



**Cherono v Republic (Criminal Appeal 12 of 2023)  
[2025] KEHC 1871 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1871 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ITEN  
CRIMINAL APPEAL 12 OF 2023  
JRA WANANDA, J  
FEBRUARY 21, 2025**

**BETWEEN**

**ISAAC KIMUTAI CHERONO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Iten Senior Principal Magistrate's Court Criminal Case (Sexual Offences) No. 13 of 2019)*

**JUDGMENT**

1. The Appellant, then a 20 years old young man, was charged in Iten Senior Principal Magistrate's Court Criminal Case (Sexual Offences) No. 13 of 2019 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006.
2. The particulars were that on 8/03/2019, at about 01:00 am at [xxxxxxx] village, in Kapchalal Location, Keiyo North Sub-County of Elgeyo Marakwet County, he intentionally caused his penis to penetrate the vagina of AJK, a child aged 7 years.
3. The Appellant 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 on the same date, time and place, he intentionally touched the vagina of the same child aged 7 years with his penis.
4. The Appellant pleaded not guilty to the charges and the case then proceeded to full trial in which the prosecution called 6 witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and placed him on his defence. He then gave a sworn statement and called no other witness. By the Judgment delivered on 30/7/2021, the Appellant was convicted on the main charge and sentenced to life imprisonment.
5. Dissatisfied with the decision, the Appellant filed this appeal on 12/07/2023 against both conviction and sentence. His Petition of Appeal, reproduced verbatim, is crafted as follows:



- i. That I am aggrieved the trial Court erred in law and fact as it failed to hold that the charge sheet was fatally defective.
- ii. That the trial Court erred in law and facts as it failed to observe that the witness evidence was inconsistency and uncorroborated.
- iii. That, I am aggrieved the trial Court erred in law and facts as it failed to hold the evidence of identification and recognition was not conclusive.
- iv. That the learned trial Magistrate erred in law and facts by shifting the burden of proof from the prosecution backyard to the Appellant when the evidence failed to link him to the offence.
- v. That other grounds will be raised during hearing.

### **Prosecution evidence**

6. PW1 was the complainant, AJK. She stated that she was a 7 years Class 1 pupil, and by reason of that age, she was taken through a *voire dire* examination, upon which the trial Court, not satisfied that the complainant understood the nature or purpose of taking an oath, directed that she gives unsworn statement, which she did.
7. Pursuant thereto, the complainant stated that she knew Isaac Kimutai, the Appellant, whom she identified in Court, who lives at Linda's home, and that he did something to her but she did not recall the date. She testified that on the material night, the Appellant did to her "tabia mbaya" (bad manners in the Kiswahili language), that she was at home sleeping, her 2 younger sisters, I and J were also asleep and both their mother and father were not at home. She stated that something woke her up but she did not know what it was, but when she woke up, she saw Isaac, she switched on a D-light which she used on to see and recognized the Appellant who did to her "tabia mbaya". She stated that the Appellant removed her trouser, took his thing (she pointed to her groin area) which she saw, which boys use to pee and put it "here to her" (she pointed at her groin area), that he put it where she uses to urinate and then he did to her "tabia mbaya". She testified that she felt pain but she did not do anything and did not talk. She stated further that the Appellant, before he did to her "tabia mbaya" asked her where her mother was and to which she responded that she did not know and that she did not cry, and kept quiet. She testified further that one M, who lives in their home, then appeared and then locked the door from outside but Isaac broke it and ran off, that went to call Sarah, who came, they tied Isaac up as he was still there and they took him to the police. She added that in the morning, her mother and Sarah took her to hospital where she was examined and given medicine. She reiterated that Isaac was known to her long before the incident. In cross-examination, she stated that she had known the Appellant since she was a child, and denied knowledge of any dispute between the Appellant and her mother.
8. PW2 was PK. She stated that she is the complainant's mother, and that the complainant was 7 years old as she was born in February 2012. She testified that she was not at home on 8/03/2019 at 2:00 am as she had travelled, she returned the following day when it was still dark and found the door to her house broken, when she saw the children, the complainant told her that Isaac had broken the door, and that her father had gone with Isaac and another person. She testified that when Sarah and Rono came back, they told her that Isaac had raped her child, that the complainant told her that Isaac had a fight with , her husband, but she did not tell her that she had been raped. She stated that after she was told of the incident, in the morning, they went to the police and later took the child to Tambach Hospital. She stated that the Appellant is her neighbour. In cross-examination, she stated that she lives with with whom she has a relationship. She denied that she had ever had a relationship with the Appellant and stated that she had lived with since 2013.



9. PW3 was Sarah Cheruiyot. She stated that she is a member of “nyumba kumi” (neighbourhood administrative committee), and knew the complainant as a neighbour’s child. She testified that on 8/03/2019 at around 1:30 am, she was asleep at her home when, the complainant’s mother’s husband came to her house and woke her up, he told her that someone had molested a child, that the child’s mother was not at home and that he ( ) had locked the person (Isaac) in the house. She stated that she got up, took a torch and went to the home where she found the door broken hanging off the hinges, inside she saw 2 children sleeping and the complainant seated, she then went and woke up Hosea, a neighbour, she (PW3) asked Hosea for a phone to take photographs but Hosea did not have one so Hosea called Erick who came with a phone with a camera and they took photographs. She stated further that they went inside the house and when they asked the complainant who the assailant was, she said that it was “Baba Abel” who had broken the door, that “Baba Abel” is Isaac and that he had done to her “tabia mbaya. She testified that she saw the child’s panty down, she then sent to and get food from her home, she examined the child and she saw “she had been done to the act”, they called Kenya Police Reservist (KPR) officers, and as they were waiting for the officers, Isaac appeared, she held him and he pleaded that they “should talk” pleading that there was a mistake that he had gone and he wanted to settle the issue with . She stated that they recorded what he said, the KPR officers then arrived and took the Appellant to Kapchela police station. She added that the Appellant had chased away his wife, that she knew the Appellant well and that she has never had any disagreement with him. She then identified Isaac as the Appellant sitting in the dock. In cross-examination she stated that her home is less than 10 minutes from the complainant’s home and reiterated that she knew Isaac, and also , who is a neighbour and lives with the complainant’s mother.
10. PW4 was Erick Kemboi. He stated that he knows the complainant and her mother (PW2) as they are his neighbours, that on 8/03/2019 at around 2:00 am, he was home when he was called by his brother, Hosea Kemboi, who told him that Sarah had called him and when he arrived he found Sarah with PW2’s children (the complainant and 2 others) in the house and Sarah told her that someone had attacked the complainant while she was asleep. He stated that he saw the door hanging from hinges, he took photographs and talked to the complainant who said that “Baba Abel” (Isaac) went into the house while they were sleeping and defiled her. He stated that they then called the police but did not find them and that as they were waiting, Isaac (Appellant) appeared, and they arrested him and took him to Kapchela Administration camp. He stated further that when they asked him about the incident, he admitted going into the house and committing the act and asked for pardon. He testified that he was with Sarah and PW2’s children, and that he later recorded a statement at Tambach. He identified the Appellant as Isaac, the person they arrested, and added that he knows him very well and that they have never had a disagreement. In cross-examination, he conceded that he did not witness the incident and stated that apart from Sarah and Isaac (Appellant), was also there, and that the Appellant asked for forgiveness. He also conceded that there was no electricity and although it was 2.00 am, there was light from the fire.
11. PW5 was Luka Kiprop, a Clinical Officer at Tambach Hospital. He presented the P3 form from the Tambach Police Station in respect to the complainant, whom he referred to as a 7 years old girl. He stated that the complainant was presented to the hospital on 8/03/2019, her state of clothing was clean with no stains or tears and she claimed to have been defiled by a person known to her, that her head, neck, abdomen, thorax upper and lower limbs were normal, age of injury was “hours old” and that she was given antibiotics, painkillers and flagyl. He stated further that on genital examination, he found that the complainant’s labia majora and minora were swollen and tender, the hymen was broken, there were blood stains on examining finger, and epithelia cells were also seen. He then produced the P3 Form for the complainant, dated 8/03/2019, P3 Form for the Appellant, aged 20 years, of the same



8/03/2019. In cross-examination, he stated that presence of epithelial cells indicated that there was friction.

12. PW6 was Police Constable Wanjala Mayende. He stated that at the time of the incident he was attached at the Tambach Police Station, and he was the Investigating Officer. He stated that on 8/03/2019 at around noon, he was at the Police Station when officers from Anin arrived with a suspect and the complainant, that the people who accompanied the complainant, and who claimed to be the child's guardian and others her village-mates, stated that the complainant had been defiled by the suspect. He stated that he took the complainant to hospital at Tambach where she was examined and the doctor concluded that she had been defiled, he then recorded statements and carried out an age assessment as the complainant did not have a birth certificate and the same showed that she about was 6-7 years old. He then produced the Report dated 18/7/2019 issued by the Iten County Referral Hospital. He also identified the Appellant as the suspect who was brought to the police station.

### **Defence evidence**

13. In his defence, the Appellant gave sworn testimony. He stated that he understood the charge he was facing, that he was arrested on 2/02/2019 and taken to Kapchela Police post but he was not told why he was taken there, that he was later taken to Tambach Police Station where he stayed until 8/12/2019 when he was brought to Court and charged with the offence of defilement, which he denied, and still denies.
14. As aforesaid, after the trial, by the Judgment delivered on 30/7/2021, the Appellant was convicted on the main charge of defilement and sentenced to life imprisonment.

### **Hearing of the Appeal**

15. It was then directed that this Appeal be canvassed by way of written Submissions. While the Appellant supplied his undated Submissions, the Respondent did not supply any. A look at the Judiciary Case Tracking (CTS), too, does not reflect filing of any such Submissions.

### **Appellant's Submissions**

16. In respect to "identification", the Appellant submitted that it was only due to the Prosecution's "provocation" that the complainant lied to the trial Court about the Appellant being the defiler. Regarding "penetration", he submitted that the medical evidence failed to prove that "penetration" occurred on the date indicated on the charge sheet. He also contended that no spermatozoa was seen and cited the case of *Dominic Kibet Mwareng v Republic* [2013] eKLR. On the issue of "age", he submitted that the evidence given by the complainant's mother was a mere allegation as no birth certificate was produced and no age assessment took place. He cited the case of *P.M.M. v Republic* [2018] eKLR. Regarding the sentence, he faulted the trial Court for sentencing him to life imprisonment as the same goes against human dignity and violates the offender's mitigation under Section 329 of the *Criminal Procedure Code* and Article 50 (2) of the *Constitution* of Kenya, 2010. He cited the case of *Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021)* [2022] KEHC 13118 (KLR) (17 May 2022).

### **Determination**

17. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (see *Okeno vs. Republic* [1972] E.A 32)



18. Although one of grounds stated in the Petition of Appeal is that the trial Court erred in law and fact in failing to hold that the charge sheet was fatally defective, I note that in his Submissions, the Appellant did not at all touch on this ground. I therefore presume that the said ground has been abandoned.
19. The issues that therefore remain for determination in this matter are the following:
  - i. Whether the defilement charge against the Appellant was proved beyond reasonable doubt.
  - ii. Whether the sentence of life imprisonment imposed against the Appellant was justified.
20. I now proceed to analyze and determine the said issues

**i. Whether the charge was proved case beyond reasonable doubt**

21. Section 8(1) and 8(2) of the *Sexual Offences Act* under which the Appellant was charged provide as follows, respectively:

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

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

22. For the offence of defilement to be established, 3 ingredients must therefore be proved, namely, the age of the victim, penetration and positive identification of the offender. (see *George Opondo Olunga v Republic* [2016] eKLR).

23. In respect to proof of the “age” of the victim, the Court of Appeal in the case of *Edwin Nyambogo Onsongo v Republic* [2016] eKLR, stated as follows:

“ .... the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

24. Further, in the Ugandan case of *Francis Omuroni v Uganda*, Court of Appeal; Criminal Appeal No. 2 of 2000, the following was stated:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense ...”

25. In this case, the complainant testified that she was 7 years old, a stance that was also reiterated by the Clinical Officer (PW5). The Investigating Officer (PW6), too, stated that he took the complainant for age assessment at the Iten County Referral Hospital and that as per the Age Assessment Report, the complainant’s age was established to be about 6-7 years old. Indeed, he produced the Age Assessment Report dated 18/07/2019 in confirmation thereof. The Appellant’s contention that there was no proof of the complainant’s age simply because no Certificate of Birth was produced is therefore evidently misplaced. As stated in the authorities cited above, a Certificate of Birth is not the only mode



- of proving age in cases of defilement. In any case, in respect to age, for purposes of conviction in a case of defilement, all that the Prosecution needs to demonstrate is that the victim is below 18 years old.
26. In the circumstances, I cannot find any reason to fault the trial Magistrate’s finding that the “age” of the minor was proved. This ground, too, therefore fails.
27. On the issue of “penetration”, Section 2(1) of the *Sexual Offences Act* defines the term as:
- “The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
28. In regard thereto, the Court of Appeal, in the case of *Mark Oiruri Mose v R* (2013 eKLR, guided as follows:
- “..... In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl’s organ.”
29. In this case, the complainant testified that she knew the Appellant, who she stated, lives at “Linda’s” home and that she saw him doing to her “tabia mbaya”. She testified further that the Appellant removed her trouser, took his thing (pointing to her groin) which she described as the one that boys use to “pee”, and put his thing into hers (pointing at her groin area). She also stated that the Appellant put his thing where she uses to urinate and did to her “tabia mbaya” and that she felt pain. It was also her testimony that her two younger sisters were asleep and that she kept silent during the ordeal. This therefore explains why the younger sisters may not have noticed what transpired. I found the above description to be very vivid, elaborate, and consistent. I also find it to be plausible and believable.
30. On his part, Luka Kiprop, the Clinical officer, (PW5) testified that he examined the complainant on 8/03/2019, the same date of the incident and found in the complainant’s genital area, that her labia majora and minora were swollen and tender, her hymen was broken, and there was also presence of epithelial cells. Needless to state, these are clear pointers to penile “penetration”. I also consider the village elder’s testimony that upon gaining access into the room (scene of crime), she came across the complainant’s panty lying on the floor. This is consistent with the complainant’s testimony that the Appellant undressed her before doing to her “tabia mbaya”.
31. In a charge of defilement, the complainant’s testimony requires to be corroborated. Further, the complainant, having given unsworn statement, again, her testimony needed to be corroborated. In that regard, I cite the case of *Oloo v R* (2009) KLR, where the Court of Appeal stated the following:
- “In our view, corroboration of evidence of a child of tender years is only necessary where such a child gives child unsworn evidence. (See *Johnson Muiruri v Republic* (1983) KLR)...
- .... in law evidence of a child given on oath after voire dire examination requires no corroboration in law but the court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration of it”. (Emphasis mine)
32. Regarding the complainant’s use of the term “tabia mbaya”, the Court of Appeal, in the case of *Muganga Chilejo Saha v Republic* [2017] eKLR, acknowledged that this is an acceptable description of defilement especially where penetration is established. In accepting that in Kenya, the society has



adopted the term as a euphemism to mean the phrase generally used by children, and even adults, to describe sexual acts, the Court of Appeal stated as follows:

“Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, “alinifanyia tabia mbaya”, (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), “he pricked me with a thorn from the front part of this body.”, (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), “he used his thing for peeing”, (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), “he inserted his “dudu” into my “mapaja”, (Jose Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), “he used his munyunyu”, (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like “he defiled me”, which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M V R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her. (emphasis added).”

33. In this case, it is evident that the medical evidence presented confirmed that indeed the complainant was defiled. There was therefore sufficient corroboration.
34. In view of the above, I cannot also find any reason to fault the trial Magistrate’s finding that “penetration” was proven. This ground, too, therefore fails.
35. On the issue of “identification”, the Court of Appeal, in the case of Cleophas Wamunga v Republic [1989] eKLR cautioned as follows:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

36. That the law requires corroboration of testimony by minors as sole or single witnesses is clear from Section 124 of the *Evidence Act*. However, there is the proviso to that section to the effect that, in cases of sexual offences, there need not be such corroboration if the trial Court believed that the minor-victim told the truth and recorded its reasons. The section and the proviso provide as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him.”

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim



and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

37. From the foregoing, it is clear that the proviso to Section 124 of the *Evidence Act* allows the Court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact.
38. In this case, the Appellant did not deny the complainant’s (PW1) testimony that the Appellant was well known to her prior to the incident as he lives in the same neighbourhood as her. In fact, the complainant stated that the Appellant lives in “Linda’s” home and that she has known the Appellant since she was a child. She also referred to the Appellant as “Baba Abel”. I note that at no point during the trial, not even in his cross-examination of the complainant, did the Appellant deny that he is indeed also referred to as “Baba Abel”. The fact of the Appellant being well-known to the witnesses, and also being a neighbour, was reiterated by the complainant’s mother (PW2), the village elder (PW3), and also by a neighbour (PW4). Although it was at night, the complainant stated that she switched on a D-Light torch and by which she clearly recognized the Appellant. I also consider the testimonies of the complainant’s mother (PW2) the village elder (PW3), and the neighbour (PW4) who each stated that the Appellant expressly mentioned to each of them the name of the Appellant as the person who defiled her. I also note that she gave the Appellant’s name in the same night that she was defiled and repeated it on several occasions thereafter.
39. I also note that in the P3 Form, it is stated that the complainant alleged that she was defiled by “a person known to her”. The complainant also testified that her mother’s “husband”, one , appeared when the Appellant was still in the house and upon realizing what the Appellant had done, locked the Appellant from outside but that the Appellant managed to break the door and fled. Testimony consistent with this was given by the village elder (PW3) who stated that appeared at her house that night, reported to her that someone had molested a child and that he had locked the person in the house where the act had occurred. PW3 stated that she woke up and accompanied to the house but upon reaching there, they found the door had been broken and that the complainant told her that “Baba Abel” is the one who had broken the door. As aforesaid, at no point during the trial did the Appellant deny that she is also referred to as “Baba Abel”. It is therefore clear that the complainant was in the same room with the Appellant for a substantial period of time and which enabled the complainant to sufficiently identify the Appellant. Both the village elder (PW3) and the neighbour (PW4) also testified that the Appellant admitted having committed the offence and even asked to be pardoned. In his defence, the Appellant did not advance any motive to explain why all these witnesses would gang up to frame him for such a heinous crime.
40. The primary testimony against the Appellant in this case was that given by the complainant (PW1) who, although gave unsworn testimony, I find that such testimony was sufficiently corroborated by the testimony of the rest of the witnesses and also by documentary evidence, such as the medical Report produced.
41. I therefore find the above to be a case of “recognition” rather than identification of a stranger. Such evidence of “recognition” is clearly more reliable and believable in “identification”. In respect thereto, in the case of *Reuben Tabu Anjononi & 2 Others v Republic* [1980] eKLR, the Court of Appeal guided as follows:
- “..... This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant



in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported).

We consider that in the present case the recognition of the appellants by Wanyoni and Joice to whom they were previously well known personally, the first appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyoni reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three appellants to the police as the robbers who had robbed him.

We are satisfied that there was no mistake as to the identity of the three appellants and they were properly found guilty of the offence with which they were charged in count 1.”

42. In light of the foregoing, I am also satisfied that the trial Magistrate correctly found that the Appellant had been positively identified. The ground of Appeal challenging the Appellant's identification also therefore fails.

## **ii. Whether the sentence of life imprisonment was justified**

43. The applicable principles in considering sentence on appeal were restated by the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR, in the following terms:

“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 stated is shown to exist”.

44. As earlier observed Section 8(2) of the *Sexual Offences Act* provides as follows:

“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.”

45. Section 8(2) above therefore prescribes only one mandatory sentence – life imprisonment. In view of the above, it is clear that the sentence imposed by the trial Court was within the statute. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory or minimum sentences should now be discouraged and that Courts should retain the discretion to depart from such mandatory sentences. In connection to this issue, the Supreme Court in the case of *Francis Karioko Muruatetu and Another vs Republic* [2017] eKLR, while dealing with a case of murder, stated as follows:

“(66) It is not in dispute that article 26(3) of the *Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been



a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of the Constitution must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.”

46. The Supreme Court then directed the Attorney General, the Director of Public Prosecutions and other relevant agencies to prepare a detailed professional review in the context of the Muruatetu Judgment with a view to setting up a framework to deal with sentence re-hearing cases. The Attorney General was then given 12 months to submit a progress report thereon.
47. On the strength of the Muruatetu decision and reasoning, the High Court and even the Court of Appeal routinely reviewed mandatory minimum sentences imposed on convicts for different offences other than murder, including for sexual offences and robbery with violence. Examples are the Court of Appeal decisions in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR, the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), and also the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR. I may also mention the oft-cited decision of Odunga J (as he then was), in the case of Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR).
48. However, by the clarification made by the same Supreme Court in its subsequent directions given in Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Supreme Court made it clear that Muruatetu only applied to murder cases, and not to any other type of case, not even sexual offences. This is how the Supreme Court put it:

“7. In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to section 296(2) of the Penal Code, and others under the Sexual Offences Act, presumably assuming that the decision by this court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision.

.....

10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision’s expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;

.....

Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to section 204 of the Penal Code and it is the mandatory



nature of death sentence under that section that was said to deprive the “courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases”.

11. ....

We therefore reiterate that this court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute.

.....

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

.....

18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:

i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the *Penal Code*;

.....”

49. Recently, the Supreme Court reiterated and restated the above directions when dealing with an Appeal emanating under the Sexual Offence Act. This was in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment). In setting aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside the mandatory minimum sentence of 20 years imprisonment imposed on the Appellant, the Supreme Court stated as follows:

52. We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance.

.....

57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime,



enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.

.....

61. Having so stated, we are aware that mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, USA, Australia, South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed. ....
62. Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in *Muruatetu* which must remain binding to all courts below.
68. Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7<sup>th</sup> October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.
50. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will be acting ultra vires were it to set aside the sentence of life imprisonment on the sole basis that the same, being a mandatory sentence stipulated by statute, is unconstitutional. As clearly spelt out by the Supreme Court, *Muruatetu* is not applicable to cases under the *Sexual Offences Act*.
51. In view of the above, it is clear that the sentence imposed by the trial Court was within the law. My above observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh, which I now hereby do.
52. The Supreme Court, in the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, guided that, in re-sentencing, the following mitigating factors would be applicable; (a) age of the offender; (b) being a first offender; (c) whether the offender pleaded guilty; (d) character and record of the offender; (e) commission of the offence in response to gender-based violence; (f) remorsefulness of the offender; (g) the possibility of reform and social re-adaptation of the offender; and (h) any other factor that the Court considers relevant.
53. I also cite Majanja J, in the case of *Michael Kathewa Laichena & another v Republic* [2018] eKLR, in which, quoting the *Muruatetu* case (supra), he stated as follows:

“The Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the



custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ....”

54. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

“..... we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ....”

55. Applying the above principles to the facts of this case, I consider that the crime of defilement is treated as a serious offence under Kenyan law and society, and is always severely punished.

56. It is also relevant to note that the victim in this case was a 7 years child of tender age, such a vulnerable human being who needed protection from all, including the Appellant. Sadly, the trust of the minor was shattered by the Appellant’s heinous and beastly act. Instead of stepping in to act as her protector, the Appellant turned out to be the very savage monster he was supposed to protect the child against. I do not have to be a psychologist to discern that the child will suffer lifelong trauma resulting from the act and will forever remember that her chastity was robbed from her by a person who was supposed to protect her. The child’s relatives, and moreso the parents must also be silently suffering from serious trauma caused by the act. I also note that in the pre-sentence Report, it is stated that the Appellant had a history of jumping bail and threatened witnesses with revenge at the time of arrest. Taking all these factors into account, it cannot therefore be denied that the Appellant merits a stiff and deterrent sentence.

57. I however also consider that, in respect to the sentence of life imprisonment, there is emerging jurisprudence questioning its constitutionality. In regard thereto, I cite the Court of Appeal case of Manyeso *vs Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) 7 July 2023 (Judgment), which dealt with the case of conviction and sentence of life imprisonment imposed on an Appellant for the defilement of a 4 years old child. Upon setting aside the sentence of life imprisonment, and substituting it with one of 40 years imprisonment, the Court of Appeal expressed itself as follows;

“21. .... In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others vs The United Kingdom* (Application nos.66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.”

58. The Court of Appeal the further expressed itself as follows:

“27. The appellant also did not say anything in mitigation after conviction by the trial court, which he attributes to his young age at the time. We are also alive to the fact that he was convicted for defiling a child of 4 years and of the likely ramifications of his actions on the child’s future. We are therefore of the view



that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction."

59. Applying the above reasoning, I may say that being only slightly above 20 years old, the Appellant is in his prime age, and although the offence he was convicted of merits his being put away for a long time, I believe that retribution will be best achieved, not by incarcerating him for an unreasonably long period of time, but by giving him a chance to come out of jail alive at some point in his life. I however also consider that the Appellant is recorded to have been a 1<sup>st</sup> offender. In the circumstances, I, reduce the sentence to 30 years imprisonment.

### **Final orders**

60. In the end, I make the following final Orders:

- i. The appeal against conviction fails and the same is upheld
- ii. On sentence, I hereby set aside the sentence of life imprisonment imposed by the trial Court and substitute it with a sentence of 30 years imprisonment.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 21<sup>ST</sup> DAY OF FEBRUARY 2025.**

.....

**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of:

The Appellant

Ms. Mwangi for the State

Court Assistant: Brian Kimathi

