REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO. E003 OF 2020

(From Original Conviction and Sentence in Criminal Case Number 21 of 2019 by the Senior Resident Magistrate's Court at Sotik – Hon. Jackson Omwange)

ERIC KIPROTICH KIRUI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of defiling a minor contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006, Laws of Kenya and was accordingly sentenced to thirty (30) years imprisonment. The particulars of the charge against the Appellant were that on 3rd June 2019, at [particulars withheld] village, Sotik Sub County, within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of CC a child aged 7 years.

2. The Appellant also faced an 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 of the alternative charge were that on the same day (3rd June 2019) at [particulars withheld] village, Sotik Sub County within Bomet County, he unlawfully touched the vagina of CC, a child aged 7 years with his penis.

3. The Appellant pleaded not guilty to the charges before the trial court, and the case went to full hearing in which the prosecution called six (6) 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 accused person and was accordingly put on his defence. The Appellant tendered a sworn statement and did not call any witnesses in aid of his defence.

5. At the conclusion of the trial, he was convicted of the main charge and sentenced to serve 30 years imprisonment.

6. Being dissatisfied with the judgment, the Appellant appealed to this court on 16 grounds which can be condensed to 6 as follows:-

i. **THAT**, the learned trial magistrate erred in law and fact by convicting the appellant when the prosecution did not prove the essential ingredients of the charge of defilement.

ii. **THAT** the learned trial magistrate erred in both law and fact by failing to consider the fact that the appellant was mentally challenged hence could not have stood trial and tendered a defence.

iii. **THAT** the learned trial magistrate erred in both law and fact by rejecting the appellant's application to recall witnesses for cross examination, to be represented by an advocate and to call additional defence witnesses thereby infringing upon his right to a fair hearing.

iv. **THAT** the learned magistrate erred in both law and fact by ignoring the legal principles governing mitigation including the failure to request for a pre-sentence report.

v. **THAT** the learned trial magistrate erred in law and fact by basing his judgment on inconsistent, incredible and contradictory evidence of the prosecution witnesses and in failing to consider the evidence as a whole and especially for the defence.

vi. **THAT** in whole, the finding and holding of the learned trial magistrate as contained in his Judgment delivered on 12th November

2020 is inconsiderate, erroneous, unlawful, biased and untenable in law.

The Prosecution case.

7. The victim CC testified as PW1 after the court conducted *voire dire* examination on her and concluded that she would give unsworn evidence. She testified that the accused was her uncle, who is a brother to her father. That on the material day, the accused person pulled her to her father's bed and removed her clothes. She stated that "he removed his trouser, removed his thing and let it enter her". The complainant subsequently told her parents what had happened, who then took her to Kapkatet where she was examined in hospital. She then went to the police station and told the police what had transpired.

8. PW2 who was the complainant's mother testified that she was not at home when her daughter was defiled. She was told by her husband and thereafter she took the complainant to Kapkatet Hospital where she was examined and treated. Thereafter, she reported the matter at the police station. PW2 further testified that the accused person was her brother in law and that she had no grudge against him. PW2 produced an Acknowledgment of Birth Notification marked as P.Exhibit 3.

9. PW3 testified that he was a Medical Officer at Kericho-Kapkatet Sub- County Hospital and that he examined the complainant. Upon examination, he found that she had scratch marks and bruises on the left side of the neck, bruises on both majora and minora and that her hymen was freshly torn and that there was discharge from the vagina. It was the conclusion of PW3 that there was penetration. PW3 produced a P3 form and Post Rape Care Form marked as P.Exhibit 1 and P.Exhibit 2 respectively.

10. PW4 testified that he was the Chief at Kamungei Location. That the accused had been arrested by the people of Nyumba Kumi on allegations that he had defiled a 7 year old girl. He further testified that he took the accused person to Sotik Police Station and made a report under OB xx/x/x/xx.

11. PW5 testified that he was the father of the complainant. That on 3rd June 2019 he arrived home from work and found the accused person with his daughter in his bedroom. He testified that the accused person jumped from the bed, that his zip was open and that his daughter was naked. It was the testimony of PW5 that the complainant informed him that the accused person had done '*tabia mbaya'* to her and that she was bleeding from her neck because the accused person strangled her. PW5 further testified that he beat up the accused person before people opened the door and the accused person managed to escape by running away. He stated that he and his wife took the complainant to hospital and later reported the matter at Sotik Police Station. PW5 further testified that his daughter was 7 years old and that the accused person was his blood brother.

12. PW6 testified that she was the Investigating Officer. That the matter was reported on 3rd June 2019 where the complainant indicated that she had been defiled by her uncle. The complainant was issued with a P3 form which indicated that she had been penetrated and had scratch marks on the neck and face. PW6 further testified that she visited the scene and found signs of struggle.

The Defence case.

13. The accused testified as DW1. He denied the offence. He told the court that he was not at home on the material day, being 3rd June 2019. That he was working in Chebang at Arap Kirui's place and when he arrived home he was told that he had defiled the complainant. On cross examination, he maintained that he was at Arap Kirui's place doing casual work from 8am to 6.30 pm and that he did not defile the complainant. He further testified that he was being framed by the complainant's mother.

14. At the close of the defence case, parties were directed to file submissions and judgment was scheduled for 1st October 2020 which was later deferred to 12th November 2020. The accused had represented himself all along and at this juncture, he got an advocate to represent him. The advocate filed an application dated 9th November 2020 seeking among others to have the accused subjected to a mental assessment. In a ruling dated 12th November 2020, the trial court dismissed the said application. The case then proceeded to judgment which is now appealed on the grounds already stated.

The appellant's submissions.

15. The appeal was canvassed through written submissions. In his submissions dated 11th May 2021, the Appellant stated that he had a medical history and had suffered from different ailments since the case began. It is the Appellant's submission that before a trial proceeds, the trial court ought to determine whether the accused person has the mental capacity to proceed. The Appellant relied on the case of **JKK Vs Republic (2019) eKLR** to support their submission. The Appellant further submitted that failure by the trial magistrate to order a mental evaluation despite an application by the Defence Counsel was a grave injustice and an affront to the Appellant's right to a fair hearing.

16. It is the Appellant's submission that the trial magistrate erred in law by failing to accord the Appellant an opportunity to have his Defence Counsel cross-examine witnesses. Additionally, that his right to a fair hearing and access to fair administrative action was infringed upon by the decision of the trial court. He relied on Sections 146(4) and 150 of the Criminal Procedure Code and the cases of **Joseph Ndung'u Kagiri Vs Republic (2016) eKLR** and **Paul Muuo Vs Republic (2018) eKLR** to support this submission.

17. Counsel further submitted that his client was not represented by an advocate during the trial and that he was not informed of his right to legal representation. The Appellant invoked Articles 24, 25 and 50 of the Constitution of Kenya to advance this submission. He further submitted that the court did not discharge its duty of informing the Accused his right to be represented by an advocate of his choice. While conceding that such right was not absolute Counsel invited the court to arrive at the decision that substantial injustice was visited upon the Appellant as he was not able to represent himself being a layman.

18. It is the Appellant's submission that the sentence imposed upon the Appellant was manifestly excessive, harsh and severe. That the trial

court failed to take into consideration mitigating factors and failed to order a Social Inquiry Report to assist the court prefer an appropriate sentence.

19. The Appellant further submitted that the trial court moved with haste to sentence the accused soon after the court dismissed the Appellant's Application to recall the witnesses thereby denying the Appellant the right to a fair hearing and fair administrative action.

The Respondent's submissions.

20. From the outset it is clear that the Respondent did not oppose the Appeal. However being the first appellate court, this court has a duty to re-evaluate the evidence on record. This duty was clearly set out by the Court of Appeal **Okeno – Vs – Republic (1972) EA 32** thus:-

> ***"An appellant 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 evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".***

21. It is the Respondent's submission that the Prosecution through the testimonies of the six witnesses, proved the ingredients of the offence as contemplated in law to the required standards. That the right to recall witnesses is not an absolute right and it is a right to be exercised by the trial court in balancing the rights of the accused person, the victim and all the actors involved in the trial process.

22. Notwithstanding the above, the Respondent submitted that the proceedings of the trial court stand vitiated for reason that the Accused person did not have legal representation yet he faced a serious offence; and, that the trial court violated his constitutional right to a fair trial contemplated under Article 25 of the Constitution of Kenya. The Respondent relied on the case of **Joseph Ndung'u Kagiri Vs Republic** to support their position.

23. It is the Respondent's submission that the law governing mistrial as stipulated in the cases of **Ahmed Sumar Vs Republic (1964) EA 481; Manji Vs Republic (1966) EA 343; Mujimba Vs Uganda (1969) and Merali Others Vs Republic (1971) 221** support their position that the instant case was a mistrial. In the view of the Respondents, no prejudice will be occasioned to the accused should an order of retrial be made, and an order for retrial would also safeguard the rights of the victim.

24. The Respondent prayed that the matter be declared a mistrial and be sent back to the lower court for re-trial.

Analysis

25. From my consideration of the Record of Appeal dated and filed on 26th November 2020, the Appellant's written submissions dated 11th May 2021 and the Respondent's written submissions dated 20th May 2021, I decipher four issues for determination as follows:-

(i) Whether the case was a mistrial.

(ii) Whether the Prosecution proved its case.

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

(iv) Whether the sentence preferred against the accused person was manifestly excessive, harsh and severe.

(i) Whether the case was a mistrial

26. The Black's Law Dictionary, 10th Edition defines a mistrial as:-

> ***"A trial that the Judge brings to an end without determination on the merits because of a procedural error or serious misconduct occurring during the proceedings".***

27. In the case of **Republic Vs Edward Kirui (2014) eKLR**, the Court of Appeal quoted the Supreme Court of India case of **Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688** where the case of **Bhagwan Singh Vs State of M. P. (2002)4 SCC 85** was cited as follows:-

> ***"The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."***

28. The prosecution called upon this court to declare the matter a mistrial based on grounds 1, 2 and 3 raised by the Appellant and submissions challenging the decision of the trial court to dismiss the Application dated 9th November 2020. The three grounds challenged the refusal of the trial magistrate to consider the mental status of the Appellant; to recall witnesses for cross-examination; and, to uphold the right

of the Appellant to legal representation.

29. As earlier stated, the Application dated 9th November 2020 was dismissed by the trial court. There is nothing on record to show whether the Applicants appealed the decision or applied for a Review.

30. This court will however look at the supporting documents attached to the application assist it in reaching a determination. DKK 1 is a letter addressed to the LSK Bomet Centre by the family of the accused seeking legal representation for him. Whereas the Constitution grants a right to legal representation, it is not clear why the family delayed in seeking out LSK for that purpose. The family must have been aware that the accused stood trial on various dates from September 2019 onwards. They had every opportunity to seek the assistance of the LSK at the commencement or during the trial. Coming to the scene late after the close of the Defence therefore seems like an afterthought and an attempt to have a second bite at the trial.

31. The other documents attached were discharge summaries from Kapkatet Hospital and Kericho District Hospital, invoice from Kericho District Hospital and Patient Release Paper from Kericho District Hospital. The Appellant did not attach a medical report that would have been conclusive proof that the accused suffered from Diabetes. The Appellant also failed to attach any evidence that he suffered from mental incapacity as alleged.

32. This court is satisfied that the accused person was in good mental capacity as he understood the charges he was facing. He pleaded not guilty to the Charges which according to the record were read to him in English, Kiswahili and Kipsigis. He was able to cross-examine PW1. When put on his defence, he chose to tender sworn evidence and called no witnesses. As already shown above, the Appellant's counsel failed to tender any evidence in the trial court regarding the Appellant's claim of mental incapacity.

33. I agree with the trial court that there was no evidence of ailment proved in court and further that the court accorded the Accused person a chance to cross-examine the witnesses as required by law.

34. With respect to legal representation, the relevant law is Article 50 (2), (b), (g) and (h) which provides:-

> ***"50 (2) every accused person has the right to a fair trial, which includes the right to-***
>
> ***(b) to be informed of the charge with sufficient detail to answer it***
>
> ***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly***
>
> ***(h) to have an advocate assigned to the accused person by the state and at the state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.***

35. Article 50 has partially been given effect under the Legal Aid Act, 2016 which provides **Section 43** that:-

"A Court before which an unrepresented accused person is presented shall:

> ***a) Promptly inform the accused of his or her right to legal representation.***
>
> ***b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and***
>
> ***c) Inform the service to provide legal aid to the accused person.***

36. A reading of the aforementioned law reveals that the right to legal representation by an accused person at the expense of the state is not automatic but qualified. In other words, there must exist the condition that substantial injustice would occur.

37. In the case of **David Njoroge Macharia Vs. Republic (2011) eKLR, Nairobi Criminal Appeal No. 497 of 2007**, the Court of Appeal stated as follows:-

> ***"Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires some form of legal aid be given to the accused because of the nature of the offence. We are of the considered view that in addition to situations "where substantial injustice would otherwise result" persons accused of capital offences where the penalty is loss of life have the right to legal representation."***

38. Further, the Court of Appeal in the case of **Karisa Chengo & 2 Others Vs R (2015) eKLR** stated as follows:-

> ***"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at the state expense in cases where substantial injustice might otherwise result. And to include all situations where an accused person is charged with***

an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. <u>However substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."</u>

39. I am satisfied that the Accused understood the Charge as read to him. The record shows that apart from English, there was interpretation in Kiswahili and Kipsigis language which the Appellant clearly understood. Additionally, I find no evidence to suggest that the Accused was unable to conduct his proceedings. As earlier observed, he cross-examined the prosecution witnesses. The charge of defilement is also not a capital offence and does not carry the death penalty. With this in mind, I am convinced that substantial injustice was not occasioned to the accused person by virtue of him being unrepresented during the trial.

40. The guiding principle here is whether the Accused was prejudiced by the denial to recall witnesses. It is also to be remembered that although an Accused is 'a favourite child of the law', the trial court must balance the scales of justice and give effect to the rights of the victim as well. Recalling of witnesses without a sound basis occasions delay in a trial contrary to the spirit of Article 50 (2) (k). In the case of **DPP Vs Kelvin Opiyo (2019) eKLR,** the Court quoted the case of the **R Vs Fanjoy 1985 21 CCC 312**, where the Supreme Court of Canada held that:-

"It is the duty of the trial judge to ensure that recall of witnesses, for examination in chief, cross-examination does not offend trial fairness."

41. It is the finding of this court that the Appellant had the chance to cross-examine the Prosecution's witnesses. He only cross-examined PW1. The accused person has failed to show sufficient cause as to why the court should have granted his application for recalling of the prosecution's witnesses. I agree with the trial court's assessment that the Application was an afterthought. It is my finding that the same was brought in with an ulterior motive of defeating justice. I agree with the holding in **Republic Vs Salim Mohamed (2016) eKLR**, where the court stated that:-

"Recalling a witness is part of the right to a fair hearing. It should not be felt that the court shielded the witness from further cross-examination unless it can be shown that the request to have the witness called is based on an ulterior motive."

42. I must also observe that the Appellant had the right to seek leave to appeal the ruling and it did not.

43. From the above, I am satisfied that no miscarriage of justice was occasioned. The trial court upheld the parties' right to a fair hearing and hence there is no basis for this court to declare the trial a mistrial. That therefore means that this court cannot order a retrial at the Magistrate's Court.

44. Having found no basis to order a retrial, I now evaluate the evidence to arrive at a conclusion whether or not the case against the Accused was proven to the required legal standard.

(ii) Whether the Prosecution proved its case.

45. 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.

46. In seeking to confirm whether the three elements were proved, the court must analyse both the prosecution case and the defence. In **Ouma Vs Republic (1986) KLR 619**, the court had the following to say in regard to evaluation of the prosecution evidence:-

"At the time of evaluating the prosecution's evidence, the court must have in mind the accused person's defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of the defence being true. If there is doubt, the benefit of that doubt always goes to the accused person"

47. The accused person was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. Section 8 (1) of the Act states that any person who commits an act which causes penetration with a child is guilty of an offence of defilement. The Children's Act no. 8 of 2001 defines a child in any human being under the age of eighteen years.

48. On the first ingredient, the charge stated that the complainant was 7 years old. Proof of age is therefore important firstly to establish the offence and secondly because the law provides for graduated sentences. As stated by the Court of Appeal in the case of **Hadson Ali Mwachongo Vs Republic (2016) eKLR,** stated that:-

"The importance of proving the age of the victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In <u>Alfayo Gombe Okello vs. Republic Cr. App 203 of 2009 (Kisumu)</u> this Court stated as follows

"In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. This must be so because dire consequences flow from proof of the offence under section 8(1)".

49. PW2 who was the complainant's mother stated that the complainant was born on 5th March 2012. She produced an Acknowledgment of Birth Notification (For Parents) which indicated the aforementioned birth date of the complainant and the same was marked as P. Exhibit 3. PW5 who is the father of the complainant testified that his daughter was aged 7 years.

50. In light of the above, and in the absence of any controverting evidence, this court is satisfied that the complainant was aged seven (7) years.

51. With respect to the second ingredient, 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 **EE Vs Republic (2015) eKLR**, the Court stated that:-

> ***"An important ingredient of the offence of defilement is that there must have been penetration. Penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement".***

52. 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. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt."***

53. In this case, the complainant (PW1) testified that the Accused person "removed her clothes, removed his thing and let it enter her". The court record indicated that she pointed to her private parts. PW1's testimony was unchallenged even upon cross-examination. PW3, a Medical Officer testified that he examined the complainant and noted that she had scratch marks and bruises on the left side of the neck, bruises on both the majora and minora and that the hymen was freshly torn. It was his conclusion that there was penetration. PW3 further produced a P3 form P.Exhibit 1 and the Post Rape Care Report P.Exhibit 2. The P3 form also indicated that there was bleeding from the vagina. The accused person chose not to cross-examine this witness and did not challenge the exhibits produced.

54. This court is therefore satisfied that penetration was proved by the evidence of the victim which was also corroborated by medical evidence as outlined above.

55. The final and critical ingredient of the offence is the positive identification of the perpetrator.

56. In the case of **Peter Musau Mwanzia Vs The Republic 2008 eKLR** the Court of Appeal expressed itself as follows:-

> ***"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise 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 has been known to him for some time, 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 seeing that the suspect at the time of the offence can recall very well having seen him earlier on before the incident"***

57. In the present case, PW1 testified that the accused person was her uncle, a brother to her father. PW2 identified the accused person as her brother in law. PW5 who literally caught the Appellant in the act identified him as his blood brother. The complainant recognized the accused person as her relative and that leaves this court in no doubt that the accused person was very well known and was adequately identified by the complainant.

(iii) Whether the Defence places doubt on the prosecution case.

58. The trial court was satisfied that the prosecution had established a prima facie case against the accused person and the accused person was called upon by the court to make his Defence under Section 211 of the Criminal Procedure Code. He opted to tender sworn evidence and not call any witnesses. He chose not to cross-examine any of the prosecution's witnesses save for PW1 only. He did not also challenge the authenticity of the documents produced as exhibits by the prosecution's witnesses.

59. The Accused denied defiling the complainant and further stated that he was being framed by the complainant's mother. He testified that at the time when he was accused of defiling the complainant, he was at Arap Kirui's place at Chebang. The accused person did not call Arap Kirui or any witness to corroborate his testimony.

60. There is nothing in the accused person's Defence that would make this court place doubt on the veracity of the prosecution's case.

61. The testimonies by PW1, PW2 and PW5 leave this court in no doubt that the accused person was an uncle to the complainant. Section 20 of the Sexual Offences Act provides as follows:-

> ***"1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:***

Provided that, if it alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of then female person".

62. According to the provisions of Section 20 detailed above, the accused person would also be liable to be charged and convicted of the offence of Incest under the provision of Section 179 of the Criminal Procedure Code which provides that:-

"1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

63. I observe however that the offence of incest attracts a less stiff penalty than defilement. I associate myself with the holding of Musyoka J in the High Court case of **NAM Vs Republic (2020) eKLR**, where it was held that:-

"I am alive to Section 179 of the Criminal Procedure Code, Cap 75, Laws of Kenya, under which an accused person could be convicted of an offence other than that charged, so long as the facts disclose that other offence, and that offence is cognate or predicate to the offence charged. Incest in respect to a minor, is strictly speaking, a defilement, of the said minor. Yet, the language of Section 20 of the Sexual Offences Act makes it a lesser offence to defilement. Under the Sexual Offences Act, defilement, as defined in section 8, is subject to mandatory sentences, incest, with respect to minors, is not subject to similar mandatory sentences, the sentences prescribed are largely discretionary save for the minimum penalty of ten years. So for all practical purposes incest is cognate to defilement.

Let me state that I do not quite understand the policy behind making incest, with respect to minors, an offence lesser to defilement. Yet in the offence of incest, with respect to minors, two offences overlap, defilement and incest. That alone should make incest a much more serious offence compared to defilement. Secondly, incest happens largely within the home, between members of the same family, as opposed to general defilement which may happen between persons who are not related to each other or whose relationship is distant. It would mean in incest, with respect to minors, there is always that element of breach of trust. The person defiling the minor would be her elder relative, taking advantage of the familiarity between them to defile her under the cover of the family home, where she should feel safest. The worst abusers of underage girls are their immediate relatives, who prey on the underage girls under the safe cover of the home environment. It is usually difficult to have such crimes uncovered, because families make efforts to cover them up. No doubt, in those circumstances, incest, with respect to minors, ought to be a much more serious offence than defilement. It is about time that policy makers focused on this to afford better protection to underage girls within families, by amending the penalties prescribed for incest where minors are the victims."

(iv) Whether the sentence preferred against the accused person was manifestly excessive, harsh and severe.

64. In **Bernard Kimani Gacheru Vs Republic (2002) eKLR**, the Court of Appeal stated that:-

"It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the 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 the wrong material, or acted on the 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 states is shown to exist."

65. There is no doubt that the sentence meted on the Appellant is stiff. However, the Appellant was charged under Section 8(1) as read with section 8(2) of the Sexual Offences Act. The provisions state:-

(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.

66. The Act provides for a maximum sentence of life imprisonment if one is convicted for the offence of defilement. In mitigation, the accused through his advocate stated that the maximum sentence of life in prison is nowadays illegal. The court was also asked to consider that the accused had a mental problem and that he needs treatment. That the court should consider granting justice to both the victim and the convict.

67. I agree with the Sentence passed by the trial court. As earlier explained the violation visited upon the complainant by her uncle was a betrayal of trust and deserves to be equally met with the full force of the law. The law prescribes that the accused person serve life imprisonment. The Sentence is not illegal as stated by counsel for the accused person. The recent directions in the Supreme Court case of **Francis Karioko Muruatetu and Another Vs Republic, Petition No. 15 & 16 (Consolidated) of 2015** provided that:-

"We therefore reiterate that, this Court's decision in Muruatetu did not invalidate mandatory sentences or minimum sentences

in the Penal Code, the Sexual Offences Act or any other statute."

68. In the final analysis, I have come to the finding that the charge against the Appellant was proved beyond reasonable doubt. I confirm both the conviction and sentence. The appeal is consequently dismissed.

69. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT THIS 28TH DAY OF SEPTEMBER, 2021.

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R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of Mr. Kipngetich for the Appellant, Mr. Murithi for the Respondent, and Kiprotich (Court Assistant).