Kibet v Republic (Criminal Appeal E003 of 2024)
[2025] KEHC 2442 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2442 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E003 OF 2024

JRA WANANDA, J

FEBRUARY 21, 2025

BETWEEN

HILLARY KIBET ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Wonders shall never cease. I say so because the case herein is that an infant of 1 ½ years is alleged to have been defiled. If true, it is one of the saddest cases that anyone would ever come across.

2. The Appellant was charged in Iten Senior Principal Magistrates' Court Sexual Offence Case No. E031 of 2022 with the offence of defilement contrary to Section 8(1) as read with section 8(2) of the *Sexual Offences Act*, 2006. The particulars of the offence were that on 19/07/2022 at [xxxxxxxxxx] village, in Keiyo sub-County, within Elgeyo Marakwet County, he unlawfully caused his penis to penetrate the vagina of SJ, as aforesaid, a girl aged 1 ½ years.

3. The Appellant pleaded not guilty to the charge and the matter proceeded to full hearing. Mr. Barmao Advocate represented the Appellant. The prosecution then called 6 witnesses. At the close of the prosecution case, the Court found that the Appellant had a case to answer and placed him on his defence. In his defence, the Appellant gave unsworn testimony and called one other witness. By the Judgment delivered on 7/03/2024, he was convicted and sentenced to serve 90 years' imprisonment.

4. Dissatisfied with the said decision, the Appellant, through Messrs Bulbul-Koitul & Co. Advocates, filed this Appeal on 20/03/2024 against both conviction and sentence. He listed the following 7 grounds:

    i. That the learned Magistrate erred in law and in fact in convicting the Appellant despite the prosecutions' failure to prove its case beyond reasonable doubt.

ii. That the learned Magistrate erred in law and in fact in failing to properly consider and evaluate the credibility and reliability of the complainants' evidence which was contradictory and riddled with inconsistencies.

iii. That the learned Magistrate erred in law by failing to properly consider and apply the legal principles governing the offence of defilement and the standard of proof required.

iv. That the learned trial Court erred in law by convicting the Appellant without according sufficient reasons for rejecting his defence.

v. That the sentence of 90 years imprisonment is harsh, excessive and disproportionate in the circumstances of this case and amounts to an error in principle.

vi. That the learned Magistrate erred in law and in fact by failing to properly consider and accord sufficient weight to the relevant mitigating factors in favour of the Appellant.

vii. That the learned Magistrate erred in law and in fact by failing to apply the principle of proportionality in sentencing policies.

viii. That the harsh sentence imposed constitutes a miscarriage of justice as it us tantamount to condemning the Appellant to imprisonment for life without the possibility of reform and reintegration.

Prosecution evidence at the trial Court

5. PW1 was BC, a minor aged 7 years. She was taken through a voire dire examination and established to be intelligent enough to testify. Pursuant thereto, she testified that she is a Grade 1 primary school pupil and that the child-victim, SC, is her sister. She then stated that she also knows the Appellant whom she identified in Court and stated that on 19/07/2022, she was with the child and the Appellant at home at around 4.00 pm, when at some point, she went to the toilet which is outside the house and left the Appellant with the child. She stated that when she returned, she found the child crying while lying on the sofa set on which the Appellant was also sitting on. It was her further testimony that she then took the child to their mother who had gone to fetch firewood. In cross-examination, she stated that when she returned and found the baby crying, the Appellant was seated on the sofa set and was carrying the baby on his back just the way she had left them when she went to toilet. She however then appears to have changed the narrative and denied that the Appellant carried the child on his back, and instead, stating that the child was lying on the sofa set. It was her further testimony that she took a short time in the toilet as it is at the door. She also stated that the child's mother is one AK who lives in Nairobi, that the Appellant has always taken care of the child, and that she (PW1) always takes care of the child but when she goes to school, her mother takes care of her. She then again reverted to her earlier narrative that she found the child crying on the Appellant's back and that she had left the Appellant carrying the child on his back.

6. PW2 was JSK. She testified that the Appellant is her nephew and the child-victim is her grand-daughter born on 16/11/2020. She stated that on 19/07/2022 at around 4.00 pm, she left to go to fetch firewood and thus left the child-victim and PW1, her other child, with the Appellant's mother (her neighbour) to take care of them, and that the Appellant's mother, in turn, left the children with the Appellant. She stated that when she returned at 5.00 pm, she found the Appellant carrying the child who was crying, and who told her that the child was crying continuously. She testified that the child kept on saying "chungu", was not walking properly and kept on crying. She stated that she tried to cross the child's leg but the child cried out when PW2 held her legs, that she checked her private parts and noticed that she had injuries around her vagina with discharge, that when she called and asked the Appellant about

the same, he denied committing the act. She stated that she later took the child to the hospital where she was examined and confirmed to have been defiled. In cross-examination, she stated that her family and the Appellant's are in-laws, that she resides with the Appellant's family in the same compound and they sometimes take care of PW2's children. She stated that she does not have differences with the Appellant's mother but stated that their relationship is not cordial either, and they are not friends. It was her testimony that it was not the first time that the Appellant had done the same act to the child having done the same previously.

7. PW3 was Dr Irene Simiyu, a medical doctor from the Moi Teaching and Referral Hospital (MTRH). She testified that she saw the child-victim on 21/07/2022 who came in with a history of defilement, that the child was examined by one Dr Kibowen who however was unable to testify as he had travelled abroad for further studies. She stated that having worked with Dr. Kibowen, she knew his handwriting and signature, and wished to give evidence on his behalf. There being no objection from the defence, she was allowed to give such evidence. Pursuant thereto, she stated that the child was brought by her grandmother, on examination, she was found to have hymeneal oedema (swollen), she had a tear at the posterior fourchette (area between anus and vagina), there was redness and swelling around the vagina opening and folds and that the findings showed recent vaginal penetration (within 72 hours) by a blunt object (penile tissue). She then produced the P3 Form. In cross-examination, she stated that she did not have treatment notes from the hospital where the child was first taken but added that the personnel at that hospital took a swab but never saw spermatozoa.

8. PW4 was FKA, who stated that he was the Assistant Chief of the area. He identified the Appellant as coming from his jurisdiction and testified that he also knew the child-victim as a daughter to PW2. He stated that on 31/07/2022 at about 2.00pm, he received information that the Appellant had been spotted near a farm, that earlier on 20/07/2022, PW2 had informed him that the Appellant had defiled the child and disappeared from home, and that he (PW4) had told PW1 to report the matter to the police. He stated that when he learnt that the Appellant had been spotted as aforesaid, he informed the police and he went to the area with other people, and that the Appellant attempted to flee when he saw them but they managed to arrest him and then handed him over to the police. In cross-examination, he stated that among the people that went with him to arrest the Appellant was the area Chief.

9. PW5 was Corporal Rael Ndiema, the Investigating Officer. He testified that the case was reported at the station on 21/07/2022 by the child-victim's grandmother and that she recorded the grandmother's statement and issued them with the P3 Form. She stated that the Appellant disappeared after the incident but was later traced, arrested and duly charged with the offence. She then produced the child's birth notification and a torn biker said to have been worn by the child at the time of the incident. In cross-examination, she stated that it is the Chief who traced and arrested the Appellant and that she (PW5) only went to pick him up. She also conceded that she never visited the scene of crime because there was no facilitation, and that she relied on the statements recorded and the doctor's findings. She also stated that no DNA test was done because the Appellant was arrested after 12 days.

10. PW6 was Dr June Jebichi, a doctor attached at Kamwosor sub-County Hospital. She stated that the Appellant was examined by one Dr. Titus Nyarotsa who was on study leave outside the country but whose handwriting and signature she was familiar with as she had worked with him for 2 years. She requested to testify on behalf of Dr. Nyarotsa and there being no objection from the defence, she was allowed to so testify. Pursuant thereto, she testified that the child came with a history of defilement on 20/07/2022 and on examination, she was found to have lacerations on the labia minora, which was bleeding and was painful on touch. She then produced treatment notes. In cross-examination, she stated that the lacerations indicated forcible touch or penetration and depends on how far back the previous defilement was. She also stated that red blood cells were noted on high vaginal swab but the

same did not reveal the presence of spermatozoa. According to her, presence of spermatozoa depends on how far back the defilement occurred.

11. At the close of the prosecution case, as aforesaid, the trial Magistrate found that a case to answer had been established against the Appellant and placed him on his defence.

Defence evidence before the trial Court

12. The Appellant gave unsworn testimony as DW1. He stated that he is 30 years in age and denied committing the offence. He stated that the child's mother is his uncle's wife, that on that date, they were in his mothers' house with 2 other boys, PW1 and the child-victim, and that he went out and on coming back the following day, he was accused by neighbours of defiling the child. He stated that he disappeared because PW2 and the Chief wanted to kill him, that they assaulted him and that he reported this fact to the doctor during treatment. He stated that they were 4 boys but he was the only one who was arrested and charged. I note that although the Appellant is indicated to have given unsworn statement, he was still subjected to cross-examination. Be that as it may, in such cross-examination, the Appellant denied that he remained alone in the house with the child, and also denied that PW1 at any time left to go the toilet, or that she returned and found the child crying. He confirmed that the child is aged 1 ½ years and PW1 is 6 years and stated that at no time did PW1 blame him for the act. In conclusion, he stated that there was no grudge between him and the child's mother.

13. DW2 was EK who testified that she was the Appellant's mother. She stated that the child-victim's mother (PW2) is her in-law, that there is a dispute between them, and that PW2 incited the community to chase her son (Appellant) away on grounds that he had defiled the child. She stated that she always fights with PW2 who also always fights other neighbours. In cross-examination, she conceded that on the material day, she was at her home and thus cannot tell what transpired. She however insisted that there were 6 people on that day in the house where the incident is alleged to have taken place.

Hearing of the Appeal

14. It was then agreed that the Appeal be canvassed by way of written Submissions. Pursuant thereto, the Appellant's Advocates filed their Submissions dated 30/10/2024 while the Respondent (State) had filed its Submissions earlier, dated 28/05/2024.

Appellant's Submissions

15. In respect to the ingredients of the offence of defilement being

    (i) age of the complainant,

    (ii) proof of penetration, and

    (iii) positive identification of the assailant, Counsel for the Appellant cited the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013[2016] eKLR. Regarding "identification", he submitted that the Appellant admitted that on 19/07/2022 he was indeed with the victim and 3 other boys in their house at 1400 hours but stated that after having lunch he decided to leave the house, thus leaving the victim and the 3 other boys. He observed that PW1 recognized the Appellant, a person well known to her, but failed to disclose or mention the presence of 3 other boys in the same house. Counsel also pointed out that PW3, the Investigating Officer, stated that she never conducted any investigations but rather relied on witness statements.

16. On "penile penetration", Counsel submitted that the reference in the P3 Form to penetration by a blunt object was insufficient and, in any case, there was no presence of blood or spermatozoa. He also submitted that PW2 (the child's mother) stated that it was not the first time that the Appellant had defiled the child and that she took the child to the hospital on 20/07/2022. He contended that there were obvious inconsistencies in the evidence tendered and wondered, if the child was taken to the hospital on 20/07/2022, why was the Report done on 21/07/2022? He also urged that PW3 (doctor from MTRH) confirmed that she was not the one who received the child and thus could not explain the contents of the P3 Form. In respect to PW6 (the doctor from Kamwosor sub-County Hospital), he submitted that the doctor stated that no spermatozoa was found and she could also not answer whether there was hymenal breakage or confirm penetration. In submitting that the said inconsistencies were not minor but glaring, he cited the case of Erick Onyango Onden'g v Republic [2014] eKLR and urged that by reason thereof, the Prosecution did not prove the case beyond reasonable doubt.

17. On the issue of the prison sentence of 90 years, Counsel submitted that the same is highly unjust as it is condemnation of life imprisonment which is unconstitutional. He cited the case of Evans Wanjala Wanyonyi v Republic [2019] eKLR. He submitted further that the Appellant is 31 years old and has a chance of rehabilitation. He cited the case of Evans Nyamari Ayako v Republic, Criminal Appeal No. 22 of 2022.

Respondents' Submissions

18. Prosecution Counsel, after citing the provisions of Section 8(1) and (2) of the *Sexual Offences Act* under which the Appellant was charged, recounted the ingredients of the offence of defilement and in so doing, cited the case of George Opondo Olunga v Republic [2016] eKLR. On the issue of "identification", he submitted that in this case, the child-victim is 1 ½ years old and could not therefore testify owing to her tender age, that PW1 was however present and testified that she left to visit the toilet and left the Appellant with the child, that when she came back a few minutes later, she found the complainant crying and the Appellant was seated while carrying the complainant on his back. Counsel recounted PW1's testimony that she then took the child to their mother who checked why the child was crying and discovered that she had been defiled. Counsel submitted that there was no other male at the scene and that the Appellant's identification was that of recognition.

19. In respect to the issue of "penetration', he cited the definition set out under Section 2 of the *Sexual Offences Act*. He recounted PW2's (the mother) testimony that the child was crying while saying "chungu" and noted that the child felt pain between her legs, that she checked her genitalia and noticed the presence of spermatozoa and injuries, and that she took her to the hospital where she was examined. Counsel further recounted PW3's (doctor) testimony that upon examination, the child was found to have hymenal oedema, tear posterior fourchette, redness and swollen vaginal opening, and vaginal folds. According to Counsel, this evidence shows that the Appellant caused penetration of his penis into the child's vagina. He submitted that the question is whether that evidence required corroboration. In answering the question, he cited Section 124 of the *Evidence Act* on single witness evidence and urged that the allegation of defilement was corroborated by the medical evidence. In respect to the "age" of the child, Counsel submitted that the Investigating Officer (PW5) produced the child's birth notification which indicates that she was born on 16/11/2020, that the incident having occurred on 19/07/2022, it means that the child was 1 ½ years old at the time of the incident. He observed that the Appellant did not challenge this evidence, and no contrary evidence was produced, and submitted that as such, the age of the child was proved.

20. In commenting on the Appellant's defence, Counsel urged that the Appellant merely denied committing the offence, but which denial was untrustworthy. According to him therefore, the trial

Court rightfully held that the prosecution had discharged its burden to prove all the ingredients of the offence beyond any reasonable doubt.

Determination

21. 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)

22. The issues that arise for determination in this matter are evidently the following:

    i. Whether the defilement charge against the Appellant was proved beyond reasonable doubt.

    ii. Whether the sentence of 90 years imprisonment imposed against the Appellant was justified.

23. I now proceed to analyze and determine the said issues

Whether the charge was proved case beyond reasonable doubt

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

25. Regarding the charge that the Appellant faced, Section 8(1) and 8(2) of the *Sexual Offences Act* provides as follows:

> " 8.
>
> (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."

26. In the instant case, the child's birth notification produced in evidence indicated that she was born on 16/11/2020. There being no contrary evidence, the alleged offence having occurred on 19/07/2022, it was therefore established that the victim was indeed about 1 ½ years in age. In any case, the issue of age was not challenged in this Appeal. This therefore dispenses with the first ingredient as adequately proven.

27. In respect to "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 this case, medical evidence was provided by two different medical doctors from two respective medical institutions, the first hospital is where the child was initially taken and the second is the one where she was referred to for further attention. PW3, the first doctor, testified that on examination, the victim was found to have a hymeneal oedema, tear at posterior fourchette, redness and swelling around the vagina opening and vagina folds. From these findings, he concluded that recent vaginal penetration (within 72 hours) had occurred. On his part, PW6, the second medical doctor, testified that on examination, the victim was found to have a laceration on the labia minora, was bleeding and that her genitalia was painful on touch. Counsel for the Appellant placed much reliance on the fact that

the evidence indicated that no spermatozoa was detected in the child's genitalia. For this contention, I refer to the case of Mark Oiruri Mose v R [2013] eKLR, where the Court of Appeal stated that:

> " 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. From the above, it is clear that the absence of spermatozoa is not necessarily of much assistance to the Appellant's case. In the circumstances, and in view of the medical evidence on record, I am satisfied that penetration was proved and that the child was defiled. To my mind therefore, the second ingredient was also adequately proven.

30. What now remains is the third ingredient, namely, identification of the assailant. In other words, was it proven that it is indeed the Appellant who defiled the child? In respect to "identification", the Court of Appeal in the case of Cleophas Wamunga v Republic [1989] eKLR guided itself 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".

31. In this case, the child-victim could not testify due to her tender age. It is therefore PW1, the child-victim's elder sister who gave the "identification" evidence implicating the Appellant. The Appellant was a neighbour of PW1 and the child-victim, thus PW1's was identification by recognition as she also stated that they were with the Appellant at the Appellant's home on the material day. This, the Appellant also confirmed. According to PW1, she left to go to the toilet and left the child alone with the Appellant and on returning, found the child crying continuously. On his part, the Appellant, although he admitted that indeed he was with the child-victim and PW1 in the house, there were also 3 other boys with them. He also denied that PW1 at any time left to go to the toilet. The question is therefore; which of these two versions should be believed?

32. Upon analysing the two conflicting versions, I am constrained to believe PW1. First, the evidence, which the Appellant admitted, placed him right at the scene of crime. Secondly, the Appellant did nothing to prove his allegation that there were 3 other boys present in the house at the material time. He did not allege that he made any attempts to call the boys as witnesses. He also never raised this allegation of the presence of the 3 other boys when he cross-examined PW1. This, to me, points to the allegation as being an afterthought. Thirdly, the Appellant admitted the accusation that he disappeared immediately after the incident and the evidence is that he was nabbed a whole 12 after days. His claim that he disappeared because the Chief and the child-victim's mother wanted to kill him is not convincing at all. If true, why is it that he never reported such threat to the police?

33. I also note that while the incident is alleged to have taken place on 19/07/2022, the P3 Form indicates that the Appellant was examined on 21/07/2022, 2 days later, and that the defilement occurred within 72 hours of the examination. This period coincides with, or fits within, the period that the Appellant is alleged to have been left alone with the child.

34. The Appellant also alluded that the child's mother framed him because of a land dispute between the families. Although the child's mother agreed that indeed her relationship with the Appellant's mother

was not that cordial, the Appellant did not adduce any evidence to prove any such alleged land dispute. The two protagonists also agreed that the child's mother would regularly leave the child under the care of the Appellant's mother. This fact alone does not indicate the existence of such a sour relationship to the extent that the child's mother would frame the Appellant for such a heinous and unforgivable offence. Even assuming that indeed, the child's mother framed the Appellant or coached PW1, how does the Appellant explain the corroborative evidence on record? Were the doctors also compromised? In any case, PW1 did not even testify that she saw the Appellant defile the child, or even that the child was defiled in the first place. Her evidence was limited to simply her returning to the house and finding the child crying uncontrollably. The suspicion of defilement only arose when the mother went further to examine the child upon noticing that her behaviour indicated that she had pain around her genitalia. It was only after the medical examination that this suspicion was established to be a painful reality. There is therefore nothing to indicate that PW1 was motivated or coached to specifically target the Appellant.

35. In the circumstances, I am satisfied that the "identification" of the Appellant as the perpetrator was proven.

36. The Appellant' Counsel seems to argue that the conviction should not stand because it was based entirely on 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 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."

37. In view of all the foregoing, my finding is that the circumstances established in this case point unerringly to the Appellant as the perpetrator of the offence herein.

38. Accordingly, I find that the trial Court had before it, sufficient material to support its conclusion that the prosecution proved its case beyond reasonable doubt. I cannot find any ground to indicate that that the trial Court erred in convicting the Appellant for the offence of defilement. The appeal on conviction therefore lacks merit.

Whether the sentence of 90 years imprisonment was justified

39. 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".

40. As already stated, Section 8(2) 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 aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

41. 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.

42. 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.

43. 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. ....."

44. 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. ....."

45. Applying the above principles to the facts of this case, I may repeat that the Appellant was liable to a sentence of life imprisonment, but the trial Magistrate meted out 90 years imprisonment. Of course, for all intents and purposes, and considering that the Appellant is in his early 30s, this is a life imprisonment.

46. It is however not in dispute that the Appellant was given the opportunity to mitigate, which he did, and which the trial Magistrate stated that she considered. The crime of defilement is also treated as a serious offence under Kenyan law and society, and is always severely punished.

47. It is also relevant to note that the victim in this case was a 1 ½ months infant, an innocent angel of very tender age, such a vulnerable human being who needed protection from all, including the Appellant. Sadly, the trust of the infant was crushed by the Appellant's heinous and beastly act. Instead of stepping in as her protector, the Appellant turned out to be the very savage monster he was supposed to protect the child against.

48. 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, and into whose care she was entrusted by the child's mother. The child's relatives, and moreso the parents must also be silently suffering from serious trauma caused by of the act. It cannot therefore be denied that the Appellant merits a stiff and deterrent sentence.

49. I however also consider that the Appellant was a 1st offender. As aforesaid also, 90 years imprisonment is indeed a life sentence by a different language. In respect to life imprisonment, there is also 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."

50. 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."

51. Applying the above reasoning, I may say that at slightly above 30 years, 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. In the circumstances, I, too, reduce the sentence to 40 years imprisonment.

Final Order

52. 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 90 years imprisonment imposed by the trial Court and substitute it with a sentence of 40 years imprisonment, to be computed as from the date of the Appellant's arrest, namely, 31/07/2022 as indicated in the charge sheet.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF FEBRUARY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Appellant present

Ms. Mwangi for the State

Court Assistant: Brian Kimathi