



REPUBLIC OF KENYA



**Timayo v Republic (Criminal Appeal 20 of 2020)  
[2022] KEHC 16892 (KLR) (19 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16892 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL 20 OF 2020  
TM MATHEKA, J  
DECEMBER 19, 2022**

**BETWEEN**

**PAUL OLEMAYAN TIMAYO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant was convicted and sentenced to fifteen (15) years imprisonment of the offence of defilement contrary to section 8 (1) as read with sub-section 8 (3) of the *Sexual Offences Act* No 3 of 2006 and. The particulars of the charge were that on July 7, 2018 in Nakuru North Sub County, within Nakuru county, the appellant unlawfully and intentionally committed an act by inserting his male genital organ namely penis into the female genital organ namely vagina of BMT a girl aged 15 years old which caused penetration.
2. He was also charged with the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on 7<sup>th</sup> day of July 2018 in Nakuru North sub county, within Nakuru county, the appellant unlawfully and intentionally indecently assaulted BMT a girl aged 15 years by touching her private parts namely vagina.
3. He was aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal as per his petition of appeal dated June 15, 2020 are that: The learned trial magistrate erred in law and in fact by,
  - a. failing to appreciate the loopholes in the prosecution case and instead went ahead to convict him.
  - b. convicting the appellant and yet there was no documentary evidence to prove the complainant's age



- c. convicting the appellant and yet the medical evidence did not prove any penetration
- d. failing to note that the prosecution case was not proved beyond any reasonable doubt
- e. misleading himself and went ahead to convict the appellant yet the appellant *alibi* was not shaken and the same shaded doubt against the prosecution case.

### Submissions

4. The appellant submitted that at the time he was charged with the offence before court he was 18 years old yet the charge sheet indicated his age as 58 years old. It was his case that the charges were trumped up against him because of a pay dispute between him and his employer.
5. The prosecution submitted that the three ingredients of defilement were proved beyond reasonable doubt. On penetration, the prosecution submitted that the same can be partial as provided under section 2 of the *Sexual Offences Act*. That PW1 told the court there was penetration which position was corroborated by PW6 who testified that it was established on examination that the complainant had wounds in her private parts and a fresh torn hymen and that the P3 Form and Post Rape Care form also established that the genital area was penetrated.
6. On the age of the complainant, the prosecution submitted that the age assessment report established that the complainant was a child aged between 14-15 years.
7. On the identity of the appellant, the prosecution submitted that the offence occurred during the day and that the complainant knew the appellant, that PW3 and PW4 saw the appellant grab and drag the victim to his house and PW7 confirmed to have retrieved a panty which belonged to the complainant from the appellant's house. This evidence established positive identification of the appellant.

### Evidence

8. PW1 BMT was the complainant. At the material time she was in primary school and was headed to class 8. She told the court that she was in class 8 at the material time. On July 7, 2018 about 2:00pm she was going to the river, when the appellant who she knew as the employee of one Michael PW5, came from behind her, held his neck and hand and pulled her into nearly unoccupied house. He told her to remove her clothes. She declined. He tore her skirt and pushed her onto the bed. He proceeded to remove his clothes, his shirt and inner wear. He told her if she screamed he would kill her. He pulled down her skirt, her panty and shorts. He wore a condom and told her that if she disturbed him he would defile her without the condom. She struggled with him and apparently some children heard her cries and came to the house and pulled the curtain to see what was going on inside. She took advantage of the interruption and dressed up. She could not trace her panty. She attempted to get away. However, the accused pulled her back onto the bed. He heard the children. He went to tell them to lock the gate, but they ran away and she managed to unlock the door and ran away. On the way met one Mama Murigu who she said, called a doctor and told him that she had been defiled. This doctor told her to report to her parents. Her mother came home about 5.00 p.m. She told her what happened. They went to the Bahati police station and made a report. She was taken to hospital. She was examined and treated. She said the panty was recovered the following day by police who visited the scene. She also said that she was on her monthly period. She identified her skirt and panty in court. She also identified the accused.
9. She stated that the accused lay on her and inserted his penis in her vagina while wearing a condom. When she struggled he removed the condom and inserted his penis into her vagina without a condom. She said she was in that house from 2:00 p.m. to 5:00 p.m. and when she left the house the children who were outside had already left. She told the court that she was born on June 9, 2002. She said that



- the place where accused worked and her home were less than a kilometer apart. That accused sent away the children before he got hold of her. That the house they were in was unoccupied, and the accused locked the gate.
10. On the re-examination she said that there were no people on the road. That the accused person sent away the small children whom she named as M and D. That she did not scream because the accused held her neck. Cross examined by court she said that before the incident she had only seen the accused and there was no relationship/grudge.
  11. PW2 VS was the mother to BMT. She said her daughter was born in June 2003, but the certificate of birth got burnt. She told the court that when she got home from work on July 7, 2016 at 5:30 p.m. She found BMT crying. BMT narrated to her what had happened telling her that the assailant whom she identified as Paul had defiled her severally. She confirmed that her daughter was on her periods. She proceeded to the home of the Paul's employer and reported to him what the daughter had told her. Paul's employer told her that some children had made the same report to him. He directed her to the police, she went there reported, then took BMT to hospital. She learnt later that Paul had been arrested. She said she only came to know Paul and his employer after the incident. Stated that she went to that home with BMT and the village elder. She said she saw Paul at the police station, then stated that she recalled that while at Paul's employer's home, she had seen Paul take off.
  12. On cross examination she told the court that Paul's place of resident was right across the home of Mama Shiko where they fetched water, she denied asking for money from the accused and his employer.
  13. PW3 a 13-year-old girl minor MS told the court that at the time of the hearing on February 21, 2019, she was in form 1. On July 7, 2018 she and her friend PW4 were going to visit their friend Friday. In front of them were Paul, B and a "light girl" walking. Paul was on a bicycle. After a short while they saw the light girl scream and run away. They caught up with the Paul and B and asked B what was wrong. She said Paul had attempted to get hold of the "light girl". It was then that Paul put his bicycle down, picked a stick and threw at them. Then he took B hand and pulled her towards his compound. She and her friends the gate while Paul and B entered the gate, into the house, where Paul placed a curtain at the window. She testified that D then called one E, who also came her mother. They all sat on stone within the compound. Then her mother. Paul called D to close the gate. They heard B shout from inside for them not to close the gate. This witness told the court that after one hour they saw B come out of the house running while crying. She testified that her home was opposite the house where the accused and Betty were, and that B home was adjacent to her own. It was her testimony that the accused came out, without a belt holding up his trouser. He asked them which direction B had run to. They did not tell him and he ran in the opposite direction. He came back to the house, dressed up and left. In the evening she told his employer what had happened.
  14. On cross examination she said that between her home and where accused was with B there was a public road. She said he found them playing at the gate.
  15. PW4 DA, 14-year-old female minor testified that she was in primary school at the time. On the material date she and PW3 were playing at Michael's (Paul's employer's) gate when they saw Paul riding a bicycle. They saw B carrying a jerry can. Then Paul told them to go home. That he took a stone and threw at them. They ran up to G shop which was outside Michael's gate. Then they saw B walking, then Paul pulled her hands towards Michael's compound. Paul then told PW4 to close the gate. She declined. He pulled B into the house, locked the door, then came out after a while and locked the gate, went back in and closed the curtain. Then while inside the house B requested them to help her. She opened the door and ran out. Paul followed her while wearing a vest and a trouser. He did not catch up with B. One E came by and asked what had happened. She told her that Paul had raped a girl. That



when Michael came MS told him that Paul had raped a girl. On cross examination she said that when the stone was thrown at them they ran their separate ways and met at G shop. That the E who came had a house in Michael's plot. That they knew about the rape when B came back and gave them the information.

16. PW5 Michael Mbugua was the employer of Paul. He told the court that it was MS who told him that Paul had pulled a girl into his room and the girl had come out crying, running. He said he inquire from his tenants but did not say what they told him. About 6.30 p.m. a village elder (unnamed) B and her mother came. B told him that Paul had done bad things to her. He referred them to the police. About midnight he heard a knock on the door. He suspected it was Paul. He rang the village elder. The police came and arrested Paul. He said he had entered Paul's room on the day of the incident and saw two used condoms on the floor near the bed. He also learnt from his youngest son that they (children) had opened Paul's house and found ladies' underwear. On cross examination he said he found the condoms on the date of the alleged offence, July 7, 2018 immediately he received the information form MS.
17. PW6 Dr Persia Nadupoi testified that the P3 was filled by a Dr Hamisi on July 10, 2018 and the PRC form by Dr Anne Geko on July 8, 2018. She also had the treatment notes written by Dr Paul. She said the complainant's vagina had wounds, the hymen was freshly torn. She said the blood in the blood stains on the panty could not have come from monthly period. She said monthly periods had clots, but the stains were probably from the torn hymen.
18. PW7 AMM 11-year-old male minor told the court that on July 9, 2018 around 4:00pm he was at home with his father and mother. The heard someone knock on the door to Paul their herdsman's house. He went out and saw 2 police officers who went into Paul's house and came out with a pink panty. He said when they were inside he peeped through the window and saw them looking under the bed. He saw the panty was pint with stars.
19. PW8 No 8xx8 Cpl Purity Kesi was attached to, Bahati Police Station. On July 8, 2018 she was assigned the defilement case to investigate. She interrogated the complainant on July 8, 2018. The complainant went to hospital on September 9, 2018. She visited the scene on September 9, 2018 where she recovered the pink panty with stars and blood stains. She said that the accused said it belonged to his girlfriend. The complainant told her that she was on her periods. She said that she established through age assessment that the complainant was between 14 – 15 years. She produced the exhibits in court.
20. PW9 Dr Aisha Masha a dentist at Provincial General Hospital Nakuru examined the complainant and assessed her age. She said she could not give an exact date, but concluded that she between 14 – 15 years.
21. The prosecution closed its case.
22. In his defence the accused made a sworn statement and did not call any witness. He told the court that PW5 had employed him as a herds boy. He was not paid his dues. On July 7, 2018 he went to demand his pay. An altercation ensued. His employer told him to wait. On July 8, 2019 he was went to cut nappier grass for the cattle. It was while he was cutting the nappier that his employer arrived with police officers. He was arrested. At that time, he was told he was selling napier grass without permission. At the police station is where he was told that he had defiled a girl. He denied having committed the offence. He said on July 7, 2018 he was in the shamba between 8:00 to 5:00 p.m. when he returned home. He said that the father to complainant was the caretaker at Mr Michael's farm. He said both MS and DA lived in Mr Michael's plot.



## Analysis And Determination

23. This is a first appeal. This court is required to review, re-examine the evidence and arrive at its own conclusion as per the principles laid down in the case of *Okeno v Republic* (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) EA 336 and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v R* [1957] EA 570). 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 conclusions; 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, see (*Peters v Sunday Post* 1978) EA 424.”

24. The charge of defilement is borne by specific ingredients. In *George Opondo Olunga v Republic* [2016] eKLR, the ingredients were set out as; identification or recognition of the offender, penetration and the age of the victim. I add that it is also necessary to take into account the additional guide given under section 33 of the *Sexual offences Act* No 3 of 2006 in the following terms: Evidence of surrounding circumstances and impact of sexual offence:

Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove;

- (a) whether a sexual offence is likely to have been committed-
  - (i) towards or in connection with the person concerned;
  - (ii) under coercive circumstances referred to in section 43; and
- (b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned. (emphasis mine)

25. It is because of this requirement that I have found it necessary to set a detailed summary of the evidence as given by witnesses in the subordinate court because these will assist to prove the commission of the offence and the setting of the sentence.

26. This evidence must be looked at from the points at which the appellant attacks the judgment of the subordinate court. It is from these that the issues for determination arise:

- a. whether there were loopholes in the case for the prosecution which the trial magistrate ignored and which if considered would have led to a different finding
- b. whether the age of the complainant was proved
- c. whether the medical evidence proved penetration
- d. whether the case for the prosecution was proved beyond a reasonable doubt



e. whether the appellant's *alibi* was shaken by the prosecution.

27. Before delving into these there is one very crucial issue that needs to be dealt with at the outset: the age of the accused at the time of plea. When the plea was taken the appellant told the court that he was 17 years old. The court did direct that an age assessment be carried out. This was done on the July 16, 2018. The report simply states; "approximately 18". The record shows that the accused was never informed of the outcome of this report. It simply states "accused over 18 years. He is an adult". This was clearly not what the report stated. Report stated that he was approximately 18 years old. It was imperative on the court to determine whether or not he had actually attained 18 years or whether he was below the age of 18 years.
28. Section 8 (7) of the [Sexual Offences Act](#) recognizes that even the child offender charged with an offence under this law is a child and states clearly that;

"Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the [Borstal Institutions Act](#) (cap 92) and Children's Act No 8 of 2001.

In my considered view this means that the child offender is to be dealt with in accordance with the Children 's Act. First it is important to note that the [Children Act](#) prohibits the use of conviction and sentence with respect to children. And in view of the provisions of article 53 (1) (f) and 53 (2) of the [Constitution](#); in the best interests of the child would require that the rights of the child be upheld . That a child has the right;

- (f) not to be detained, except as a measure of last resort, and when detained, to be held—
  - (i) for the shortest appropriate period of time; and
  - (ii) separate from adults and in conditions that take account of the child's sex and age.
- (2) A child's best interests are of paramount importance in every matter concerning the child.

29. In my considered view this means that even as the child is punished for the offence the child will have been found guilty of, the court ought to balance the public interest with the requirement to do what is in the best interest of the child. To do so the trial court herein ought to have made a determination at the outset whether it was trying the appellant as a child or whether it was trying him as an adult. As a child the court would be obligated to accord the child all his rights and to protect his welfare. In any even the court ought to give the child the benefit of doubt of the lower age as approximated by the doctor. It would have done the appellant justice to inform him of the decision, and since he had indicated that he was a child, to have the witness produce the age assessment report in the similar fashion it was produced for the complainant.
30. The importance of this cannot be gainsaid. The mere statement by the court that the accused before it was over 18 years removed him from the statutory and constitutional protections assigned to a child who is in conflict with the law. The court did not make effort to satisfy itself whether or not the accused could not establish his age, and even after seeking the views of the medical examiner, the verdict was an approximation which could have gone either way. To that end the learned trial court failed this accused



person as there was no explanation why the court decided that the accused was over 18 years old yet there was no sufficient evidence to prove that.

31. With respect to the age of the complainant, she told the court the date she was born, June 9, 2003. Her mother testified as well and told the court that she was born in June 2003 and that the birth certificate got burnt. There was no demonstration as to why an age assessment had to be conducted to obtain a different age yet the age as given by the complainant and her mother was not challenged.
32. Let it be clear that I am not saying that there is anything wrong with age assessment by a medical officer but this is only one of the ways for determining the age of the person when it cannot be ascertained by other evidence. It is evident that that evidence alone is not sufficient as it only gives an approximate age and at the end of the day the court must make a determination of the age it is going by and give reasons for the same.
33. Was the age of the complainant ascertained? The appellant was asking for documentary evidence. It was there in the form of the age assessment report which simply emphasized the age that the complainant and her mother had given. She gave the date in court as June 9, 2003, same date in the medical examination reports as given to the personnel who examined her. Hence the age of the complainant was ascertained.
34. It is not in doubt that the appellant was known to the complainant because they were neighbors. Some of the other witnesses lived on the same plot with the appellant as they were his employer's tenants. Hence I am not in doubt that the appellant was known to the witnesses and more so the complainant.
35. The next element is proving penetration. "Penetration" is a term is defined under section 2 of the Act to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".
36. From the record the complainant described in detail what happened. After spending the better part of the afternoon with the appellant, he took a condom, wore it and penetrated her. She struggled with him. He removed the condom, and penetrated her without it. She was on her periods. It is after this that she ran out of the house crying.
37. It is evident from the P3 that the medical officer who filled the P3 form did not examine the complainant. You find that in the places she was required to fill it with information from the examination she simply wrote "as per PRC Form".
38. The PRC form indicates that the complainant was examined on the July 7, 2018 in the evening. Her vaginal walls were inflamed, the hymen was freshly broken and there was blood in the genitalia. The examiner concluded that there was penetration.
39. It is not in doubt that a sexual encounter took place between the complainant and the accused on the material date. It is also not doubtful that there was penetration. Hence the three ingredients of defilement were proved.
40. What about the circumstances of the offence? Do they count for nothing?
41. The prosecution witnesses gave conflicting stories as to what exactly happened on that day. The complainant's account was that the accused crept up from behind her and grabbed her. The two eye witnesses said the accused was riding a bicycle while in the company of the complainant and another. There is no explanation in the evidence as to how the appellant got off the bicycle and grabbed the complainant or what happened to the bicycle.



42. It is also the complainant's testimony that the witnesses were small children whom the appellant chased away. The two witnesses were both aged 13 years old in class 8 and could not be described as small children. Two adults were called, the mother to PW3 and one E. They both came to the scene but from the testimony of the two girls, they did nothing despite being told that the accused was inside the house with the complainant.
43. It is noteworthy that the house where this incident happened was unoccupied in a compound where there were other houses with tenants although none heard the alleged commotion.
44. In addition, the witness's version was that the defilement took place at noon. The complainant told the court she was with the accused in that room from 2pm to 5pm.
45. The scenario that draws itself is that these two adolescents aged 15 and 17 years went into this unoccupied house and remained there the entire afternoon. The appellant even had time to wear a condom, even time to remove it and proceed to penetrate her. He had time to tell off the children who were peeping and disturbing their activity. However, there was a point where the two children outside heard the complainant shout asking for help. There was also a point where when the appellant told some children to lock the gate they heard the complainant tell them not to lock the gate. At some point on the complainant changed her mind at some point but the accused persisted. That is the point where the offence arose.
46. There was an attempt by the prosecution to show that that appellant ran away. That evidence is contradictory and unbelievable. His employer is the only person that was found at home when the complainant and her mother went there. Neither the Nyumba Kumi elder nor the arresting officer testified to confirm the allegation.
47. No condoms were produced in court yet it was alleged that two of them were near the appellant's bed at the time the scene was visited.
48. The appellant's defence was a denial of the offence and to say that he was at the shamba the whole day from 8am to 5pm. That this case was trumped up against him by his employer when he demanded his 6 months' unpaid salary. That his employer connived with the father of the complainant who was the caretaker of the employer's shamba to set him up.
49. I have considered this defence together with the evidence given by the prosecution. This offence happened during the day. There is nothing to show that there was any grudge between the appellant and the family of the complainant. Her mother testified in court and the issue of the alleged set up never came up. This issue of a set up appears to be an afterthought.
50. With respect to the sentence, it is evident that the appellant could have been between 17 and 18 years at the time of the offence. The complainant was 15 years old. The circumstances as described by the complainant present what has come to be referred to Romeo and Juliet scenarios, though we do need to find our own local jurisprudence that we can relate to as this Shakespearean reference does not ring true with us. One community to whom the terms Romeo and Juliet were mentioned in this regard rejected the same and gave their own as Esapat and Epese.
51. In the case *Shadrack Kipkoech Kogo v Republic*, Eldoret criminal appeal No 253 of 2003 the Court of Appeal stated thus:-

“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.”

52. Section 8(1), (3) of the *Sexual Offences Act* provides as follows:

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

(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.”

53. In sentencing the appellant to 15 years’ imprisonment the learned trial magistrate stated “the offence in question is rampant in this court’s jurisdiction on the said premise I am inclined to make a deterrent sentence”.

54. The law states that a person found guilty of this offence is liable to imprisonment for a term not less than 20 years. Taking into consideration the circumstances of the offence as provided for under section 33 of the *Sexual Offences Act*, the age of the appellant vis a vis that of the complainant, the fact that the appellant was a first offender.

55. In *Dismas Wafula Kilwake v Republic* [2019] eKLR the Court of Appeal dealt with the issue of sentences under section 8 of the *Sexual Offences Act* and made the following observations:

“For defilement of a child of eleven years or less, the Act provides that the accused person “shall...be sentenced to imprisonment for life”, whilst for defilement of a child between twelve and fifteen years, the offender “is liable...to imprisonment for a term of not less than twenty years”. Lastly, for defilement of a child between sixteen and eighteen years, the Act prescribes that the accused person “is liable...to imprisonment for a term of not less than 15 years.” Therefore, while for the first age bracket the offender “shall” be sentenced to life imprisonment, in the other two age brackets, the offender “is liable” to imprisonment for not less than the prescribed number of years. Other than the fact that the Act uses different language, the rationale for the use of the different language is not readily apparent to us.

Since the enactment of the *Sexual Offences Act*, the above provisions have been interpreted and applied by all the levels of the courts as imposing mandatory minimum sentences. The effect is that irrespective of the circumstances under which the offence is committed and irrespective of any mitigating circumstances, the Act purports to tie the hands of the courts, so that in all cases they must pass the same sentence predetermined by the legislature, based only on the age of the victim.”

56. The circumstances of the offence must be considered.

57. With respect to this case I am guided by the Court of Appeal’s holding in *MABI v Republic* [2018]eKLR:-

“Regarding the age of the appellant, serious doubts were raised from the beginning of the trial as to whether the appellant was above 18 years when he committed the offence. If the appellant was under the age of 18 years, he was then a child in terms of section 2 of the *Children Act* which defines a “child” to mean any human being under the age of 18 years. When the appellant was first arraigned in court, he was in school uniform, and that was noted by the trial magistrate. During the trial, the appellant’s advocate told the court



that the appellant was born on 5th February, 1996; although no documentary evidence was availed to prove that allegation. However, as pointed out earlier, the appellant told the trial magistrate that as at the date of the trial he was 17 years old and was in form four at [particulars withheld] Secondary School. To ensure a fair trial and obviate the possibility of dealing with a child offender as an adult, the trial court ought to have ordered that the appellant's age be assessed by a doctor. Alternatively, the trial court ought to have made due inquiry as to the appellant's age, in accordance with section 143(1) of the *Children Act*... Here was a young person who was presented to court in school uniform, he told the investigating officer and the trial court that he was a minor; that he was a student; and without any inquiry as to his age, the trial court proceeded with the trial on the presumption that he was an adult. In the circumstances, we are satisfied that the lower courts' finding that the appellant was not a minor, in the absence of any inquiry to his age, might have occasioned a miscarriage of justice. Had the trial court found that the appellant was a minor but had defiled the complainant, who was also a minor, it would have dealt with him in any of the ways prescribed under section 191(1) of the *Children Act*. Such ways include discharging the offender under section 35(1) of the Penal Code. Section 190(1) of the *Children Act* expressly provides that no child shall be ordered to imprisonment or to be placed in a detention camp" Having concluded that the trial magistrate did not conduct an inquiry as required (emphasis mine)

58. In addition, the learned trial magistrate ought to have made reference to the Sentencing Policy Guidelines as well.
59. In the circumstances it is my view that had the learned trial magistrate taken into consideration all the factors in that case the sentence would have been different.
60. The appeal therefore succeeds in part.
61. I am of the view that the accused's age was below 18 years at the time of the offence. The conviction is sustained but substituted with a finding of guilt. The sentence of 15 years' imprisonment is set aside.
62. I direct that a Pre-Sentence Report be made available to the court within seven (7) days hereof.

**Signed, Dated and Delivered virtually this 9<sup>th</sup> day of September, 2022.**

**Mumbua T. Matheka**

**Judge**

Court Assistant: Jennifer

Ms Murunga for state

Appellant

### **Disposition**

The 'presentence' report dated November 1, 2022 was filed by probation and after care officer Nakuru. It indicates that the appellant is the only child of his land less parents. His father is said to be a herd's man and his mother a house wife. And when he was sent to prison his father's poor health which worsened.

He dropped out of school at class four to take casual jobs to help his family.

The victim completed class 8. Passed the exams but could not continue with her education due to lack of fees and is a hawker. She harbors no fear of the appellant.



The appellant told the court that his parents perished in the Solai Dam Tragedy. The probation officer has today clarified that when they visited the ground they confirmed that the appellant was indeed orphaned

One of the purposes of rehabilitation of someone like the appellant is to correct any warped norms he might have on relations with the opposite sex and to set him on the proper path at this early age. It would be in his best interest for the Probation and After Care Officer to come up with an individually tailored treatment plan take him through the steps of being a responsible adult.

In addition, there are the risks of re offending, considering the situation at home.

The Probation and After Care Officer proposes setting up the offender with a neighbor member of the community who will host him, offer him a chance and engage him in productive work. Thea appellant confirms that that was the nearest neighbor at home and he is agreeable to the arrangement.

The duty of the Probation and After Care Officer is to ensure that this does not turn out to be a labor exploitation arrangement and any work done will be compensated for value taking into consideration the appellants needs to prevent are occurrence of the circumstances of this case. By supporting the offender to acquires some life skills and empowerment that will go some way to dealing with the root cause of his committing the offence and removing him from the cycle of labor exploitation.

The appellant was arrested on July 8, 2018. He was sentenced on May 13, 2020. He was in remand for two years and had been in prison for about another two years.

Taking that into consideration I would consider any requirement for detention in custody to have been served.

In view of the Probation Officer's Report, and for purposes of reintegration back to society I direct that the appellant be placed on probation supervision for three years during which period he must abide by the probation order.

Probation and After Care Nakuru to work with the appellant to pursue the possibility of acquiring some skill.

Orders accordingly.

**Mumbua T Matheka J**

**19th December 2022**

CA Edna

Appellant present

Mr. Salim for probation and After Care Services Nakuru

Ms. Murunga for state

