SM v Republic (Criminal Appeal E101 of 2022) [2025] KEHC 1885 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1885 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E101 OF 2022

LW GITARI, J

FEBRUARY 7, 2025

BETWEEN

SM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arises from the conviction and sentence of the Chief Magistrate's Court at Maua in Sexual Offences Case No. E021/2021)

JUDGMENT

1. The appeal arises from the conviction and sentence of the Chief Magistrate's Court at Maua in Sexual Offences Case No. E021/2021 where the appellant was charged with Incest Contrary to Section 20(1) of the *Sexual Offences Act*(Cap 63 A) Laws of Kenya.
2. The particulars were that on the 1/4/2021 at around 21.00 Hours in Igembe North Sub-County within Meru County intentionally caused his penis to penetrate the vagina of BG a child aged five (5) years who to his knowledge is his daughter. In the alternative the appellant was charged with committing an indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
3. The appellant denied the charges and after a full trial he was convicted on the charge of Sexual Assault contrary to Section 5 (1) a of the Sexual Offences Actand sentence to serve twenty five (25) years imprisonment.
    1. The appellant was aggrieved by both the conviction and sentence and filed this appeal based on the following grounds:
        1. That the learned trial magistrate erred in both law and fact by sentencing the appellant to serve a sentence which is harsh and excessive contrary to the law.

2. That the learned trial magistrate erred in both law and fact by failing to note that there was grudge between the appellant and JK.

3. That the learned trial magistrate erred in both law and fact by failing to note that the key (P) witness was not called to clear doubts.

4. That the learned trial magistrate erred in both law and fact by rejecting the appellant defense without giving cogent reasons.

4. The appellant prays that the appeal be allowed the conviction quashed, the sentence be set aside and he be set at liberty. The respondent opposed the appeal and prays that it be dismissed and conviction and sentence be upheld.

The Prosecutions Case:

5. This is a case of incest where the appellant was charged with incest. It was alleged that the appellant engaged in sexual intercourse by causing his penis to penetrate the vagina of BG a child aged five years who to his knowledge is his daughter. The prosecution's case is that the minor complainant was sleeping with her grandmother when the appellant who is her father took her, removed her clothes and placed her on the bed. The appellant then inserted his index finger into her vagina. The child wept and told P what had happened. The complainant, PW1 told the court that she cried when the appellant died that to her. She was taken to hospital and the doctor gave her an injection on the finger.

6. PW2 JK testified that on 2/4/2021 at 7.30 am her neighbor JK went to ask him to assist her with his phone so that she could call FK as her son had disturbed her the whole night. PW2 told his wife P to go and check on the complainant. The wife returned and told him that the child had been defiled.

7. PW2 informed the Chief who went to the scene with the assistant chief and they arrested the appellant. They took the child and the appellant to Kabachi Police Post. The appellant was arrested and he child was escorted to hospital by Police Officers.

8. He told the court that the appellant was his neighbor and they had no issues. In cross-examination he told the court that the appellant was inside the house.

9. PW3 PM testified on 2/4/2021 he was at home when his father told him to go to the house of JK and see what had happened. He went and found P and the child who had bloodstained hands and trouser. The child said that SM had inserted his finger into her genital area which she pointed. He left the child with P. SM had been locked inside the house by his mother JK. They took SM to Kabachi Police Station. The child was taken to hospital by police officers. PW4 told the court that the appellant was his neighbours and he had no issues with PW4 Daniel Kobia Ntonja is the area Chief of Lucuti Location.

10. On 2/4/2021 at 8.00 a.m it was Easter Holiday and was about to take breakfast when JK called him and told him that a child had been defiled. He told him he would call the sub-area. He was told that G was defiled by her father known as SM. He called the area assistant chief. They proceeded the home and found a crowd had gathered on hearing the news. SM had come out of the roof of the house but the crowd prevented him from running away. PW4 arrested him and took him to Kabachi Police Station. The complainant was with the grandmother and she was crying. He took a sack which had a lot of blood. The child was bleeding from her genitalia. The trouser was stained with blood and when she took her to a canteen to buy tea for her she left blood stains on the seat. He then took the child to the police station. He told the court that he had no issue with the appellant

11. PW5 JK is the complainant's grandmother and the appellant is her biological son. The witness was treated as a hostile witness. She stated that she lived with the complainant and the appellant in the same house abut it had two rooms.

12. PW2, 3 & 4 were recalled on application by the appellant and he cross-examined them.

13. PW6 was Erick Kirimi a Clinical Officer attached to Mutuati Sub-County Hospital. He told the court that he examined the complainant the same day she was defiled by a person who was well known to her. He told the court that the child BG was five (5) years old, a female.

14. On genital examination, there were fresh bruises on the vagina with bleeding. The hymen was freshly broken. There were blood stains on the thighs. He found that there was forceful vaginal penetration. There was fresh blood oozing from the vagina which had even dried up in the vagina. He concluded that there was forceful vagina penetration. He produced the treatment notes, as exhibit 2- P3 form as exhibit 5, lab request exhibit 3 PRC Form exhibit 4 which were all filled on 2/4/2021 and is the one who prepared all the documents and signed them.

15. PW7 Jacinta Wanjira Mureithi is a police officer attached at Kabachi Police Post. On 2/4/2021 the appellant was taken to the police post by the area chief who was accompanied by members of the public PM and JK on allegation that he had defiled his daughter. The child was present and she told her that the appellant who is her father had inserted his finger in her vagina. She took the child to hospital as she was bleeding.

16. The doctor examined the child and filled a P3 form. She recorded a statement from JK who is the appellant's mother. She produced the statement as exhibit -1. The child was taken for age assessment and the doctor formed the opinion that she was five years old. She produced he age assessment report as exhibit 6. She told the court that the child was bleeding from her vagina when she was taken to her. The appellant was charged. He prosecution closed its case and the appellant was put on his defence on both the charge of indecent act with a child. The appellant gave sworn defence and told the court that he was in the youth service and had returned home that night. He entered the house and slept. In the morning, people went and assaulted him. The Chief went and rescued him. He was taken to Kabachi Police Post. He was told he had defiled his child. He denied as he had not seen or heard it. He stated that nobody saw, as all the witnesses said they were told. He alleged a grudge with JK over money for miraa belonging to his mother. He told the court that he could not defile his own child.

17. The learned magistrate concluded that the charge that was proved was Sexual Assault contrary to Section 5(1) (a) (1) as read with Section 5(2) of the Sexual Offences Actwhile relying on Section 186 of the *Criminal Procedure Code*.

18. The appeal was canvassed by way of written submissions.

Appellant's Submissions:-

19. The appellant has urged the court to be guided by the dicta in Maina -v- Republic (197) E.A.A 370

20. He submits that the prosecution failed to prove the charge against him beyond any reasonable doubts. That the learned magistrate erred in both law and facts by imposing a harsh and excessive. He submits that the evidence adduced does not connect him to the charge. That no evidence was adduced to connect him to the injuries which were observed by the Clinical Officer. She further submitted that a key witness, one P was not called as a witness. He relies on the case of Martin Ndegwa Kabocho - v- Republic (2014) eKLR

21. He alleges a grudge between him and PW2 he submits that the only evidence that pointed to his guilty was that of the minor. He relies on Fappyton Mutuku Ngui -v- Republic Criminal Appeal No, 296 of 2010 to submit that the prosecution failed to prove the charge to the required standard.

22. Finally the appellant's faults the trial magistrate for failing to comply with Section 333(2) of the Criminal Procedure Code and Kenya Judiciary Sentencing Guidelines.

Respondent's Submissions:-

23. They submit that the conviction and sentence should be upheld as the prosecution proved the charge against the appellant beyond any reasonable doubts. He submits that in a charge of incest the prosecution was supposed to proof that,Offender was a relative of the victimProof of penetration or indecent ActIdentification of the perpetratorProof of age of the victim

24. The prosecution called seven witnesses who proved that the appellant was the biological father of the complainant proved that the appellant was the biological father of the complaint

25. She submits that the complainant implicated that the appellant as the one who removed her from the room where she was sleeping with her grandmother, undressed her and inserted his finger in her vagina. That the appellant did not challenge the evidence of PW1. She relies on Section 124 of the Evidence Act which she submits that comes to the aid of vulnerable victims as the offences are committed in exclusion of eye witnesses. That PW5 the appellants mother was treated as a hostile witness but her evidence was examined and the trial magistrate found that it corroborated what happened on that fateful night.

26. The respondent submits that penetration was proved by medical evidence adduced by the clinical officer (PW6) who testified that there was evidence of fresh vaginal bruising and a freshly broken hymen. That the age of the complainant was proved with credible evidence of the age assessment report by a doctor. On the ground that the respondent failed to call crucial witnesses she submits that all pertinent witnesses were called. That the prosecution has discretion on which witnesses to call and relies on Bukenya -v- Uganda (1972) E.A. She submits that the learned trial magistrate did consider the appellant defence and found that it was an afterthought.

27. On sentence she submits that the court has o reason to interfere with the sentence and relies on the case of Benard Kimani Gacheru -v- Republic (2002) eKLR. She submits that the appeal should be dismissed.

Analysis and Determination:

28. I have considered the record of the learned magistrate in the lower court, the grounds of Appeal and the submissions. The issue for determination are -

    1. Whether the charge of incest was proved.

    2. Whether the charge of Sexual Assault is cognate to the charge of incest.

    3. Whether the prosecution failed to call a crucial witness.

    4. Whether the decision of the learned magistrate should be upheld

    5. Whether this court should interfere with sentence imposed by the learned magistrate.

29. This is a first appeal and this court has a duty to analyze the evidence which was tendered before the magistrate, evaluate it and come up with its own independent finding. The appellant has a legitimate

expectation that the evidence shall be subject to an exhaustive evaluation by the appellate court and the appellant court's own independent finding. However, the court must warn itself that it did not have an opportunity to see the witnesses when they testified and leave room for that. The leading authority on the subject is the case of Okeno -v- Republic 1972 E.A 32. The court stated that the duty of the first appellate court is to analyze, re-evaluate the evidence which was before court and itself come up with its own conclusion. However I must warn itself that it did not have the benefits of seeing the witnesses when they testified and must leave room for that. That Court of Appeal in David Njuguna Wairimu -v- Republic (2020)eKLR while citing with the approval the case of Okeno -v- Republic (supra) stated as follows:-

> "The duty of the first appellate court is to analyze, re-evaluate the evidence which was before he trial court and itself come up with its own conclusions on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may, depending on the facts and the circumstances of the case, come to the same conclusion as those of the lower court. It may also reverse those conclusions. We do not think there is anything objectionable in doing so provided it is clear that the court has considered the evidence on the basis of the law and the evidence to correctness of the decision."

30. The court further stated that-

> "An appellate court on a first appeal is entitled t expect the evidence as a whole to the subjected to a fresh exhaustive examination (Padya- -v- Republic (1975) E.A 336) and to the appellate court's decision on the evidence and draw its own conclusion.
>
> In doing so it must make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. See Peter's-v- Sunday Post (1978) E.A 424"

31. The first appellate court has jurisdiction to consider the Facts and the law. Section 347 (4) of the Criminal Procedure Codeprovides:

1. Whether the charge of incest was proved

32. The appellant was charged with incest contrary to Section 20(1) of the Sexual Offences Actwhich provides as follows:-

> "(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:
>
> Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

33. The ingredients of the offence are:-

    1. Proof that the offender is a relative of the victim.

    2. Proof of penetration or indecent act.

3. Identification of the perpetrator

4. Proof of age of the victim

34. On proof that the offender is a relative of the victim, the complainant testified that the appellant is his father. This was also confirmed by PW5 the mother of the appellant and grandmother of the victim. The appellant in this defence admitted that the complainant in this case is his daughter. This was confirmed by the prosecution witnesses PW1, PW2, PW3, & PW4 who knew the appellant and the victim.

35. I find that the appellant and the complainant are relatives is not in disputed. The appellant is the father of the minor.

Proof of Penetration:

36. The evidence was adduced by the complainant that on the material night the appellant removed her from her grandmother's bed, placed her on his bed and undressed. She testified that the appellant penetrated her vagina using his finger. PW5 the complainant's mother had recorded a statement which she stated that the appellant had removed the complainant from her house and dragged her to his room where she heard her crying. In the morning she saw her with bloodstains on her glegs ad hand and on enquiring she told her that the appellant had inserted his fingers in her private parts. She went to her neighbor JK (PW2) and informed him what happened. The PW5 was declared hostile. However the prosecution called witnesses who confirmed the information which show had recorded with police. Indeed the complainant (PW1) confirmed what happened and that the appellant inserted his fingers in her vagina.

37. Medical evidence adduced by PW6 confirmed that the complainant who was aged five years was presented to him on allegation of defilement by a person known to her that night. On examination she had blood stains on her thighs, a bruise with bleeding with freshly broken hymen. He concluded that there was forceful vaginal penetration. In cross-examination PW6 told the court not to tell what used to injure the child. The appellant did not challenge the evidence of the complainant, indeed in his submissions he has stated that it is clear that the only evidence that pointed to the alleged guilt of the appellant was that of the minor. PW2, 3, & 4 they saw the complainant and she was bleeding from her private parts and her clothes were soiled with blood from her private parts. Penetration is defined under Section 2 of the Sexual Offences Actas the “partial or complete insertion of a person's genital organ into the genital organs of another.”

38. The law therefore recognizes that penetration is committed by use of a genital organ which is inserted into another person's genital organ. Penetration into another person's genital organ using other parts of the body or using objects does not fit the definition of penetration defined under Section 2 of the *Sexual Offences Act*. In this case although, the doctor confirmed that there was penetration into the genital organ of the minor, he was non -committal as to what used to penetrate the minor. The only testimony as to what was used to penetrate the minor was the testimony of the minor who told the court that a finger was used. Penetrant using any part of the body of anther fits in the offence under Section 5 of the Sexual Offence Act which is termed as Sexual Assault. In this case I find that the prosecution proved that there was penetration into the genital organ of the complainant using a finger. The overall definition of a sexual or indecent assault is an act of physical, psychological and emotional violation in the form of a sexual act, inflicted on someone without their consent. It can involve forcing or manipulating someone to witness or participate in any sexual acts, in most cases the victim does not consent. I find that penetration was proved.

39. On the age of victim. The prosecution produced the age assessment report signed by a doctor and CD to support his report. I find that the age of the complainant was proved with credible evidence.

Whether the Prosecution failed to call a crucial witness:

40. The appellant submits that one crucial witness by name P was not called.

41. Section 143 of the Evidence Act provides as follows:-

> "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."

42. In the case of Bukenya-v- Uganda (supra) it was stated:

> "It is well established that the Director has discretion to decide who are the material witness and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary o establish the truth, even though their evidence may be inconsistence. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence that is inadequate and it appears that there were other witnesses who were not called, the court is entitled, under the general rule of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tendered to be adverse to the prosecution case."

43. This is a sexual offence which gives the court discretion t rely on the evidence of the victim to conflict if it is satisfied that the victim in truthful. Section 123 of the Evidence provides as follows:-

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*(Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

44. The appellant submits that one P was called. She is said to have confirmed that the complainant was defiled. PW2, PW3, & PW3 confirmed that the complainant was defiled and it was corroborated by medical evidence adduced by PW6. Failure to call the said witnesses is not fatal to the prosecution case. The respondent had the discretion to call witnesses who were material witnesses to the case. I find that it called witnesses who were adequate and did not have to call a superfluity of witnesses to prove one fact. The ground is without merits. I will address grounds 2, 4, & 5 together.

2. Whether the charge of Sexual Assault under Section 5 (1)(a) (i) of the Sexual Offences Actis cognate to the charge of Incest.

45. The appellant has submitted hat the evidence tendered by the prosecution did not in any way connect the appellant with the charge under Section 5(1) of the Sexual Offences. He submits that the evidence

adduced by witnesses did not in any way connect the appellant to this charge. What this court has to consider is whether the accused could be convicted for an offence which he was not charged with. The court of Appeal has dealt with question at length.

46. In Robert Mutungi Muumbi -v- Republic (2015) eKLR, Court of Appeal, it was stated:-

> The 3rd issue in this appeal relates to appellant's alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child before he was afforded an opportunity to plead to the offence. Mr. Mondas 1st response was that the appellant could be properly under Section 179 of the *Criminal Procedure Code* without having to plead to the offence so long as it was a minor and cognate offence charged.

47. provides as follows,;

> " 179(1) when a person is charged with an offence consisting of several particulars a combination of some only of which constitutes compel minor offence although he was not charged with it.
>
> 3. When a person is charged with an offence and facts are proved which reduce to a minor offence, he may be convicted of the minor offence although he was n charged with it."

48. As is apparently clear Section 179 of the Criminal Procedure Codeempowers a court, in some particulars special circumstances to convict an accused of an offence, even though he was not charged with that offence. The court contemplated by Section 179 can either be the trial court or the appellate court............ The question is whether the special circumstances contemplated by Section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence and the minor offence are cognate; that is to say, both are offence that are related or alike of the same genius or species. To sustain such a conviction the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence.

49. Secondly that the major charge has given the accused person notice of all the circumstances constitution the minor offence of which he is to be convicted. (see Robert Ndecho & Another -v- Rex 1950-51) E.A 171 and Wachira s/o Njenga -v- Regina (1954) E.A 398) Spry J explained the essence of the 1st consideration as follows in Ali Mohammed Mpanda -v- Republic (1963) E.A 294 while construing the provision of Tanzania *Criminal Procedure Code*, equivalent to Section179 lf the Kenya *Criminal Procedure Code*: Sub-Section (1) envisages process of subtraction the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that remaining ingredients includes all the essential ingredients of a minor, cognate offence (proved), finds that the remaining ingredients includes al eh essentials ingredients of a minor, cognate, offence (proved and may then, in its discretion, convict of that offence."

50. That conclusion is reached at the stage of Judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised the discretion of the court based on the evidence adduced at the end of the trial."

51. The court went on to state as follows:

> The second consideration arises of necessity, precisely because the accused person is not charged with and has not pleaded to the minor cognate offence. The purpose delivering into this consideration is to satisfy the court that the accused person was not prejudiced and that by being charged with the major offence, he had sufficient notice of all the elements that constitute minor offence, (see Republic -v- Cheyia & Another (1973) E.A 500). In this case we are satisfied that indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent Act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under Section 179 of the Criminal Procedure Codeeven though he was not charged with that offence and had not pleaded to it. The requirements of Section 179 were satisfied."

52. The Court of Appeal set down the application of Section 179 of the Criminal Procedure Codethat it is permissible to convict a person with an offence with which that person was never provided that the offence is a minor and cognate to the more serious offence charged. See Kalu -v- Republic (2010) 1 KLR

53. A cognate offence is defined under Black Laws Dictionary 9th Edition page 1186 as follows:-

> " A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class and category."

54. Thus the offence which an accused person is convicted must be lesser and cognate.

55. In the case of Robert Mutungi Muumbi -v- Republic (supra). The appellant was charged with defilement under Section 8(1) of the Sexual Offences Actand was convicted for Indecent Act with a child under Section 11(1) of the Act. The Court of Appeal upheld the decision of the High Court and held that committing an indecent act with a child is a cognate offence of defilement which the appellant was charge with.

56. In this case the appellant was charged with Incest contrary to Section 20(1) of the Sexual Offences Actwhich provides as follows:-

> "(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:
>
> Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

57. On the other hand the appellant was convicted under Section 5(1) of the Sexual Offence Act which provides as follows:

> Any person who unlawfully-

a. Penetrates the genital organ of another person with-

Any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where that person except where that penetration is carried out for a proper and professional hygienic or medical purposes;

b. Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed Sexual Assault"

2) Any person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life. "

58. The punishment under Section 11(1) and 5(2) of the Sexual Offences Actare similar. The offences are minor and cognate to the offence of incest. The elements of Sexual Assault are ingrained and sub—summed in the elements of the offence of Incest as the former attracts a comparatively lesser sentence than the latter.

59. The learned Magistrate held as follows:-

> " The evidence in this case proves that there was penetration into the genital organs of the child by the accused person's finger. The Sexual Offences Actprovides for such an offence under Section 5 shown above. The offence that has been proved is sexual Assault."

60. The learned magistrate relied on Section 186 of the *Criminal Procedure Code*(now repealed) but was in force when the Judgment of the learned trial magistrate was delivered. The section provides as follows:-

Charge of Defilement of a girl under 14 years of age.

> " When a person is charged with the defilement of a girl under the age of 14 years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Acthe may be convicted of that offence although he was not charged with it. "

61. I find that under Section 179 and Section 186 of the *Criminal Procedure Code*; the learned magistrate could convict the appellant for a lesser cognate offence to that of Incest. The prosecution proved that there was penetration into the genital organ of the minor but the minor maintained that the appellant penetrated her using a finger. The appellant has challenged the conviction on the ground that he was convicted for an offence that he was not charged. I am well guided by the decision of the court of Appeal in the case of Robert Mutungi Muumbi -v- Republic. The appellant was properly convicted as all he elements of the charge of Incest were proved save that penetration was not by use of genital organ (penis) as stated in the particulars of the charge. The appellant was not prejudiced. The decision of the learned magistrate was proper and must be upheld.

3. Whether the sentence was harsh and excessive.

62. The appellant submits that the sentence was harsh and excessive as he was convicted for an offence which he was not charged with. The Court of Appeal in the case of Robert Mutungi Mutuma-v-Republic (supra) held that since the appellant had been convicted for defilement, and that conviction was quashed. The offence which the High Court convicted him was minor, the High Court should

have addressed its mind to the issue of sentence. In this case the appellant was convicted for a lesser offence and the court exercised discretion and passed a sentence of twenty five years.

63. The learned magistrate when passing sentence considered the age of the victim and the appellant as well as their relationship, that of father and child. That the victim was aged five years and the appellant was supposed to protect her but he went ahead and harmed her. That after taking all that into consideration, she sentenced the appellant to twenty five years.

64. I have considered this ground of appeal. I find that sentencing is a matter that rests in the discretion of the court and the appellate court will not easily interfere with the sentence unless the sentence is manifestly excessive in the circumstances of the case of that the trial court overlooked some material factor, took into account some wrong material or acted on a wrong principle. See Benard Kimani Gacheru -v- Republic (2002) eKLR

65. I find that the learned magistrate exercised her discretion judiciously considering the circumstances of this case, relevant factors were considered. The learned magistrate could enhance the sentence to life imprisonment but passed a sentence of twenty five years. The sentence was not harsh nor was it excessive. I find no reason to interfere with the sentence.

66. The appellant has however urged the court to consider the time that he spent in custody awaiting trial which was not considered by the learned magistrate Section 333(2) of the Criminal Procedure Codeprovides as follows:-

> 333(2) Subject to the provisions of section 38 of the Penal Codeevery 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."

67. The Court of Appeal in the case of Ahamed Abolfathi Mohammed & Another -v- Republic (2018) eKLR held that the time spent by an accused person in custody awaiting trial should be taken into account to reduce the sentence proportionately with the time spent in custody. In this case the appellant was in custody from 7/4/2021upto 21/7/2022 when the sentence was passed on him. The learned magistrate did not take into account the time the appellant had spent in custody awaiting trial. This ground has merits. I order that the sentence of twenty five years should run from 7/4/2021 to take into account the time spent in custody.

68. The appeal is without merits and is dismissed.

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

L.W. GITARI

JUDGE