismissed.

32. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal filed on 21st June 2022, the Amended Grounds of Appeal and Appellant's written submissions both filed on 6th December 2022, the Appellant's undated supplementary written submissions, the Respondent's written submissions dated 17th March 2023 and the following issues arise for my determination: -

i. Whether failure to conduct a voire dire examination was fatal.

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

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

iv. Whether the Sentence preferred against the Accused was manifestly excessive, harsh and severe.

i. Whether the failure to conduct a voir dire examination was fatal

33. The Appellant submitted that a voir dire examination was not conducted on VC as required by the law. Voir dire was explained by the Court of Appeal in the case of Macharia vs. Republic (1976) KLR 209, as:-

> " It [voir dire] must be a preliminary examination of a witness by the magistrate in which the witness is required "to speak the truth" with respect to questions put to him, or her, so that the magistrate can discover if he, or she, is competent (e.g. she is not too young, or she is not insane) to give evidence and should be sworn or affirmed (according to whether or not she is a Christian, or of any other, or no, faith, and understands the nature and obligation of an oath to tell only the truth)....."

34. In the present case, PW3 gave sworn testimony and was later cross examined by the Appellant's advocate. There was no indication by the trial court that PW3 did not understand the meaning and the consequences of an oath. I have also noted that PW3 was not a child of tender years. I take guidance from recent case law which determined that the use of voir dire in relation to the age of the victim may vary from case to case and will depend on the facts of a particular case. In Maripett Loonkomok vs. Republic (2016) eKLR, the Court of Appeal held that:-

> " We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014. Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth.....
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> It is clear to us from the record that the trial Magistrate deliberately did not conduct voir dire examination for he believed, erroneously, that the complainant was not a child of tender years. The record reads thus;
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> "PW1 F/c (Female child) not of tender years sworn states in Kiswahili." The question therefore is, who is a child of tender years? The *Sexual Offences Act* and the *Oaths and Statutory Declarations Act* are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in

> Patrick Kathurima v R, Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;
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> "In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

35. Guided by the authorities above and the circumstances of the present case, it is my finding that V.C (PW3)'s evidence was properly taken by the trial court. In any event, V.C was aged above 14 years old and it was not necessary for the trial court to conduct a voir dire examination on her.

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

36. 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.

37. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an accused person. This was reinforced by the Court of Appeal in Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010 as was cited in NNC vs Republic (2018) eKLR when it had this to say:-

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

38. Rule 4 of the Sexual Offences Rules of Court 2014 provides that:-

> When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

39. LMC (PW1) who was VC's mother produced a Birth Certificate and the same was marked P.Exh 3. The Birth Certificate indicated that VC (PW3) was born on 28th October 2004. The authenticity of the Birth Certificate or its production was not challenged during the trial. I find the Birth Certificate admissible and based on its contents it is my further finding that the time of the commission of the alleged offence, VC was aged 15 years.

40. The Appellant submitted that the Prosecution erred in drafting the charge sheet because they included the age of VC as 15 years as opposed to 16 years and one month. As I have found above, VC was aged 15 years at the time of the commission of the offence and thus there was no error in drafting of the charge sheet. She was 1 ½ months shy of her 16th birth day and therefore was still 15 years old.

41. The Appellant erroneously stated that the provisions of Section 137 of the Criminal Procedure Code were contravened. Section 137 of the Criminal Procedure Code dealt with Plea Agreements and there was no evidence on record of a Plea Agreement between the Prosecution and the Appellant.

42. With regard to the issue of identification, the Court of Appeal in the case of Cleophas Wamunga vs Republic(1989)eKLR expressed itself as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger....."

43. The victim (PW3) testified that the Appellant was her boyfriend and that they had sex numerous time before the material day. That on the material day (18th September 2020), they also had sex with the Appellant. Upon cross examination, she reitarated that the Appellant had been her boyfriend for over two months prior to their arrest and that they had sex on 18th September 2020.

44. From the Appellant's defence, the Appellant knew PW3 and her mother (PW1). He even stated that he went to their (PW1 and PW3) house to be in the company of Kevin and Felix. In my view, this was evidence of recognition. The Court of Appeal in Peter Musau vs Republic (2008) eKLR held that:-

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him, and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect had been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness in serving the suspect at the time of the offence, can recall very well having seen him before the incident in question."

45. Flowing from the above, there is no doubt in my mind that the Appellant was well known to PW3 by virtue of being her boyfriend. I am also satisfied that the Appellant was positively identified as the perpetrator of the offence as he was placed in V.C's room by the victim (VC) on the material day being 18th September 2020.

46. With regards to penetration, 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. In the case of Bassita vs Uganda S. C Criminal Appeal Number 35 of 1995, the Supreme Court 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....."

47. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred.

48. VC (PW3) testified that on 18th September 2020 at around 11 p.m., the Appellant came to her house and he penetrated her using his male genital organ which he inserted into her female genital organ.

49. Eliud Langat (PW2) who was the clinical officer at Kapkatet Sub County Hospital testified that when he examined PW3, he found that PW3 had minor lacerations in her vagina and had a whitish discharge

from her genitalia. He further stated that he found epithelial cells and he concluded that there was evidence of penetration.

50. PW2 produced P3 and PRC forms that were marked as P.Exh 1 and 2 respectively. The P3 form (P.Exh.1) indicated that at the time of examination, PW3's injuries were about 3 days old. The findings on the P3 form were that that PW3 had minor laceration on the vaginal orifice but had no lacerations of the labia minora, labia majora and cervix. That PW3 had a whitish discharge from her genitalia which was a possible indication of the presence of a venereal infection. The PRC form (P.Exh. 2) indicated that PW3 was examined on 21st September 2020, which was approximately 3 days after the commission of the offence. The findings on the PRC form mirrored those contained in the P3 form.

51. Upon scrutiny and my analysis of the evidence of the clinical officer (PW2) and the contents of the P3 Form and PRC Form, it is my conclusion that the medical evidence tendered was not conclusive as to whether there was penetration on the material date. The victim (PW3) was examined three days after the commission of the offence. The P3 and PRC Forms indicated that PW3 had a minor lacerations on her vaginal orifice which was her vaginal opening. The Forms also state that PW3 had no bleeding and did not have lacerations on her labia majora, labia minora and cervix and that could be because she was examined three days after the incident. The medical evidence was therefore inconclusive whether penetration occurred on the material date. It was only conclusive in proving that PW3 was sexually active.

52. In George Kioji v. Republic, Cr. App. No. 270 Of 2012 (Nyeri), the Court of Appeal addressed itself on medical evidence touching on sexual offences thus:-

> " 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."

53. This court is empowered to convict an Accused in a sexual offence based solely on the victim's evidence. 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

54. The victim's testimony was aptly captured earlier on in this Judgment. It was clear from the evidence that Appellant was PW3's boyfriend and they were in a sexual relationship and that they had sex on

18th September 2020. PW3 confirmed the same during her cross examination. On the other hand, the Appellant did not deny being PW3's boyfriend.

55. Though I did not witness PW3 during her testimony, her evidence was credible and cogent and it was not shaken during cross examination. I find PW3's evidence as credible and believable and in the same light, I dismiss the Appellant's ground of appeal that PW3's evidence was unworthy and not credible.

56. The Appellant stated that he was not medically examined and no DNA had been done as stipulated under Section 36(1) of the *Sexual Offences Act*. Section 36(1) of the *Sexual Offences Act* provides that: -

> 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.

57. In expounding Section 36(1) of the *Sexual Offences Act*, the Court of Appeal in the case of Robert Mutungi Mumbi vs Republic (2015) eKLR, held that: -

> " Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

58. Similarly in Williamson Sowa Mbwanga vs Republic, C App. No. 109 of 2014 (Malindi), the Court of Appeal held that:-

> " .....It is partly for this reason that section 36(1) of the *Sexual Offences Act* is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific, or DNA testing."

59. It was therefore not mandatory for the Appellant to be medically examined to provide a link between him and the offence. What the Prosecution needed to prove in the charge of defilement was among others, penetration, the age of the victim and positively identification of the perpetrator which they have.

60. It is my finding that the Prosecution evidence was sufficient as they were able to establish the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

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

61. I have considered the Appellant's defence which was captured earlier on in this Judgment. The Appellant's version of events was that on 18th September 2020 while he was selling potatoes, PW3 came to buy some potatoes on credit and when he declined to sell them to her on credit, her mother (PW1) came and threatened him with dire consequences. He stated that he was being framed.

62. His witnesses (DW2, DW3 and DW4) all testified to the events of 19th September 2020. It was clear from the evidence that PW3 and the Appellant did not engage in sexual intercourse on 19th September 2020 as they were interrupted by Linah Mutai Chelangat (PW1) who was the victim's mother. None of the Appellant's witnesses testified to the events of 18th September 2020 specifically to the sexual intercourse between the Appellant and PW3. The Appellant's witnesses were not present and therefore could not testify as to whether or not the Appellant and the PW3 had sex on the material dates.

63. The Appellant simply denied committing the offence and focused his defence to the events of 19th September 2020 which were immaterial to this case. I have also not found evidence to back up the Appellant's claim that he was being framed.

64. In totality, I find that the Appellant's defence did not place a doubt on the Prosecution's case.

ii. Whether the Sentence preferred against the Accused was manifestly excessive, harsh and severe.

65. The principles guiding interference with sentencing were stated by the Court of Appeal in Ogolla s/o Owuor vs. Republic, (1954) EACA 270, as follows:-

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

66. The penal section for a defilement case for a child of 15 years is provided by Section 8 (3) of the *Sexual Offences Act* which states that:-

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

67. The Appellant was sentenced to 20 years as prescribed by the law the mandatory trial court was therefore not in error and the sentence was lawful.

68. I have however considered the age of the Appellant who was 23 years old at the time he committed the offence. It was clear from the evidence on record that the Accused and the victim were in a sexual relationship. The victim was 1 ½ months shy of 16 years and clearly lacked legal capacity to consent to a sexual relationship as she was below 18. The evidence however showed that she consciously embraced the relationship before they were busted by her mother.

69. The question then becomes whether I have the discretion to reduce a mandatory minimum sentence. I take guidance from the reasoning of the Court of Appeal in Dismas Wafula Kilwake vs. Republic (2019) eKLR where the court hereunder:-

> " Here at home in a judgment rendered on 14th December 2017 in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015, the Supreme Court concluded that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional. While appreciate that the decision had nothing to do with the *Sexual Offences Act*, we cite it because of the pertinent observations that the apex Court made regarding mandatory sentences.....
>
> ..... In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the

circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing."

70. In the end, I uphold the conviction. Having considered the unique circumstances of this case, justice demands that I fashion an appropriate sentence, with the result that I set aside the 20-year jail term and substitute therefor the period already served.

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

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 15TH DAY OF DECEMBER , 2023

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R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of Mr.Njeru for the State,the Appellant present in person and Siele(Court Assistant)