REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 83 OF 2018

DICKSON ODUOR ADERO ALIAS DICKY.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. N.C. Adalo, RM, delivered on the 13th day of July 2016 in Iten Principal Magistrate's Criminal Case No. 676 of 2015)

JUDGMENT

[1] This appeal arises from the conviction and sentence passed by the Resident Magistrate, **Hon. N.C. Adalo**, in **Iten Principal Magistrate's Criminal Case No. 676 of 2015: Republic vs. Dickson Oduor Adero**, on **13 July 2016**. The Appellant had been charged before the lower court with Defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars thereof were that on the **5 January 2015** at about 2.00 p.m. at [particulars withheld] Village in Elgeyo Marakwet County, he intentionally and unlawfully caused his genital organ, namely penis, to penetrate the genital organ, namely vagina of **R.A**. a girl aged 15 years.

In the alternative, he was charged with Indecent Act with a Child, contrary to **Section 11(1)** of the **Sexual Offences Act,** in that, on the **5 January 2015** at about 2.00 p.m. at [particulars withheld] Village in Elgeyo Marakwet County, he intentionally and unlawfully committed an indecent act to **R.A**. a child aged 15 years, by touching her genital organ, namely vagina.

[2] The Appellant denied the charges; and upon hearing the respective cases presented by the Prosecution and the Defence, the lower court was satisfied as to the guilt of the Appellant and convicted him of the Main Charge for which he was sentenced to 15 years' imprisonment. Being aggrieved by his conviction and sentence, the Appellant preferred this appeal, with the leave of the Court, on **12 October 2018,** citing the following grounds:

[a] That he pleaded not guilty at the trial;

[b] That he is a first offender;

[c] That his appeal has a high chance of success.

Hence, the Appellant prayed that his appeal be allowed, the conviction quashed, and the sentence set aside.

[3] He filed Amended Grounds of Appeal pursuant to **Section 350(2)(v)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya** in which he contended that:

[a] The Learned Trial Magistrate erred both in law and fact by superintending an unfair trial;

[b] The Learned Trial Magistrate erred both in law and fact by not finding that the medical evidence was benign and unable to prove the allegation of defilement;

[c] The Learned Trial Magistrate erred both in law and fact by failing to appreciate that the evidence of the Prosecution, notably **PW1** and **PW3,** was incredible and could not support the Charge;

[d] The Learned Trial Magistrate erred both in law and fact in convicting him when the age of the complainant was not conclusively established;

[e] The Learned Trial Magistrate erred both in law and fact when he disregarded the defence without any cogent reason.

[4] Along with the Amended Grounds of Appeal, the Appellant filed written submissions on which he relied in urging the appeal. He submitted that the his right to a fair trial was violated. In support of the ground that he was not accorded a fair trial, the Appellant faulted the lower court for declining his application for adjournment, while at the same time granting the Prosecution's request for leave to amend the Charge Sheet; notwithstanding that the application for amendment was belatedly made. According to him the trial magistrate thereby ran afoul of **Articles 25(c), 24, 27 and 29(a)** of the **Constitution of Kenya.** He further complained that in allowing the application for amendment of the Charge, the trial magistrate did not inquire from him whether he had any objection thereto; and posited that the application, which was made after about 9 months from the date of his arraignment, was made for the ulterior purpose of stiffening the sentence in the event of him being found guilty.

[5] It was further the submission of the Appellant that no credible evidence was adduced to prove either penetration or the age of the minor. He discounted the evidence of **Dr. Castro (PW2)** and argued that it purported to show that the Complainant was taken to hospital on **13 June 2015** for examination, after a period of 5 months from the date of the alleged offence; and that even then, **Dr. Castro** was not explicit in his evidence as to whether there was penetration. Thus, the Appellant submitted that it was to no avail that **PW2** produced a P3 Form before the lower court. He further submitted that although **DNA** samples were taken from him, no report was presented before the lower court. In this regard, the Appellant relied on **Nakuru High Court Criminal Case No. 280 of 2014: Michael Odhiambo vs. Republic** in urging the Court to find that, in the absence of cogent medical evidence, the Prosecution Case was not proved to the requisite standard. Likewise, the Appellant cast doubts on the contention that the Complainant conceived as a result of the unlawful sexual interaction; or that she gave birth in **September 2015.** He posited that if this were true then the Complainant could easily have produced before the lower court documentary evidence in that regard to concretize the Prosecution Case; which was not done.

[6] Regarding proof of the age of the Complainant, it was the submission of the Appellant that the evidence of the Complainant, that she was 16 years old at the time, was at variance with the Age Assessment Report; which was to the effect that the Complainant was 15 years old as at **23 June 2015**. He therefore posited that the Age Assessment Report was unlawfully procured, granted that it indicates that it was initially for **Joyce Manyali** and not the Complainant. He submitted therefore that the lower court ought not to have relied on that flawed evidence.

[7] Finally, it was submitted by the Appellant that the trial court failed to give any consideration to his defence alongside its analysis of the Prosecution Case as is required by **Section 169** of the **Criminal Procedure Code**. He relied on **Criminal Appeal No. 121 of 1983: James Nyanamba vs. Republic** and urged the Court to find that the appeal has merit and to allow the same, quash his conviction and set aside the sentence.

[8] On behalf of the State, **Mr. Mulamula,** opposed the appeal and submitted that in line with **Malindi Criminal Appeal No. 504 of 2010: Kaingu Kasomo vs. Republic,** the Prosecution availed credible evidence to prove the age of the minor by way of an Age Assessment Report. He pointed out that the age assessment was done by **Dr. Henry Wanyoike Mwangi** through a radiographical test; and is therefore credible. On the credibility of **PW1** and **PW3**, **Mr. Mulamula** submitted that there was nothing on record to indicate that the two witnesses were of doubtful credibility. He also directed the Court to pages 43 to 44 of the Judgment of the lower court for a confirmation that the defence of the Appellant was given due consideration by the lower court. Counsel therefore posited that sufficient evidence was placed before the lower court by the Prosecution to warrant the conviction of the Appellant; notwithstanding the failure by the Prosecution to avail the DNA report. He consequently prayed for the dismissal of the appeal.

[9] I have given careful consideration to the appeal. I have also taken into account the written and oral submissions made herein by the Appellant and Learned Counsel for the State. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32,** the Court of Appeal for East Africa had the following to say in this connection:

> **"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 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..."**

[10] Before the lower court, the Prosecution called a total of 5 witnesses, the first of whom was the Complainant. She testified as **PW1** and told the lower court that she was born on **12 June 1999**. She stated that she was at home on **5 January 2015** when the Appellant, a person she had known well as a former employee of her father, and who she treated as a brother, invited her to his house with a request for help with household chores. That, when she was done, the Appellant started caressing her and eventually had sexual intercourse with her. All the while she did not scream or raise alarm and explained that the Appellant had prevailed upon her not to scream. She went home afterwards and did not report the incident to anybody. After some time, she started noticing changes in her body, accompanied by frequent bouts of sickness. Her father, who testified as **PW2** before the lower court advised her to go to hospital for treatment; and upon examination, she was told that she was pregnant. When her father got to know the result, he caused the matter to be reported to Iten Police Station. She identified the Appellant to be the person who defiled and impregnated her.

[11] **PW3**, the Complainant's father confirmed that she was born in **June 1999;** and that her Certificate of Birth got burnt when his house got razed down. He confirmed that he had noticed the cases of frequent indisposition on the part of the Complainant; and that on **12 June 2015**, she advised her to go to **Musekekwa Dispensary** for medical examination. He thereafter called the nurse in charge and got to learn that the Complainant was pregnant; and that when she interrogated her, she revealed that the Appellant, a former employee of his, was

responsible for the pregnancy. He then had the matter reported to the Police for appropriate action and thereafter the Complainant was given a P3 Form which was filled and signed by a doctor.

[12] The doctor aforementioned, **Dr. Castro Mugala**, testified as **PW2** before the lower court. He was then attached to **Iten County Referral Hospital**. He confirmed that he examined the Complainant herein on **13 June 2015;** and that she presented a history of defilement six months after the act. His examination revealed that the Complainant, who was otherwise normal, was 27 weeks pregnant. Her genitalia appeared normal and no samples were taken due to the time lapse. He filled the P3 Form which was signed by **Dr. Fwawaz**, a medical intern with whom they jointly examined the patient. He produced the P3 Form as an exhibit before the lower court.

[13] PW4 was **Cpl Mwanatum Guyato**, a Police Officer then attached to **Iten Police Station**. She testified that the complaint was brought to her attention on **13 June 2015** by her father; and that by then the Appellant had already been arrested and was in custody. She then recorded the statements of both the Complainant and her father; and then issued her with a P3 Form, which they went with to **Iten District Hospital** for examination. After the P3 Form was returned duly filled, she charged the Appellant and caused him to be arraigned before court. She added that she asked for the Complainant's Birth Certificate but was told the same had been burnt accidentally. He thus had an age assessment done on the Complainant and the result confirmed that she was 15 years old at the time of the offence.

[14] Dr. Henry Wanyoike Mwangi (PW5) told the lower court that he is a Dentist based at **Iten County Referral Hospital**; and that on the **23 June 2015,** he conducted some radiographical examination of the Complainant with a view of ascertaining her age. He came to the conclusion that the Complainant was aged about 15 years. He prepared a report to that effect which he produced along with the x-rays as **the Prosecution's Exhibits 2 and 3** before the lower court.

[15] The Appellant, in his unsworn statement of defence, conceded that he was a former employee of the Complainant's father; and that he worked for him for two years before opening his own carpentry workshop. He stated that although he informed the Complainant's father of his intention to leave his employ and the reason therefor, the Complainant's father did not want to release him; but that he left nevertheless. He added that after about three months of opening up his own workshop, an AP Officer went and arrested him and that the Complainant's father went to the AP Camp to tell him that he had played with fire and would meet the consequences.

[16] It was further the evidence of the Appellant that he was then taken to **Iten Police Station** and was thereafter arraigned in court for having defiled the Complainant; yet it was known to the Complainant's father that the Complainant had spent nights at the house of one **Gedion** and had been impregnated by the said **Gedion.** He pointed out that the Age Assessment Report that he was served with was, not in respect of the Complainant, but in respect of **Joyce Munyali**; and that the DNA test that was ordered for by the court did not yield any result. It was therefore his contention before the lower court that no evidence had been adduced to connect him with the alleged offence.

[17] The foregoing being the summary of the evidence, the question to pose is whether the offence of Defilement with which the Appellant was charged and convicted, was proved beyond reasonable doubt. It is manifest from the record that although the Appellant was initially charged under **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act,** there was an amendment that was approved by the lower court on **20 October 2015** to replace **Section 8(4) with Section 8(3)** of the **Sexual Offences Act.** It is therefore pertinent to have **Section 8** of the **Sexual Offences Act** reproduced here below for its full tenor and effect. 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.**

[18] Accordingly, the Prosecution needed to prove the following essential ingredients:

> **[a]** That the Complainant was, at the material time, a child for purposes of **Section 8(3)** of **the Sexual Offences Act**;
>
> **[b]** That there was penetration of the Complainant's vagina;
>
> **[c]** That the penetration was perpetrated by the Appellant.

[a] <u>On the age of the Complainant:</u>

[19] There is no gainsaying that for purposes of **Section 8** of **the Sexual Offences Act,** the age of a Complainant is an essential ingredient that must be proved beyond reasonable doubt; not only for purposes of proving that the Complainant is a minor, but also for purposes of sentence, should the accused person be found guilty at the end of the trial. This observation was aptly made in **<u>High Court Criminal Appeal No. 34'B' of 2010: John Otieno Obwar vs. Republic</u>** by **Hon. Makhandia, J.** (as he then was) thus:

> **"Defilement is a strict offence whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly it is important that the age of the victim to be proved by credible evidence..."**

[20] Similarly, in **Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010** the Court of Appeal stressed this point thus:

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

[21] Accordingly, **Rule 4** of the **Sexual Offences Rules of Court Rules** recognizes 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."**

[22] The Complainant told the lower court that she was born on **12 June 1999**. She was accordingly 16 years old as at **12 June 2015**. **PW3**, the Complainant's father, also confirmed that she was born in **June 1999.** He was unable to produce the Certificate of Birth for a plausible reason; namely, that the same got destroyed in a fire that burnt down their house. However, **PW4** caused the Complainant to be examined by **Dr. Mwangi (PW5)** and in the doctor's assessment the girl was aged about 15 years as at **23 June 2015** when the examination was carried out. The Age Assessment Report was produced before the lower court and marked **the Prosecution's Exhibit No. 2.** It is manifest from the report that it was in respect of the Complainant and accords, in all respects with the evidence of **PW5,;** noting that the radiological examination yielded an approximation based on the dental age of the minor.

[23] The contradiction alluded to by the Appellant is therefore without foundation, considering that the incident took place before the Complainant's 16th birthday. 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. In **Hadson Ali Mwachongo vs. Republic [2016] eKLR,** for instance, the Court of Appeal explained that:

> **"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."**

[24] Consequently, the Complainant was 15 years as at **5 January 2015** when the offence occurred. Hence, it is my finding that there was cogent evidence to prove beyond reasonable doubt that the Complainant was a child for purposes of **Sections 2 and 8(1)** of the **Sexual Offences Act**, as read with **Section 2** of the **Children Act, No. 8 of 2001**. It was similarly demonstrated beyond reasonable doubt by the Prosecution that the Age Assessment Report **(the Prosecution's Exhibit No. 2)** was in respect of the Complainant and had nothing to do with **Joyce Munyali** as was suggested by the Appellant.

[25] It bears repeating that the Particulars of the Charge were amended to read 15 years instead of 16 years; and that in the Judgment of the lower court, a finding of fact was made, based on the evidence of **PW5** that the Complainant was 15 years old at the time. Granted the definition of a minor **in Section 2** of the **Sexual Offences Act** as read with **Section 2** of the **Children Act, No. of 2006**, the alleged lack of clarity as to whether the Complainant was 15 or 16 years is immaterial for purposes of the determination that the Complainant was a minor when the defilement is said to have occurred; though it is pertinent when it comes to sentence, which I shall revert to shortly.

[b] On whether Penetration of the Complainant Occurred:

[26] The Complainant narrated the events of **5 January 2015** and told the lower court that she had gone to fetch water when the Appellant, a person she had known well prior to that date, invited her to his house with a request for help with household chores. She explained that the Appellant was like a brother, granted that he was previously employed by her father in his workshop. That, when she was done with the chores, the Appellant started caressing her and eventually had sexual intercourse with her; and that she thereafter went home and did not report the incident to her parents. She further stated that, after some time, she started noticing changes in her body, accompanied by frequent bouts of sickness; and that at the instance of her father, she was examined and found to be pregnant.

[27] The Complainant's evidence was supported by the testimony of her father, **PW3**. He confirmed that he had noticed the cases of frequent indisposition on the part of the Complainant; and that on **5 January 2015**, she advised her to go to **Musekekwa Dispensary** for medical examination; and that he thereafter called the nurse in charge and got to learn that the Complainant was pregnant. **Dr. Castro Mugala** of **Iten County Referral Hospital** testified as **PW2** before the lower court and confirmed that he examined the Complainant herein on **13 June 2015;** and that his examination revealed that the Complainant, who was otherwise normal, was 27 weeks pregnant.

[28] It is understandable then that, at the time of her examination, the Complainant's genitalia appeared normal, granted the time lapse. It is also understandable that, for the same reason, no samples were taken by the doctor for further analysis; and he explained as much before the lower court. Nevertheless, it is indubitable that the Complainant was defiled and impregnated at the age of 15. Indeed, in his response to the Submissions herein by Counsel for the State, the Appellant conceded thus:

> **"It is true that the Complainant was defiled and that a child was born as a result. This issue was raised before the lower court and that is why the court ordered for DNA to be done..."**

In the premises, the conclusion arrived at by the trial court that penetration took place in the case of the Complainant cannot be faulted.

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

[29] As to the pertinent question whether the penetration of the Complainant was perpetrated by the Appellant, the Complainant's evidence was that she knew the Appellant well before the **5 February 2015** as a former employee of her father and family friend. Thus in cross-examination, she told the lower court that:

> **"...I know you since 2010. 2010 is when you started working for my father. In 2010 I was in class 3. I got pregnant in 2015 on 5th January. By that time you had rented your own house. You used to live behind the workshop where you worked for my father. You forced me to love you. You told me that you love me. You wanted me to be your girlfriend..."**

[30] The picture painted before the lower court was therefore of a person that was well known to the Complainant; and as the incident occurred in the afternoon hours, it cannot be said that the Complainant was in any difficulty whatsoever in identifying the Appellant. And, she had no hesitation in revealing to her father, when the matter of her pregnancy became known to him, that the Appellant was responsible for her defilement.

[31] I do note that, in his written submissions, the Appellant did urge the Court to find that there are reasons for doubting the credibility of the evidence of **PW1** and **PW3.** It is plain, however, that the issues raised by the Appellant under this particular ground had to do with the fact the Age Assessment Report was at variance with the evidence of **PW1;** and **PW3** with regard to the exact age of the Complainant; and that the Complainant did not provide documentary evidence to prove that she gave birth in **September 2015**. I have already dealt with the perceived variance in the evidence of **PW1, PW3** and **PW5** with regard to the age of the Complainant herein above. Regarding the failure by the Complainant to adduce evidence in proof of the birth of her child, there being no dispute that the Complainant was impregnated by her defiler, this omission is of no consequence. It must always be born in mind that the offence of defilement is complete so long as there is penetration; and it is immaterial whether or not there was conception or consent.

[32] Moreover, when it comes to credibility, this Court, as an appellate court, is expected to defer to and be guided by the impression formed on the trial court by the witnesses. Hence, in **Shantilal Maneklal Ruwala vs. Republic [1957] EA 570,** it was held, *inter alia*, that when the question arises which witness is to be believed rather than another and that question turns on demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses. The trial court saw the Complainant and **PW3** and believed their testimony. I therefore find no reason to discredit the two witnesses or find fault with the lower court for believing their respective testimonies.

[33] The Appellant urged the Court to find that he was being fixed for a crime he did not commit. He consequently submitted thus with regard to the DNA samples that were taken from him for profiling:

> **"...My samples were taken. The report was not availed to the court. This was important because the Complainant spent the night in question with another man and it was important that the issue be ascertained. The child that was born has since been taken to the father and yet I am suffering in custody for an offence I did not commit..."**

[34] Thus, in his written submissions, the Appellant cited **Section 36** of the **Sexual Offences Act** to support his argument that failure by the Prosecution to avail a DNA test result was prejudicial to him; and that the report would have been used by the lower court to absolve him from blame. He relied on **Nakuru High Court Criminal Appeal No. 280 of 2014: Michael Odhiambo vs. Republic** for the proposition that it was the duty of the Prosecution and the court trying his case to ensure compliance with **Section 36** of the **Sexual Offences Act** with a view of ascertaining whether or not the accused committed the offence. Indeed it is to be expected that, where a pregnancy ensued and samples taken for purposes of forensic analysis, the report be availed for the court's consideration.

[35] It is equally trite that, whereas **Section 36** of the **Sexual Offences Act** provides for DNA testing, that provision is not mandatory. In **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

> **"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her..."**

[36] This is because, **the fact of defilement, unlike, say, paternity, is not proved by DNA test, but by evidence. (see AML vs. Republic [2012] eKLR . In the premises, the fact that the DNA test result was not availed did not have any adverse effect on the Prosecution Case. The same principle was restated by the Court of Appeal in *Geoffrey Kionji vs Republic Cr. Appeal No 270 of 2010*, as follows:**

> **"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."**

Hence, on both fronts, the contention by the Appellant that he was not accorded a fair trial is untenable; noting too that the process of amendment of the Charges was also carried out in accordance with the law and the Appellant was called upon to plead to the Charges as amended.

[37] Lastly, it was the contention of the Appellant that the trial court failed to consider and appraise his defence alongside the Prosecution Case and yet, in his view, his defence completely dislodged the Prosecution Case. He relied on Criminal Appeal No. 121 of 1983: James Nyanamba vs. Republic in the context of Section 169 of the Criminal Procedure Code as to contents of judgments.

[38] However, a look at the Judgment of the lower court confirms that it set out the Charges, a summary of both the Prosecution and Defence Cases, as well as an analysis of the evidence in the light of the applicable law. The trial court also framed issues for consideration at page 6 of the Judgment (see page 44 of the Record of Appeal). Ultimately, the trial court considered the evidence adduced by either side before choosing to believe the Prosecution version. In the result therefore, I am satisfied that the conviction of the Appellant for the offence of Defilement contrary to **Section 8(1**) as read with **Section 8(3)** of the **Sexual Offences Act** was based on sound evidence. I would consequently dismiss the appeal against conviction.

[39] It is noteworthy however, that the Appellant was sentenced to 15 years' imprisonment; and yet **Section 8(3)** of the **Sexual Offences Act** is explicit that:

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

[40] In the premises, the trial court fell into error by imposing a sentence other than that which has been prescribed by the law for the offence in question. Accordingly, pursuant to **Section 8(3)** of the **Sexual Offences Act** as read with **Section 354(3)(a) of the Criminal Procedure Code**, that is an error that must be corrected. I would accordingly endorse the expressions of **Hon. Makau, J.** in **Moses Otieno Opondo vs. Republic [2017] eKLR** that:

> **"Where a minimum mandatory sentence is set out by a Statute, the Court should impose the prescribed sentence and where it has no discretion and imposes a sentence below the minimum sentence, the Court will be acting contrary to the law and such sentence is by all means illegal and on appeal being dismissed, the Appellate Court is obliged to substitute the illegal sentence imposed with lawful sentence..."**

[41] I would thus set aside the sentence imposed on the Appellant by the lower court and in place thereof sentence him to imprisonment for a period of 20 years in accordance with the provisions of **Section 8(3)** of the **Sexual Offences Act**.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF MARCH, 2019

OLGA SEWE

JUDGE