



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 213 OF 2019

JOHN KIMUTAIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence dated 17th December, 2019 in Eldoret Chief Magistrate's Criminal Case No. 1771 of 2017 by Hon. P. W. Wasike, (SRM))

JUDGMENT

[1] This appeal arises from the conviction and sentence passed on **17th December 2019** against the appellant, **John Kimutai**, by Hon. P. W. Wasike in **Kapsabet Senior Principal Magistrate's Criminal Case No. 1771 of 2017: Republic vs. John Kimutai**. The Appellant was charged, in Count I, with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4) of the Sexual Offences Act, No. 3 of 2006**. The particulars of the charge were that on the **9th July, 2016** at Mosobecho village within Nandi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **M L**, a girl aged 16 years old.

[2] In the alternative, the appellant was charged with indecent act with a child contrary to **Section 11** of the **Sexual Offences Act**. It was alleged that on the **9th July, 2016** at [particulars withheld] village within Nandi County, the appellant unlawfully and intentionally caused his penis to come into contact with the vagina of **M L**, a girl of 16 years old.

[3] The appellant denied those allegations and had all the issues in contest tried before the trial court. At the conclusion of the said trial, he was found guilty of the substantive count of defilement. He was accordingly convicted thereof and sentenced to 15 years' imprisonment. Being dissatisfied with the conviction and sentence passed on **17th December, 2019**, the appellant filed this Appeal on **30th December, 2019** on the following Grounds:

[a] That the learned trial Magistrate erred in fact and in law by convicting and sentencing the appellant on the basis of insufficient prosecution evidence before the court.

[b] The learned trial Magistrate erred in law and in fact in failing to consider the complainant's behaviour and in sentencing the appellant on the basis of insufficient prosecution evidence presented to the court.

[c] The learned trial Magistrate erred in fact and law in convicting and sentencing the appellant based on prosecution which was full of material contradictions and which was insufficient evidence of defilement which ought to have been resolved in favour of the appellant.

[d] The learned trial Magistrate erred in fact and law in failing to arrive at a safe decision that the prosecution failed to discharge its statutory duty by failing to prove all the ingredients of defilement within the meaning of the **Sexual Offences Act**.

[e] The learned Trial Magistrate erred in law and fact in passing a conviction and sentence that is manifestly unsafe in the circumstances of this case, and the prevailing law as interpreted in the case of **Martin Charo v Republic [2015] eKLR**.

[f] The learned trial Magistrate erred in law and fact in rendering a judgment that is self-contradicting and relying on issues not tendered in evidence, thus rendering the conviction and sentence unsafe.

[g] The learned trial Magistrate erred in law and fact in sentencing the appellant for a term of 15 years which is too harsh in the circumstances.

[4] It was, accordingly the Appellant's prayer that his appeal be allowed and his conviction and sentence set aside. In the alternative, he prayed that the Court be pleased to order for a retrial of the case.

[5] The appeal was argued by way of written submissions, pursuant to the directions given herein on **27th January, 2021**. In the appellant's written submissions, filed on his behalf by **M/s Rotich, Langat & Partners Advocates** on **27th April, 2021**, the following issues were proposed for determination:

[a] Whether the evidence adduced by the Prosecution proved the charge to the required standard;

[b] Whether the appellant's defence was properly disregarded; and

[c] Whether the sentence meted on the appellant was harsh and excessive.

[6] It was the submission of **Mr. Rotich** that, since the complainant gave birth on **23rd February 2017**, it would follow that she was 17 years, 1 month and 28 days old when the offence occurred. He likewise urged the Court to find that the complainant was a willing participant and therefore gave consent to the sexual act complained of, as evidenced by the fact that she followed the appellant to the house in which the offence allegedly occurred; as well as her reluctance to report the incident to her mother and/or police.

[7] It was further the submission of **Mr. Rotich** that the appellant honestly believed that the complainant was over the age of 18 years, given her physique; and that that defence was enough to cast aspersions on the prosecution's case. Counsel underscored the contention by the appellant that he had no knowledge that the complainant was a school-girl; and that he only got to know of that fact in court. He relied on **Section 111 (1) of the Evidence Act** and **Section 8(5) and (6) of the Sexual Offences Act** to support his assertion that the appellant's defence created a reasonable doubt in the Prosecution case and, therefore, he ought not to have been convicted or sentenced.

[8] Thus, according to counsel, the complainant had reached the age of discretion and was therefore capable of making her own decisions; including the decision as to whether or not to engage in consensual sexual intercourse. He urged the Court to take into account that the complainant willingly followed the appellant to his brother's house; and therefore that there was no evidence of coercion and/or undue influence to warrant his conviction. In this regard, reliance was placed on the Court of Appeal case of **Eliud Waweru Wambui vs. Republic** [2019] eKLR in which a similar defence was upheld. The appellant's counsel also cited **Martin Charo vs. Republic** [2016] eKLR to buttress his argument that proof of age and penetration should not be the exclusive grounds for conviction and sentence in cases of this nature.

[9] As regards the sentence of 15 years' imprisonment, the contention of learned counsel was that, by imposing the minimum sentence, the trial court did not exercise its discretion judiciously. He made reference to the Court of Appeal case **Bonface Andayi Hezron vs. Republic** [2020] eKLR and **Dismas Wafula Kilwake vs. Republic** [2018] eKLR for the proposition that **Section 8 of the Sexual Offences Act** must be interpreted in a way that does not take away the discretion of the Court in sentencing. He added that a trial court should not be rendered powerless because of the minimum sentences; which, in his view, deprive the court of its discretion to determine an appropriate sentence on the basis of the prevailing circumstances of every case. He likewise referred the court to the Supreme Court case of **Francis Karioko Muruatetu & Another vs. Republic** [2017] eKLR in which the Supreme Court set out the parameters that should guide courts in sentencing. It is on that basis that counsel complained that the sentence imposed on the appellant was excessive. On that account, he urged the Court to allow the appeal, quash the conviction and set aside the sentence imposed on him.

[10] On behalf of the State, **Mr. Mugun** opposed the appeal. He relied on his written submissions dated the **19th July, 2021**, wherein he took the stance that every ingredient of the charge of defilement was well proved. He submitted that a birth certificate was produced that showed the complainant was born on **11th May, 2000** and hence was 16 years old at the time when the offence was committed. He urged the Court to note that the appellant did not challenge the complainant's age when had the chance to do so during cross-examination and in his defence.

[11] **Mr. Mugun** further submitted that the appellant was well known to the complainant; granted that they were immediate neighbours who lived only 30 metres apart, a fact that was corroborated by the complainant's mother. He also pointed out that, in her testimony, the complainant made it plain that the appellant as had pursued her since she was in primary school and that they had been in a relationship for over 2 years. He accordingly urged the Court to find, on the basis of **Anjononi & Others vs. Republic** [1976-1980] KAR 1566, that this was a case of recognition rather than identification of a stranger; and therefore more assuring and reliable.

[12] On penetration, counsel made reference to the oral evidence presented by the complainant as well as the medical evidence presented by the Prosecution. He submitted that the complainant was candid about the fact that she willingly gave herself to the appellant; and that their relationship continued until she got pregnant and gave birth on the **23rd February, 2017**. He also pointed out that a DNA test was conducted which confirmed that there was a 99.99% chance that the appellant was the father of the complainant's child. He accordingly urged the Court to find that this was irrefutable proof of penetration.

[13] Accordingly, **Mr. Mugun** urged the Court to dismiss the appellant's contention that his defence was not taken into account. In his submission, the appellant's defence was considered by the trial court and was rightfully found unbelievable. In his view, the fact that the appellant did not cross-examine the complainant on the alleged deception as to her age, if anything, proves that the defence was an afterthought. He urged the Court to note that the appellant wooed the complainant for 2 years; right from the time she was still in primary school. Hence, in **Mr. Mugun's** view, the appellant, being a close neighbour to the complainant's family, must have known that the complainant was a pupil; and therefore not of age.

[14] On sentence, **Mr. Mugun** submitted that, whereas previously courts had the discretion to move away from the prescribed minimum sentences pursuant to **Francis Karioko Muruatetu (Supra)**, the said case is no longer applicable to appeal herein, following the directions of the Supreme Court issued on the **6th July, 2021**, by which it was clarified that the said case is only applicable to murder cases. He, consequently asserted that the mandatory minimum sentence of 15 years' imprisonment is still applicable and ought to be upheld.

[15] This being a first appeal, this court is obliged to analyze and evaluate afresh all the evidence adduced before the lower court and to draw its own conclusions thereon, while bearing in mind that it neither saw nor heard any of the witnesses. This principle was well explicated in **Okeno vs. Republic** [1972] EA 32 by the Court of Appeal for East Africa thus:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."

[16] The principle was restated by the Court of Appeal in **Kariuki Karanja vs. Republic** [1986] KLR 190 thus:

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

[17] It is therefore pertinent that before the lower court, the complainant, **M L** [name withheld] testified as **PW1**. She stated that, in the year **2016** she was in Form 1 at N High School; and that on **9th July, 2016** at 7 p.m. she was at home when the appellant called her and asked her to accompany him to their home. She stated that they had boy-girl friendship with the appellant. She therefore agreed to accompany the appellant to their home, which was 30 metres away. Once in his house, the appellant removed her clothes and thereafter they had sexual intercourse for the first time; and that though she felt pain, she was agreeable because the appellant was her boyfriend. She added that they would thereafter often have unprotected sex; and that the appellant would call her from their common fence for the purpose.

[18] She further told the lower court that after one month, she started feeling sick and suspected that she was pregnant. Her suspicion was confirmed when she went to hospital; and although she did not disclose this to anyone, her mother got to know about it and confronted her on the **20th November, 2016**. She further stated that she had initially refused to implicate the appellant but later admitted to their friendship. Thereafter, on **26th November, 2016**, a report was made at the Kapsabet Police Station. She was then taken to Kapsabet County Referral Hospital where she was treated and was issued with a P3 form.

[19] The complainant further testified that she did not go to school in **2017** due to the pregnancy.; and that she gave birth to a baby girl at Kapsabet County Referral Hospital on the **23rd February, 2017**. She added that she was 16 years old when she gave birth. She consequently identified her Certificate of Birth, which was presented before the lower court along with the Notification of Birth for her daughter, among other documents. She also availed her daughter before the lower court and reiterated that she was impregnated by the appellant.

[20] The complainant's mother, **C C K** [name withheld], testified before the lower court at **PW2**. She confirmed that the complainant, **M L**, is indeed her daughter; and that she was 16 years old in **2016**. She availed the complainant's Certificate of Birth to prove that she was born on **11th May 2000**. **PW2** further told the court that, it came to her attention in **November 2016** that **PW1** was pregnant; and that when she confronted her about it, she denied it. She testified that after **PW1** finally admitted and stated that the father of the child was **John Kimutai**, a close neighbour with whom they share a fence, she took up the matter with both the appellant and his family. Ultimately, after the appellant owned up to their relationship and asked **PW1** to "keep the baby", she caused the matter to be reported to Kapsabet Police Station on **26th November, 2016**. Both the complainant and the appellant were then told to go to the hospital for examination; and whereas the appellant declined, **PW1** was examined and found to be 7 months pregnant. She added that the appellant went underground and only resurfaced after the child was born. He was thus arrested and charged with defilement.

[21] **Polycarp Lutta Kimenyio (PW2)**, a Government Analyst based in Kisumu testified herein on **14th October 2019**. His testimony was that on **6th December, 2018** he received a request to determine the paternity of a child, **C J** [name withheld], in relation to **PW1** and **John Kimutai** (the appellant). He stated that he took blood samples as well as swab samples of the three and thereafter conducted his analysis. He then generated profiles from the samples submitted and formed the opinion that the appellant is the father of the complainant's child. He produced his report, dated **17 May 2019**, before the lower court as **the Prosecution's Exhibit No. 5**.

[22] **Danson Gichangi**, a clinical officer at Kapsabet County Referral Hospital, was called before the lower court as **PW3**. He testified that he saw **PW1** as a patient and that she presented a history of having been in an intimate relationship with her boyfriend since **January, 2016**. He further stated that **PW1** told him that she had engaged in unprotected sex with her boyfriend severally and was approximately 5 months pregnant. On examining **PW1** it appeared to him that she was 28 weeks pregnant. He added that there are no signs of trauma to the vagina, but her hymen had been broken and had healed, and her vaginal discharge was normal. He filled and signed the P3 Form which he produced along with his notes as exhibits (marked **the Prosecution's Exhibit 1 and 2**, respectively).

[23] The investigation officer, No. 74411 **PC Julius Kuloba**, testified as **PW4**. He confirmed that he was then attached to Kapsabet Police Station. It was his evidence that on **26th November, 2016**, **PW1** went to the station in the company of **PW2** and reported a case of defilement. He thereafter recorded their statements on **10th July 2017**, after which he traced and arrested the appellant. **PW4** also confirmed that he obtained the Certificate of Birth for the complainant as well as a Notification of Birth in respect of her child. He produced the documents before the lower court as the Prosecution's Exhibit 3 and 6, respectively. **PW4** also mentioned stated that afterwards, he escorted the appellant, **PW1** and her baby to Kisumu for DNA samples to be taken. He confirmed that a report was prepared dated the **17th May, 2019** that showed the accused was the biological father of **PW1's** child. **PW4** produced the Exhibit Memo by which he requested for a DNA test. It was marked as the Prosecution's Exhibit No. 5 before the lower court.

[24] Upon being placed on his defence, the appellant conceded before the lower court, in his unsworn statement, that he well knew the complainant and that they were in a boy-girl relationship. He however contended that as far as he was aware, she was over 18

years old when the sexual acts complained of took place. He added that, other than the fact that the complainant's physique showed that she was an adult, the complainant herself used to tell her that she was an adult; and therefore he had no reason to doubt her. The appellant also conceded that he was informed that the complainant was pregnant and that he was arrested and charged in connection with the complainant's pregnancy 6 months after she gave birth. The appellant denied having any knowledge at all that the complainant was a school-girl at the material time.

[25] The foregoing being the evidence, can it be said that the charge of defilement, as laid in the substantive count, was proved beyond reasonable doubt before the lower court? The starting point, in this analysis, is **Section 8** of the **Sexual Offences Act** pursuant to which the charge was laid. It provides as follows:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) 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.

(4) 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.

[26] Hence, as was held in **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013**:

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

[27] Accordingly, the Prosecution was under duty to prove the following essential ingredients beyond reasonable doubt:

[a] That the complainant was, at the material time, a child aged 16 years;

[b] That there was penetration of the complainant's vagina;

[c] That the penetration was perpetrated by the appellant.

[a] On the age of the complainant:

[28] From the foregoing summary, it is manifest that credible evidence was placed before the lower court to demonstrate that the complainant was born on **11th May 2000**. This evidence was adduced by both **PW1** and her mother, **PW2**. In addition, the complainant's Birth Certificate No. 252947 was produced before the lower court and marked **Exhibit No. 3** to corroborate the evidence of both **PW1** and **PW2** as to the Complainant's age. Thus, the Prosecution satisfied the requirements of **Rule 4** of the **Sexual Offences Rules of Court Rules**, which 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."

[29] It is also trite that, in addition to the documents set out in **Rule 4** above, the age of a minor for purposes of the **Sexual Offences Act** can also be proved by the oral evidence of the minor's mother, by way of age assessment, as well as by observation and common sense. Hence, in **P.M.M. vs. Republic** [2018] eKLR, it was held thus:

"...whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant..."

[30] I am therefore convinced that indeed the complainant was 16 years old as at **9th July 2016** when the offence of defilement is alleged to have occurred. I note that counsel for the appellant, in his written submissions filed on **27th April 2021** took issue with the evidence availed herein in respect of the appellant's age, positing that it is contradictory. According to him, the Prosecution evidence revealed that the complainant was 17 years, 1 month and 28 days old by **9th July 2016**. It is however manifest that his computation was premised on a false assumption because, simple arithmetic shows that the complainant was 16 years, one month and 28 days as at **9th July 2016**.

[31] Needless to point out that, for purposes of **Section 8(4)** of the **Sexual Offences Act**, it suffices that the victim is within the age bracket between 16 and 18 years; and therefore, the argument that the complainant was 17 years old at the time is of no consequence. Moreover, it is now trite that the months following the last birthday, if any, do not count for purposes of determining the age of a child, so long as they are less than one year. This was well explained by the Court of Appeal in **Hadson Ali Mwachongo vs. Republic [2016] eKLR** as hereunder:

"Section 2 of the Interpretation and General Provisions Act defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into

account the period above the prescribed age so long as it does not amount to a year."

[32] Accordingly, it is my finding that credible evidence was adduced before the lower court to prove beyond reasonable doubt that the Complainant was a child for purposes of Sections 2 of the Sexual Offences Act, as read with Section 2 of the Children Act, No. 8 of 2001.

[b] On Penetration:

[33] In this regard, the evidence adduced before the lower court was principally that of the complainant. She testified as to how the appellant got her to have sexual intercourse with him on 9th July 2016 at about 7.00 p.m. and how they used to meet and have sex thereafter. She further told the lower court that the appellant started pursuing her for friendship when she was in Class 8; which she accepted. She therefore readily acknowledged him before the lower court as her boyfriend; and that they would habitually engage in sexual intercourse and consequently got pregnant. The complainant's evidence in this respect was buttressed by the evidence of her mother, who testified as PW2 before the lower court.

[34] In addition to the evidence of the complainant and her mother, the Prosecution presented evidence, through Mr. Polycarp Lutta Kweyu (PW2), the clinical officer, Mr. Gichangi (PW3), and the investigating officer (PW4), that, after the complainant gave birth to a baby girl on 23rd February 2017, DNA profiling was conducted involving her, the appellant and the child with a view of establishing the paternity of the child, C J. A report was availed before the lower court dated 17th March 2019 by Mr. Kweyu, whose opinion was that there are 99.99+% chances that John Kimutai, (the appellant herein) is the biological father to the complainant's daughter, C J.

[35] In the premises, the trial court cannot be faulted for coming to the conclusion that the complainant's pregnancy and subsequent birth of C J furnished additional proof of penetration. Indeed, in **Wayu Omar Dololo vs. Republic** [2014] eKLR, the decision of the trial court that pregnancy was one aspect of proof of penetration was upheld on appeal. Here is what **Hon. Mutuku, J.** had to say, which I find apposite:

"The trial magistrate took judicial notice that a pregnancy results from a sexual activity and as such found penetration proved. On my part, I have examined the evidence carefully. At the time of examination by a doctor, the complainant was heavy with child and the pregnancy was visible as observed by the trial court. Indeed, at the time of hearing the complainant said she was nine months pregnant. A pregnancy is a biological condition that results from a sexual activity unless there is evidence that there was artificial implanting of fertilized ova into the uterus of a female human being..."

[36] Likewise, in **Mbogo Raphael Chengo vs. Republic** [2019] eKLR the Court of Appeal affirmed the position that the fact of pregnancy of a complainant in a defilement case is evidence that sexual intercourse had taken place and is therefore proof of penetration. It is noteworthy too that the appellant expressly conceded that he had sex with the complainant. What he disputed was culpability; his defence being that the complainant was a willing participant who freely agreed to follow him to his brother's home for purposes of having sex. I am therefore satisfied that penetration was proved beyond reasonable doubt.

[c] On whether the penetration of the complainant was perpetrated by the Appellant:

[37] This aspect of the Prosecution case was also proved beyond reasonable doubt. As has been pointed out herein above, the appellant and the complainant were in a boyfriend/girlfriend relationship for over 2 years. They were next door neighbours who shared a common fence. Accordingly, the complainant's evidence inculcating the appellant is credible. Moreover, the appellant expressly admitted, in his statement of defence, that he knew the complainant and that they had been in a relationship since 2014. Then there is the DNA report that linked the appellant to the child that was the product of their relationship. Moreover, the evidence that the child was born on 23rd February 2017 at 8 months' gestation period, does point to July 2016 as the time of conception. I therefore have no hesitation in holding that the Prosecution proved beyond reasonable doubt that the appellant defiled the complainant on the 9th July 2016.

[38] Having so found, the question remains as to whether the appellant's defence was taken into account and properly dismissed. His contention before the lower court was that he did not know the complainant was under the age of 18 years as her physique showed that she was an adult who was able to give consent. He thus invoked the defence provided for in Section 8(5) and (6) of the Sexual Offences Act. The appellant also relied on Section 111 (1) of the Evidence Act to support his assertion that his defence created a reasonable doubt in the Prosecution case when he claimed that, as far as he was aware, the complainant was over the age of 18 years and was able to give consent to their sexual engagements. In particular, the appellant told the lower court that the complainant herself deceived him that she was an adult.

[39] Section 8(5) and (6) of the Sexual Offences Act provides as follows:

"(5) It is a defence to a charge under this section if-

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

[40] A perusal of the Judgment of the lower court reveals that due attention was given to the appellant's defence. At page 20 of the Record of

Appeal, the learned trial magistrate had the following to say in his Judgment:

“The accused seemed to admit the defilement but ...said that she used to tell him that she was an adult and that from her physique he had no reason to doubt. That he was not aware if she was going to school and if she was a minor until ...she testified in court.

I note that PW1 said she was in form 1 at the time. They were next fence neighbors who shared a fence. I can't believe him when he says that he was never aware that she was a school girl and was a minor. I saw this girl in court on 27/9/2018 at the time of her testimony. I can't believe the accused when he said that he knew her in 2014 and still believed that in 2016 she was an adult.

His defence does not meet the threshold in Section 8(5) as read with 8(6) of the Sexual Offences Act. The accused's defence is not believable and is found without merits at all and is safely disregarded...”

[41] As to whether the trial magistrate misdirected himself in dismissing the appellant's defence, I note that no cogent proof was presented before the lower court to prove deception for purposes of **Section 8(5)(a)** of the **Sexual Offences Act**. The argument presented by **Mr. Rotich** was that the burden of proof was on the Prosecution to disprove the appellant's defence; and therefore that it was an error on the part of the trial magistrate in shifting that burden to the defence. He relied on **Eliud Waweru Wambui vs. Republic** (supra) for the holding that:

“We would think that once a person has actually been deceived into believing a certain state of things, it adds little to require that his belief be reasonably held. Indeed, a reading of subsection (6) seems to add a qualification to subsection (5)(b) that separates it from the belief proceeding from the deception in subsection (5)(a). We would therefore opine that the elements constituting the defence should be read disjunctively if the two sub-sections are to make sense. We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years...”

[42] I find nothing in the excerpt above to support the submission that the burden of disproving the appellant's defence under **Section 8(5) and (6)** was on the Prosecution. To the contrary, the Court of Appeal succinctly stated that:

“..The burden of proving that deception or belief fell upon the appellant, but the burden is on a balance of probabilities and is to be assessed on the basis of the appellant's subjective view of the facts...”

[43] Since no evidence of deception was presented before the lower court, it follows that allegations to that effect were baseless and were therefore properly disregarded by the lower court. As to whether the appellant had reasons to believe that the complainant was an adult, it is instructive that he referred to the girl's physique as the main factor that misled him into his erroneous assumption. The trial court had the opportunity of seeing the girl and hearing her testimony. He was in no doubt that the appellant's defence was untenable. Added to this is the fact that the appellant was a close neighbour of the complainant. He obviously knew that she was a minor, having been in a relationship with her from **2014** when she was in class 8.

[44] In the circumstances, any argument that the complainant consented to being defiled by the appellant lacks traction; and whereas counsel for the appellant purported that it was premised on the persuasive case of **Martin Charo vs. Republic** (supra), which was referred to in Ground 5 of the appellant's Grounds of Appeal as the prevailing case law, there are numerous decisions of the High Court to the contrary. For instance, an alternative view was propounded in **Peter Charago vs. Republic** [2019] eKLR by **Mwongo, J.**, which is the view I subscribe to, that:

“...Unless there is proof that the complainant deceived the appellant, any sexual act between the two is treated as non-consensual sex and therefore amounted to defilement, as the complainant was a child under the age of 18 years and incapable of giving consent in law. Even where a minor behaves like an adult, the law still recognizes that person as a child...”

[45] It is therefore my finding that, roundly considered, the learned trial magistrate addressed his mind to all the pertinent issues; and that the conclusion he arrived at was premised on sound evidence. Thus, the inevitable conclusion that I come to is that the appellant's conviction in respect of the substantive count of defilement was premised on sound evidence. I also need to point out that, in the context of **Eliud Waweru Wambui** (supra) the whole concept of age of maturity was brought up by way of recommendation for purposes of law reform. Clearly therefore, **Mr. Rotich** quoted that section of the Judgment of the Court of Appeal out of context.

[46] Turning now to the question whether the sentence of 15 years' imprisonment imposed on the appellant was unwarranted, it is instructive that that is the minimum penalty provided for in **Section 8(4)** of the **Sexual Offences Act**, pursuant to which the substantive count was laid. Nevertheless, Counsel for the appellant placed reliance on the cases of **Dismas Wafula Kilwake** (supra) and **Francis Karioko Muruatetu** (supra) in pitching the argument that the set minimum sentence deprived the court of its discretion to pass appropriate sentences based on the peculiar circumstances of each case.

[47] It is important to note that on the **6th July, 2021**, the Supreme Court gave directions in respect of the case of **Francis Karioko Muruatetu** (supra) and stated that it is only applicable to death sentences as contemplated under **Section 204** of the **Penal Code**. It was thus clarified that **Muruatetu** did not invalidate mandatory sentences or minimum sentences in the **Penal Code**, the **Sexual Offences Act** or any other statute for that matter. In particular, the Supreme Court stated thus at paragraphs 11, 12 and 14 of the Directions aforementioned:

[11] **The ratio decidendi in the decision was summarized as follows;**

“69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment”.

[12] 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.

...

[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.”

[48] In the light of the foregoing, it is manifest that, within the backdrop of the new directions by the Supreme Court, the appellant has no basis for challenging the sentence imposed on him by the lower court. Needless to say that sentencing is a matter of discretion and an appellate court ought not to interfere simply because it would have meted a lesser or stiffer sentence. The Court of Appeal in Bernard Kimani Gacheru vs. Republic [2002] eKLR, held that:

It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

[49] In the result, I find no merit in the appeal. I hereby dismiss it accordingly.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JANUARY 2022.

OLGA SEWE

JUDGE