Ian Njeru v Republic (Criminal Appeal E019 of 2024)
[2025] KEHC 1490 (KLR) (7 February 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E019 OF 2024

JRA WANANDA, J

FEBRUARY 7, 2025

BETWEEN

IAN NJERU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Iten Senior Principal Magistrate's Court Sexual Offence Criminal Case No. E039 of 2023 with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on the 11/09/2023 during day hours in Keiyo North Sub-County within Elgeyo Marakwet County, he intentionally and unlawfully caused his penis to penetrate the vagina of CN, a child aged 16 years old. The Appellant was also charged with the alternative charge of committing an indecent act with the same child on the same date and place, contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

2. The Appellant pleaded not guilty to the charges. The commencement of the hearing was however delayed when the Court was informed that the complainant had "disappeared" from home. The trial eventually commenced and at the close thereof, by the Judgment delivered on 2/05/2024, the Appellant was convicted on the main charge of defilement, and sentenced to serve 15 years imprisonment.

3. Dissatisfied with the decision, the Appellant filed this appeal on 9/8/2024, against both conviction and sentence. It is not clear whether he obtained leave to file the Appeal out of time. Be that as it may, he raised the following 11 grounds of Appeal, reproduced verbatim:

    i. That the Learned trial Magistrate erred in law and fact when she failed to note that there was a defect on the charge sheet as he was charged under a wrong section of the law. The

complainant's age was 16 years but he was charged under the bracket of 8(1) & 8(3) instead of 8(1) & 8(4) of S.O.A.

ii. That the Learned trial Magistrate erred in law and fact by failing to make a finding that the medical examination done on him exonerated him from any wrongdoing as the doctor indicated to the Court that nothing was found in his examination that gave indication that he was involved in the alleged offence. The filled P3 under the Appellant's name confirmed the same.

iii. That the Learned trial Magistrate erred in law and fact by failing to make a finding of no case to answer when the complainant indicated to the Court that he was not responsible for the alleged offence. She stated that her boyfriend that earlier engaged her in sexual activity after being sent home to collect school fees balance, this activity explained presence of spermatozoa in her private parts.

iv. That the Learned trial Magistrate erred in law and fact by admitting the evidence of the complainant to convict and sentence him while it was on record that she was acting as a hostile witness and actually had been placed in a juvenile home to coerce her into testifying in favour of the Prosecution case.

v. That the Learned trial Magistrate erred in law and fact when she disregarded the Appellant (explanation) defence that she had come to his place to collect a book left behind by the Appellant's sister whom they school together.

vi. That the Learned trial Magistrate erred in law and fact when very key witnesses in the case were not availed in Court despite being listed as witnesses such as the school director whom I urge the Court to make an adverse finding on.

vii. That the Learned trial Magistrate erred in law and fact in enforcing the minimum mandatory sentence in effect denying him the benefit of Article 50(2)(p) of COK. Her failure to use her sentencing discretion resulted to Appellant not getting an appropriate or lesser sentence in the circumstance of this case.

viii. That the Learned trial Magistrate did not give reasons for imposing the minimum sentence as there was no extraneous circumstances in the case to warrant the same. The Appellant therefore believes that he ought to have benefited from a lower sentence as envisaged in Article 50(2)(p) of COK.

ix. That the Learned trial Magistrate did not consider his mitigation on record which is clearly inferred from the mandatory sentence of 15 years imposed on him. The Appellant urges the Court to consider the mitigation and the personal circumstance that he is a young man who is a first offender and deserved some leniency.

x. That the Learned trial Magistrate did not order the period spent in pre-trial custody be factored in his 15 years sentence. He was arrested on 11th September 2023 and was not admitted on bond or bail during his trial period.

Prosecution evidence

4. The Prosecution called 7 witnesses.

5. PW1 was Philemon Kitony, a doctor at the Iten County Referral Hospital. He referred to the P3 Form for the complainant, CM, whom she stated, came to the hospital on 12/09/2023, within 12 hours of the alleged sexual act. She stated that the complainant's underwear had a stain on the perineal area

and alluded to the use of a sharp object. She further testified that both labias were intact but there was blood on the minora and lacerations of the vestibula area below the vagina, the vagina opening was wet with white substance on the perinium, laboratory test for the complainant revealed numerous epithelial cells and there were red blood cells. She then produced the complainant's said P3 Form and Post Rape Care Form. She stated that she also examined the Appellant on the same date, and who had no injury on the penis. In cross-examination, she confirmed that the complainant was defiled.

6. PW2 was the child's father. He stated that on 11/09/2023 at 9.00 am, he was preparing to go to work when her daughter, the complainant, and his son appeared from school where the complainant was in Form 1 as they had been sent back home to collect school fees balance, and that the children were given some money and returned to school. He stated that at around 2 pm, he received a phone call from the complainant's teacher informing him that he was required at the school, that he rushed there and was informed that the complainant had been found with a man in his house at the local Centre while half naked, and that the school is about 400 metres from the entre. He stated that he was informed that the complainant had been taken to the police station where PW2 also went but found that they had been taken to the hospital where he again went and found 2 police officers with the complainant and the Appellant. He stated that the complainant was 16 years old as she was born on 4/04/2007 and referred to her certificate of birth. He stated further that the Appellant lives within the area and that he had no grudge against him.

7. PW3 was the complainant, CN. She stated that she is a Form 1 student and was born on 24/04/2007 but conceded that the Certificate of birth indicates 4/04/2007. She stated that on 11/09/2023 they were sent home from school for fees balance, that she was given the money when she returned home, that she was with her brother, W, and a friend, G, that while the other two returned to school, she branched off and went to the Appellant's house which was by the road and that the Appellant was living alone. She stated that while there, their school watchman appeared, beat them up and escorted them to the school, and thereafter, they were taken to hospital where they were examined. She denied that she had sex with the Appellant.

8. The case however took a new twist when the Prosecution successfully requested for the complainant to be declared a hostile witness. The Prosecution was therefore allowed to cross-examine the complainant. She however refused to answer the questions put to her by the Prosecution in cross examination and even by the Court. In the circumstances, and upon the Prosecution's request, the complainant was remanded in custody.

9. PW4 was one EK, the Deputy Principal at the complainant's school. She stated that on 11/09/2023, the students were sent home for school fees, at about 11.00 am, the complainant's brother returned and paid the fees both for himself and for the complainant, at about 2 pm, the brother reported that on their way back to school, they had met the Appellant, who remained behind with the complainant, and that up to that time, the complainant had not returned to school. She stated that she liaised with the Principal and upon whose instructions, she sent the school watchman to go and check, accompanied by two other students. She stated that indeed, they found the complainant with the Appellant and brought them both to school, and thereafter they were taken to the police station. She stated that the complainant was a Form 1 student. She also stated that she had not known the Appellant before.

10. PW5 was one BK. He stated that he is an employee of the said school as a cook, that on 11/09/2023 at around 2.00 pm, he was summoned and instructed by the Deputy Principal to go and check on a student from the school who had been spotted at the local Centre, which he did, accompanied by others. He stated that at the Centre, which is next to the school, they went to the house identified and found the door slightly opened, when they pushed it, they found the Appellant seated on the bed dressed in a shirt and a trouser, and the complainant was sleeping on the bed half-naked as she did not

have any clothing on top, such as a blouse. He stated that they then arrested the duo, escorted them to the school and handed them over to the Deputy Principal. Upon the Principal's further instructions, they escorted the two to the police station. He stated that he did not know the Appellant before. In cross-examination, he stated that the time when they found the complainant and the Appellant was around 2.00 pm.

11. PW6 was one FKB. He stated that he, too, is an employee of the same school as a watchman, that on 11/09/2023 while on duty, he was summoned and instructed by the School Director and the Deputy Principal to go and check on a student from the school who had been spotted in one of the rental houses next to the school, which he did, accompanied by others. He stated that at the plot, they found 4 rooms, 3 were locked and 1 was open, that he heard the voice of a girl and when they knocked on it, upon the same being opened, they entered and found, on the floor, a jumper, a blouse, school bag and shoes. He stated that when he asked the Appellant whose items the same were, the Appellant claimed that they were his sister's. He stated further that there was a curtain separating the room and upon opening it, he found the complainant lying on the bed half-naked, he identified her as one the students in the school and informed the Deputy Principal who sent the Director of Students who arrived and they then escorted the Appellant and the complainant to the police station. He stated that he had never seen the Appellant before.

12. PW7 was one Police Constable (PC) Alex Kiprono Rotich, who was at the material time, stationed at Ainaptich Police Station, and the Investigating Officer in the case. He stated that on 11/09/2023 at about 3.30 pm, he was at the station when the Appellant was brought there. He recounted the narrative that he was told by the people who brought the accused, which is in terms of the testimony given by the earlier witnesses, as already stated above. He stated that after recording statements, he and another officer, escorted the Appellant and the complainant to the hospital where, upon examination, the defilement was confirmed. He stated further that he issued a P3 Form which was duly filled and he later charged the Appellant with the offence of defilement. He stated that the complainant was 16 years old and produced a copy of the Certificate of Birth and the school leave out sheet given to the complainant on the date of the incident.

13. The complainant (PW3), who had been declared a hostile witness and remanded in custody as aforesaid, then returned to conclude her testimony. She basically recounted her earlier testimony and insisted that she never had sex with the Appellant. She stated that she used to school with the Appellant's sister, and that she went to the Appellant's house because the Appellant had asked her to take to him a book which his siter had left with the complainant. She conceded that she had been in the Appellant's house for about 3 hours by the time that the watchman and others appeared and added that she had known the Appellant for about 1 year.

14. At the close of the prosecution case, the Court made a finding that a case to answer had been established against the Appellant and placed him on his defence.

Defence evidence

15. In his defence, the Appellant gave sworn testimony. He stated that he is a boda boda rider, that on 11/09/2023 at around 10.00 am, he was washing clothes when the complainant came and asked him to give him a book that the Appellant's sister had left in the Appellant's house, that the complainant then left but returned at around 1.00 pm with the same request, that he found the book and gave it to the complainant. He claimed that shortly, he saw PW2 beating and undressing the complainant, then PW2 went and called another person, they were escorted to the school, and later to the police station and finally to hospital, where they were both examined. He asserted that the doctor did not confirm that the sperms were the Appellants.

Judgment of the trial Court

16. As aforesaid, by the Judgment delivered on 2/05/2024, the trial Court found the Appellant guilty, and convicted him for the offence of defilement. After hearing the Appellant's mitigation, the trial Court then sentenced the Appellant to serve 15 years imprisonment.

Hearing of the Appeal

17. The Appeal was canvassed by way of written Submissions. The Appellant's Submissions is dated 15/11/2024 while the Respondent's is dated 6/11/2024.

Appellant's Submissions

18. The Appellant, in his Submissions introduced what he described as "Supplementary Grounds of Appeal" listing 7 new grounds of Appeal. Coming after the parties had already taken directions, and there being no evidence that the same has been served upon the Respondent, I will address these new grounds in my Judgment but being alive that the Respondent may not have had an opportunity to respond to the same. The new grounds are as follows:

    i. The trial Magistrate erred in law and fact as she introduced new evidence to find me guilty in this instance the status of hymen was never featured in the evidence of the medical doctor both on his testimony and P3 form that he exhibited in Court. She listed in the judgement the doctor's evidence in (f) had a torn hymen which was not correct.

    ii. The trial Magistrate erred in law and fact for adopting an inaccurate fact to convict and sentence him. The medical doctor indicated the penetrative object was sharp while on the contrary the penile penetration is known to be blunt. This fact introduced doubt on the ingredient of penetration in the prosecution case.

    iii. The trial Magistrate erred in law and fact when she alluded to some facts on witness interference by the family members which were not substantiated as they were just rumours. The complainant said to the Court before being placed in the police awaiting transfer to Juvenile remand home, that she had not been defiled by the appellant. She repeated the same testimony after coming out of the above place indicating there was no evidence of witness interference.

    iv. The trial Magistrate erred in law and fact by not according the appellant a fair trial c/article 50 (1) of COK. She aggravated his case by deliberately amending it to a wrong provision, introduced non-existent evidence and extraneous issue on witness interference. Her biasness is seen when she went on overdrive by throwing everything on his face to a pre-determined guilty verdict. She applied sarcasm in her judgment on the explanation of the complainant presence at the appellant – she had to spend 3 hours to pick a book. The Magistrate presumed him guilty before any evidence was adduced to prove him guilty c/sec 50 (2)(a) of COK.

    v. The trial Magistrate erred in law by not making a finding that the case lacked factual foundation as no incriminating evidence was presented during the prosecution case that would link the appellant to the alleged offence its only suspicion that the complainant was at his house to pick a book twice, suspicion can never be a basis of conviction and sentencing. PW 1 sad it was an indication that something had happened. This was an opinion not a fact and therefore a suspicion.

vi. The trial Magistrate erred in law by not complying with provisions of section 169 (1) of the criminal procedure code while writing a judgment. In particular the justification to find the appellant guilty as charged when the medical evidence was not conclusive and the complainant was hostile.

vii. The trial Magistrate erred in law and fact by not indicating in the judgment that she had taken into consideration the period spent in pre-trial custody unfortunately its not evidenced on her judgment and by extension the committal warrants as it shows the date of sentence commencement to be 2nd May 2024 (date of conviction) and not my arrest date on 11th September 2023. Reliance Ahamad Abulfathi Mohammed And Another Vs Republic (2018) which held that the period spent in pre-trial custody must be accounted for in practical sense/ manner instead of the mere mention without evidence on the same.

19. In his Submissions, the Appellant contended that the trial Magistrate made an error by convicting and sentencing him on the basis of a defective charge sheet contrary to Section 134 of the *Criminal Procedure Code*, that he was charged under Section 8(1) of the *Sexual Offences Act*, as read with Section 8(2), and that the trial Magistrate, in her Judgment, noted this defect and made an attempt to rectify the same by convicting the Appellant under Section 8(1) as read with Section 8(3). He added that in any case, the complainant being 16 years and 2 months, the correct provision under which he ought to have been charged was Section 8(1) as read with Section 8(4) under which he could have benefited from a lesser sentence.

20. He submitted further that there was exculpatory evidence which was ignored by the trial Court in terms of the examination conducted upon him, and which did not link him in any way to the offence, According to him, this piece of evidence exonerated him. He again referred to the denial by the complainant that they had sex and contended that this denial was ignored by the trial Court. He criticized the action of the trial Magistrate of remanding the complainant after declaring her a hostile witness and submitted that such remanding was done to coerce the complainant to change her testimony to one that was favourable to the prosecution and submitted that the Courts discourage reliance on the testimony of a hostile witness and urged that the same ought to have been disregarded.

21. The Appellant also criticized the Court for disregarding his defence and also complained that the Director of the complainant's school, whom according to him, was a crucial witness, was not called. He also submitted that the trial Court convicted him on incredible evidence noting that the doctor's testimony was that the penetration was by a sharp object, which, according to the Appellant, was not consistent with penile penetration which would be described as penetration by a blunt object. He also criticized the trial Magistrate for introducing the piece of evidence of a torn hymen when the doctor made no such mention. He also submitted that his conviction was based on extraneous issues as it was founded on mere suspicion, and that the trial Court alluded to unsubstantiated allegations of witness interference by the Appellant's family members, and which were mere rumours.

22. On the issue of the sentence, he submitted that he was sentenced to the mandatory minimum sentence without any reason being given, and also that although the trial Magistrate, in her Judgment, stated that she had taken into account the period spent in custody, she did not order when the sentence was to commence or the period to be reduced as required under Section 333(2) of the Criminal Procedure Act. He urged that the sentence ought to be computed from the date of his arrest, namely, 11/09/2023, since he was not admitted to bond/bail throughout the trial. He cited the case of Ahamad Abdulatif Mohamed & Another vs Republic [2018] eKLR.

Respondent's Submissions

23. On his part, regarding the elements of the offence of defilement, Counsel for the Respondent cited the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013, and stated such elements to be; (i) age of the complainant, (ii) penetration, and (iii) identification of the assailant. Regarding "age", Counsel submitted the same was proved by the complainant's birth certificate. Regarding identification and penetration, he observed that the Appellant heavily relies on the testimony of the complainant who turned hostile and then refractory during trial. On "penetration", he cited the definition set out in Section 2 of the *Sexual Offences Act*. He then referred to the conduct of the complainant while giving testimony, namely, the fact that she denied having sex with the Appellant, that her testimony was far too removed from the statement she gave at the police station and that, as a result, she was then declared a hostile witness.

24. Regarding recanted statements, Counsel cited the case of Abel Monari Nyanamba & Others v Republic [1996] eKLR, in which the case of Alowo v Republic [1972] EA was quoted. He also cited the case of Allan Chebore Chemosit Chemosit v Republic [2022] eKLR, and the case of Daniel Odhiambo Koyo v Republic [2011] eKLR. He then submitted that in tandem with the said decisions, the complainant's testimony became almost worthless upon being declared hostile and refractory, and as such, the Court was called upon to look elsewhere in search for the truth. He then recounted the testimony of the doctor (PW1) and submitted that it confirmed that the complainant went to the hospital within 12 hours of the act of defilement alleged. He also referred to the testimony of the other witnesses, and how a search was conducted for the complainant upon which she was found at the Appellant's house while half-naked. He urged that the direct evidence of these witnesses established the elements of defilement conclusively. He urged further that even if the Court was to look at the circumstantial evidence, the chain of events are so close-knitted such that the complainant moved from school, to home, to the Appellant's house, to the police station and then to the hospital thus leaving no room for mistake. He cited the case of Teper v Republic [1952] ALL ER 480.

25. On the allegation that the Director of the school was left out, Counsel urged that the Deputy Principal was availed (PW4) and her testimony encompassed the school administration involvement in the case, and that in any case, the law on the number of witnesses to be called as set out in Section 143 of the *Evidence Act*, does not dictate any particular number of witnesses to be called. He cited the case of Keter v Republic [2007] EA 135. According to him, the witnesses called by the prosecution were sufficient to establish the case against the Appellant. Counsel also referred to the portion of the Judgment of the trial Court in which the trial Magistrate had observed that the Appellant and her family members were in collusion as they bought her milk and bread, and even gave her money so that she could testify in the Appellant's favour. Counsel also observed that most of the grounds raised by the Appellant are based on the refractory/hostile testimony of the complainant, PW3 which, as submitted, lost value upon her being declared hostile. He again cited the case of Allan Chebore v Republic (supra). In conclusion, he urged that the prosecution witnesses were credible and consistent, and that the evidence adduced was overwhelming.

Determination

26. Being 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 demeanor of the witnesses (see Okeno vs. Republic [1972] E.A 32).

27. The issues that arise for determination in this appeal are evidently the following;

    i. Whether the charge sheet was defective and if so, what consequence should follow.

ii. Whether the prosecution proved its case beyond reasonable doubt.

iii. Whether the imposition of 15 years imprisonment was justified.

iv. Whether the period that the Appellant had spent in custody should be deducted in computation of the sentence to be served.

28. I now proceed to analyse and answer the said issues.

i. Whether the charge sheet was defective and whether it affected the conviction

29. Section 8(1) – (4) of the *Sexual Offences Act* provide as follows:

> " 8. Defilement
>
> (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".

30. In the charge sheet in this case, the complainant was stated to be 16 years old at the date of the defilement, namely, 11/09/2023. The certificate of birth produced in evidence indicates that she was born on 4/04/2007 meaning that she was about 16 years and 5 months at the date of the alleged defilement. The Appellant was charged however under "Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006". It is therefore evident that Section 8(2) was erroneously invoked since it relates to defilement of a child aged 11 years old or below. The trial Magistrate, upon noting this defect, deemed it to be a mere typographical error that was excusable and therefore treated the Appellant as having been charged under "Section 8(1) as read with Section 8(2)".

31. It is evident that the substantive charge of defilement arises from Section 8(1) of the *Sexual Offences Act*, and that Sections 8(2), 8(3) and 8(4) only come into play in respect to the sentence to be imposed upon conviction. In a charge of defilement, the age of the complainant is important for two reasons: (i) defilement is a sexual offence against a child; and (ii) age of the child is also used as an aggravating factor for purposes of determining the sentence to be imposed, the younger the child the more severe the sentence. The Appellant, despite complaining that it was wrong for the trial Magistrate to purport to rectify the above defect by treating him as charged under Section 8(3) rather than Section 8(2) indicated in the charge sheet, the Appellant did not at all demonstrate what prejudice he suffered by dint of that action. In any event, that action by the trial Magistrate favoured the Appellant since it reduced the minimum sentence to which the Appellant was liable, to the lesser sentence of 20 years imprisonment under Section 8(3), rather than life imprisonment under Section 8(2).

32. The Appellant is however right that, the complainant being aged 16 years and 5 months, he ought to have been charged, not even under Section 8(3) as alluded by the trial Magistrate, but under Section 8(4), which would have even further reduced the liable minimum sentence to 15 years imprisonment. However, there being no prejudice demonstrated insofar as conviction for defilement of a minor is concerned, I will treat the Appellant as having been charged under "Section 8(1) as read with Section 8(4)" of the *Sexual Offences Act*.

33. In regard to what should be contained in a Charge Sheet, Section 134 of the *Criminal Procedure Code* provides as follows:

> " Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

34. In addition, it was held in Sigilani vs Republic, (2004) 2 KLR, 480 that:

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

35. Applying the test above, I find that the particulars of the offence were clearly spelt out, as were the date of the offence, the place of the offence, the act constituting the offence and the name of the victim. Although therefore the Charge Sheet partially cited the wrong sub-subsection, I find the same to have been a minor excusable defect that did not go the root of the charge. Although I acknowledge that the Appellant is a layman and was unrepresented at the trial, I note that he did not raise any objection before the trial Court or raise any contention that the charge sheet was defective. He fully participated in the trial in clear demonstration that he understood the charge, he cross-examined witnesses and was able to put up an appropriate defence. This is sufficient indication that he understood the particulars of the charge he faced. The offence was disclosed and stated in a clear and unambiguous manner, there is no allegation that because of the way that the charge sheet was drafted or framed, the Appellant was unable to plead to a specific charge that he could not understand or that he was unable to prepare his defence. In the circumstances, the Appellant cannot be said to have been prejudiced.

36. In any event, the defect is curable under Section 382 of the *Criminal Procedure Code* which provides as follows:

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

37. Similarly, the Court of Appeal, in the case of Fappyton Mutuku Ngui v Republic [2014] eKLR, while dealing with a similar error as herein, namely, inaccurate reference to "Section 8(1) as read with Section 8(2)" as "Section 8(1)(2)" of the *Sexual Offences Act*, held as follows:

> " 30. We now turn to the issue of the defective charge sheet. The appellant argues that he was charged contrary to 'section 8(1) (2)' of the *Sexual Offences Act* when in fact there is no such section. We note that the appellant did not raise this issue in his first appeal. Despite this, the High Court addressed it in its judgement in light of any prejudice or miscarriage of justice that the appellant may have faced as a result. The High Court relied on Section 382 of the *Criminal Procedure Code* which provides that:
>
> .....
>
> 31. The first appellate Court was of the opinion that this defect was curable under section 382 cited above; the appellant had participated fully in his trial because he knew the charge that was facing him, and the trial process was fair. There was no prejudice that faced the appellant. We concur with the High Court and learned counsel for the respondent that the appellant was well aware of the charges he was facing, he had sufficient notice of the charges facing him and that he participated vigorously in the trial process. Furthermore, the charge sheet outlines the essential ingredients and particulars of the offence. We therefore find no merit in this ground of appeal and dismiss it."

38. Further, in Senator Johnstone Muthama v Director of Public Prosecutions & 2 others; Japhet Muriira Muroko (Interested Party) [2020] eKLR, a three Judge High Court bench held as follows:

> " 46. The law contemplates that there may be occasions when there may be an error, omission or irregularity in a charge sheet. In addition, there may be errors, omissions or irregularities that may defeat a charge. However, whether such an error, omission or irregularity is incurable will depend on whether it occasions a miscarriage of justice. This is the foundation of Section 382 of the *Criminal Procedure Code* ....."

39. In light of the foregoing, coupled with the fact that the Appellant never challenged the Charge Sheet before the trial Court, I am not persuaded that the error in failing to partially accurately cite the correct sub-section of the *Sexual Offences Act* under which the Appellant was charged resulted into any error, omission or irregularity that may be said to have occasioned a failure of justice. This ground therefore fails.

ii. Whether the prosecution proved its case beyond reasonable doubt

40. The specific elements of the offence of defilement arising from Section 8(1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are the following; (i) age of the complainant, (ii) proof of penetration, and (iii) identification of the perpetrator.

41. The above was reiterated in the case of Dominic Kibet Mwareng –vs- Republic [2013] eKLR as follows:

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

42. Regarding age, I have already dealt with that and found that, from the Certificate of birth produced in evidence, the age of the complainant as being a minor was satisfactorily established. She was clearly below 18 years of age.

43. Regarding "penetration", Section 2(1) of the *Sexual Offences Act* defines the term as follows:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

44. In this case, the complainant denied that she had sex with the Appellant. When she became uncooperative at the trial, she was declared a hostile witness. As also already pointed out, the record indicates that before the trial commenced, the complainant had even disappeared from home and by reason whereof, the commencement of the trial had to be delayed. The Appellant contends that the trial Magistrate erred in convicting him by relying on evidence adduced by a hostile witness. Who then is a "hostile witness" and what is the weight of the testimony, if any, of a hostile witness?

45. The term "hostile witness" is defined in the Black's Law Dictionary 2nd Edition as "a party that the Court feels is hostile against the party they are supposed to testify for". On its part, Merriam Webster dictionary defines the term as, "a witness in a legal case who supports the opposing side."

46. Under Section 161 and 163 of the *Evidence Act*, the Court is given discretion to allow cross examination of own witness and impeachment of the credit of such witness. Indeed, Section 161 of the *Evidence Act* provides that:

> " The Court may in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross examination by the adverse party."

47. In the case of Alowo vs. Republic (1972) EA, the Court stated the following:

> " The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible."

48. From the foregoing, it is evident that a "hostile witness" can be cross examined and can be impeached by his own credibility. In this case however, the Prosecution successfully applied to cross-examine the complainant and she indeed returned to the stand after a few days and concluded her testimony. Be that as it may, having been declared a "hostile witness", the complainant's testimony would, to a great extent, be deemed as worthless. In saying so, I cite the case of Batala vs. Uganda [1974] E.A. 402 in which it was held as follows:

> " The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight."

49. Such evidence should not therefore be heavily relied upon by the party calling that witness. In that respect, the Court of Appeal in Maghanda vs. Republic [1986] KLR 255 held that:

> " The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the Court."

50. The Court of Appeal, in the case of Daniel Odhiambo Koyo v Republic [2011] eKLR, also held as follows:

> " There is a thin line between a hostile and refractory witness. Both are people who display reluctance in giving evidence as required of them.
>
> Normally a Court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or is reluctance to testify."
>
> .....
>
> PW3 as stated earlier was treated by the Court and the prosecution as a refractory witness and we stated earlier that evidence of such a witness needs to be treated with circumspection because of her conduct. In certain cases however, such evidence may be accepted as corroborative of other evidence if the Court is satisfied that it cannot be but true and is consistent with other evidence adduced and which the Court has accepted. Although PW3 was initially refractory she appears to us to have accepted to co-operate and her testimony was clearly consistent with what PW2 had testified on."
>
> In view of what we have said about PW3, her evidence was properly accepted and acted upon as corroborative of PW2's testimony and the testimony of the complainant. ....."

51. Further, Hon. J. Lesiit, J (as she then was), in the case of Abel Monari Nyanamba & 4 Others vs. Republic [1996] eKLR, guided as follows:

> " The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no Court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt."

52. In line with the above authorities, it has been said that a "hostile witness" is not just a person whose evidence is unfavourable to the party calling him, but a witness who appears to be biased or unwilling to tell the truth, and that a "hostile witness" is the one who, from the manner in which he gives evidence, shows that he is not desirous to telling the Court the truth. Needless to state, if a witness is unreliable, his evidence, too, is unreliable, and although such evidence may still be considered, it would bear only little weight, if any.

53. The complainant having been declared a "hostile witness", it behoves the Court to look elsewhere for the truth to determine whether the evidence of "penetration" was proved. In doing so, I note that in his testimony, the complainant's father (PW2), testified that on the 1/09/2023, the complainant, together with his brother, returned home from school after they had been sent away for school fees balance. He confirmed that the complainant and her brother collected the money and together, left to return to school. He stated that later, at around 2.00 pm, he received a phone call from the school asking him to go there as his daughter, the complainant, had been found in a nearby house with a man. The school Deputy Principal (PW4), on her part, testified that the students were sent home in the morning for the reason of school fees balance, that later in the day, the complainant's brother reported that he and the

complainant, after collecting the fees from home, and while on their way back to school, had met the Appellant and that the Appellant and the complainant remained behind as the brother proceeded to school and paid the fees for both. The concern was that since then, the complainant had not returned to school. As the Appellant lived nearby the school, the area where he lived was identified and the school watchman, a cook and other people were sent to go and check thereon. According to the watchman (PW5) and the cook (PW6), they indeed located the house and when they gained access, they found items believed to belong to the complainant strewn on the floor. These included a blouse, a jumper, school bag, and shoes. They testified that they found the Appellant seated on the bed while dressed while the complainant was lying on the bed half-naked as she had no blouse or any clothing on top. The witnesses confirmed that the Appellant and the complainant were then escorted to the school, then taken to the police station, and finally to the hospital, where they were both examined.

54. The complainant, although her evidence would hold little weight, having been declared a hostile witness as aforesaid, in her testimony, up to this point, she confirmed the above witnesses' accounts as correct and true. She indeed conceded that instead of returning to school after collecting the school fees, she went to the Appellant's house, and also that she was later flushed out of the Appellant's house where she had been for about 3 hours, from around 11.00 pm to 2.00 pm. She conceded that all along, they were just the two of them in the house, herself and the Appellant. Although she denied having sex with the Appellant, she did not deny or explain why her belongings were strewn on the floor, and why, she was found lying almost naked on the Appellant's bed.

55. I note that the Appellant, too, conceded that the complainant, a schoolgirl, was found in his house during school time. Although he sought to explain that the complainant had gone to his house on her own, to collect a book belonging to the Appellant's sister, that explanation falls flat for various reasons. First, there is evidence that the complainant, while accompanied by his brother, on their way back to school after collecting school fees balance, met the Appellant who retained the girl behind as her brother proceeded to school. Secondly, since the complainant admitted that she stayed in the Appellant's house for 3 hours, both her and the Appellant did not offer any explanation on what they were doing for all those 3 hours if all she had gone to do was to collect a book. The Appellant and the complainant also contradicted each other on several aspects. For instance, while the Appellant claimed that the complainant had gone to his house to collect a book, the complainant, on her part, claimed that it is her who had returned a book. To my mind, this is clear evidence of a conspiracy between the two.

56. There was also the testimony of the doctor (PW1) who testified that upon examining the complainant, he concluded that she had engaged in sexual intercourse within a period of 12 hours prior. His reasons were that the complainant's underwear had a stain on the perineal area, there were some injuries around her genitals, there were lacerations on both sides of the labia, there were blood stains on the minora and laceration on the vestibula area below the vagina, the vagina opening was wet with white substances on the perinium, and there were also numerous epithelial cells. Her unhesitant conclusion was that the complainant had been defiled. It is true, as correctly pointed out by the Appellant that the trial Magistrate, in her Judgment, erroneously alluded to the presence of "a torn hymen". I agree because nowhere in the evidence before the Court did I find any testimony, either by the doctor or any other witness, or any exhibit, where such mention was made. However, in light of the other sufficient material corroborating the evidence of sexual intercourse, I do not find any prejudice caused by the trial Magistrate's erroneous citing of on non-existent evidence.

57. From the doctor's testimony, it is clear that the complainant had sex some time before she was examined by the doctor. Her movements from morning up to 2.00 pm when she was flushed out of the Appellant's house is well accounted for and in the absence of any other theory available, all indication is that the sexual activity that she engaged in could only have occurred within the 3 hours that she was

alone with the Appellant in his house. In view of the foregoing, I am convinced that the complainant, in her testimony, sought to "protect" the Appellant by giving false evidence on the issue of whether they had sex.

58. Indeed, I agree with the Prosecution Counsel, Mr. Kirui, that the facts of this case seem to be on almost all fours with the facts in the case of Allan Chebore Chemosit v Republic [2022] eKLR, in which Hon. W. Korir J (as he then was) held as follows:

> " 67. I have considered the defence case as purportedly supported by the evidence of the complainant and find the same unbelievable. The Appellant and the complainant were engaged in unlawful and immoral relationship and it was only after they were found that they formed an alliance in order to rescue the Appellant. Sex is an activity that ordinarily takes place in secluded areas and in the absence of prying eyes. In the case at hand, the evidence that was adduced established that the complainant and the Appellant had sex on the material day. It is immaterial that they have denied coitus. Defilement is a matter beyond those involved in the act and one can be convicted for it notwithstanding denial by the concerned parties. The Trial Magistrate was therefore correct in finding that the Appellant had defiled the complainant.
>
> 68. The accusation that the Trial Court did not consider the Appellant's defence is without merit. The Magistrate did indeed consider the Appellant's case and rejected it."

59. In view of all the above, I agree with the Prosecution Counsel that, despite the denials by the complainant, her engagement in the sexual activity withy the Appellant, including penetration, was satisfactorily proved.

60. In respect to "identification", both the complainant and the Appellant confirmed that they live in the same neighbourhood and that the Appellant lives near the school. They both also confirmed that they knew each other and both also stated that the complainant and the Appellant's sister were schoolmates. In fact, the complainant stated that she had known the Appellant for about 1 year before the incident. The two were therefore not strangers to each other. No wonder, the issue of identification was not been raised as a ground of Appeal.

61. In the end, I find the evidence of the Prosecution witnesses to have been consistent, candid and credible. Accordingly, I find that the prosecution evidence left no doubt that the Appellant indeed defiled the complainant, and that the complainant's denials against the same were simply calculated to "protect" the Appellant.

62. Another ground raised by the Appellant is that key witnesses in the case were not availed despite being listed as witnesses. He however only singled out the school Director and urged that the omission to call the Director should give rise to the presumption of an adverse finding. This submission is, in my view, misplaced since the Appellant has not disclosed what area of testimony the Director would have given which the other witness did not. In any case, it is the discretion of the Prosecution to call witnesses who are relevant to their case and the Prosecution can therefore only be faulted if it is demonstrated that its failure to call a specific witness is prompted by an oblique motive. Further, in any case, I agree with the Prosecution Counsel that the Deputy Principal having testified (PW4), her testimony ably represented and corroborated the position of the school administration on the matter and was thus sufficient. It is also true that Section 143 of the *Evidence Act* expressly provides that "no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the

proof of any fact". This ground, too, therefore fails as the Appellant has failed to demonstrate that the omission to call the school Director in any way affected the establishment of the Prosecution case (see Mwangi v Republic [1984] eKLR 595).

63. The Appellant has also protested that his conviction should not stand because it was based entirely circumstantial evidence. I do not agree. The evidence before Court was not only circumstantial. The medical evidence for instance, was direct evidence. But even assuming that the evidence was purely circumstantial, still, such evidence, can and will sustain a conviction where it is sufficient, by itself, to sustain a finding of guilt. This was restated in the case of In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, in the following terms:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -
>
> > " It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

64. In this case, my finding is that the circumstances proven in this case point unerringly to the Appellant as the perpetrator of the offence herein.

65. In the circumstances, I find that the elements of defilement, namely, minority of the complainant's age, penetration and identity of the perpetrator were all proved. I find that the prosecution proved its case beyond reasonable doubt and I cannot find any error on the part of the trial Court in convicting the Appellant. The conviction was proper. The appeal on conviction therefore lacks merit.

iii. Whether the imposition of 15 years imprisonment was lawful

66. Regarding interference with sentence at the appellate stage, the applicable principles were restated by the Court of Appeal in the case of Bernard Kimani Gacheru v Republic [2002] eKLR, as follows:

> " 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".

67. As already stated, Section 8(4) of the *Sexual Offences Act* under which the conviction of the Appellant stands, provides as follows:

> " 8(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."

68. In view of the above, it is clear that the sentence imposed by the trial Court, although the minimum prescribed, was within the law. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory or minimum sentences should be discouraged and that Courts should retain the discretion to depart from such sentences. In connection to this, 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."

69. 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.

70. On the strength of the Murautetu 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).

71. 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 Court made it clear that Muruatetu only applied to murder cases, and not to any other type of case, not even sexual offences.

72. 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 an Appellant for a defilemnent offence, the Supreme Court stated, inter alia, as follows:

> " 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.
>
> ....."

73. 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 15 years imprisonment on the sole basis that the same, being a mandatory minimum 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*.

74. My above observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh. In view thereof, I cite Majanja J, in quoting the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR) in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, in which 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. ....."

75. The Court in the Muruatetu Case also 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.

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

> " With regard to the above, 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. ....."

77. Applying the above principles to the facts of this case, I may repeat that the Appellant was liable to a sentence of not less than 15 years imprisonment, which coincidentally the minimum prescribed by statute. The trial Court did not expressly state that it meted out that sentence because it was the minimum.

78. It is not in dispute that the Appellant was given the opportunity to mitigate, which he did. I also consider that, as aforesaid, the Appellant, in collusion with the complainant, chose to mislead the Court by giving an obviously false narrative of their illicit actions. The crime of defilement is also treated as a serious offence under Kenyan law and society and is always severely punished. As the trial Magistrate observed, the Appellant preyed on a young Form 1 schoolgirl and took advantage of her naivety to quench his sexual urges. This is totally unacceptable. Even if the complainant seemingly agreed to the sexual act, due to her age, the law considers her as lacking the capacity to give consent for her participation to the sexual act.

79. There are however "mitigating factors" that I discern. For instance, the Appellant did not employ the use of force in committing the act and the complainant, although underage, appears to have actively and willingly played a big part in procuring the commission of the offence. At more than 16 years of age, she was obviously old enough to possess the intelligence to know, even without the Appellant's influence, that she was engaging in an unlawful and prohibited act. The fact that she is said to have disappeared at some point just before the trial commenced, obviously in a bid to forestall the same, and the fact that she even gave false evidence in a bid to "protect" the Appellant leading to her being declared a hostile witness, confirms the above. The Appellant was also a 1st offender. I am of the view that the trial Court may have overlooked these material factors and by virtue thereof, imposed a sentence that appears excessive in the circumstances of the case.

80. The Appellant is in his prime age, and I believe that his rehabilitation will be best achieved, not by confining him to custody for an unreasonable long period of time, but by reducing the length of his incarceration. In the circumstances, I reduce the sentence to 10 years imprisonment.

iv. Whether the time spent in custody should be factored in sentence

81. Section 333(2) of the *Criminal Procedure Code* provides as follows:

> "Subject to the provisions of section 38 of the Penal code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

82. In Ahamad Abolfathi Mohammed & Another v Republic, [2018] eKLR, the Court of Appeal stated as follows:

> "By dint of section 333 (2) of the *Criminal Procedure Code*, the Court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial Court. With respect, there is no evidence that the Court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the Court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. .... We find that the first appellate

Court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

83. It has not been challenged that the Appellant remained in custody throughout the trial. Since the proviso to Section 333(2) of the *Criminal Procedure Code* is couched in mandatory terms, the period spent in custody must be factored in the sentence.

84. From the Charge Sheet, I note that the Appellant is stated to have been arrested on 11/07/2023. I however note that he was arraigned on 13/09/2023. I presume that the date of arrest stated as 11/07/2023 was a typographical error as I do not imagine that the police could have kept the Appellant in custody for a whole 2 months before arraigning him. Although the Appellant was admitted to bond, there is no indication that he in fact secured release from remand custody. He was then convicted and the sentence was delivered on 2/05/2024. His contention that he remained in custody throughout the trial therefore appears valid and correct. The period between arraignment and sentence is about 7 months. This period ought to be factored and reduced from the 10 years prison sentence that this Court has now imposed.

Final Orders

85. In the end, I issue the following orders:

    i. The appeal against conviction fails and the same is upheld

    ii. On sentence, I hereby set aside the sentence of 15 years imprisonment imposed by the trial Court and substitute it with a sentence of 10 years imprisonment, to be computed as from the date of the Appellant's arraignment, namely, 13/9/2023.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF FEBRUARY 2025.

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the Presence of:

Appellant present virtually from Eldoret Main Prison

Mr. Okaka h/b for Ms. Mwangi for the State

C/A: Brian Kimathi