Kangogo v Republic (Criminal Appeal E011 of 2024)
[2025] KEHC 6200 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6200 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E011 OF 2024

RB NGETICH, J

MAY 15, 2025

BETWEEN

JOSHUA KASITET KANGOGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal on both conviction and sentence in Criminal Case No. E008 of 2023 where the Appellant was sentenced to 30 years imprisonment by Hon. P. Koskey – SPM at Kabarnet by a judgement delivered on the 16th September, 2024)

JUDGMENT

1. The Appellant Joshua Kasitet Kangogo was charged with two counts of defilement each with an alternative charge. Count I with the offence of defilement contrary to section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that the accused on the 12th day of August, 2023 at 1300 hours at Illchamus Location in Baringo South Sub- County, intentionally caused his penis to penetrate the anus of J.L. a child aged 4 years.

2. In the alternative, the appellant was charged with the offence of committing an indecent Act with a child contrary to Section 11 (1) of the *Sexual offences Act* no. 3 of 2006. The particulars being that the Appellant on the 12th day of August, 2023 at 1300 hours at Illchamus Location in Baringo South Sub-County, intentionally touched the vagina, breasts and buttocks of J.L. a child aged 4 years.

3. Count II was the offence of defilement 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 the accused on the 12th day of August, 2023 at 1300 hours at Ilchamus Location in Baringo South Sub- County, intentionally caused his penis to penetrate the anus of P.M. a child aged 3 years.

4. In the alternative to count II, the appellant was charged with the offence of committing an indecent Act with a child contrary to Section 11 (1) of the *Sexual Offences Act* no. 3 of 2006. The particulars being that the Appellant on the 12th day of August, 2023 at 1300 hours at Ilchamus Location in Baringo South Sub- County, intentionally touched the vagina, breasts and buttocks of P.M. a child aged 3 years.

5. The Appellant denied the charges and upon trial by a judgement delivered on the 4th September 2024, the trial court found that count II was not proved beyond reasonable doubt and the appellant was acquitted accordingly under Section 215 of the *Criminal Procedure Code*. The appellant was found guilty of count I and convicted accordingly under Section 215 of the criminal procedure code and on the 17th September, 2024 upon considering all factors, the trial court sentenced the Appellant to serve 30 years imprisonment.

6. Dissatisfied and aggrieved by the judgment and sentence by the trial court, the Appellant filed this appeal on the following grounds: -

    i. That the Learned trial magistrate erred in matter of law and fact by failing to note that the prosecution failed to prove their case beyond reasonable doubt as required by law in the *Evidence Act* Section 107 Laws of Kenya.

    ii. That the Learned trial magistrate erred in matters of law and fact by finding him guilty based on a defective charge sheet violating Section 134 of the *Criminal Procedure Code*. The particularization in the charge sheet did not match the evidence presented notably a witness indicated that he was being prosecuted with defilement and theft emphasis was laid on the house breaking and stealing by most witnesses.

    iii. That the trial magistrate erred in both matters of law and fact where he rejected his general defence and alibi defence over mere allegations brought against the Appellant some of which were dropped after court doubted its accuracy and his defence remained unchallenged.

    iv. That the trial magistrate erred in law by misapplying it to unsubstantiated claim (facts) that the Appellant committed an act of defilement to the complainant, on the contrary the ingredients of the alleged offence were not properly established moreso on the identification of the perpetrator and the penetration aspect. The complainants did not positively identify the Appellant as the perpetrator. on penetration, one of the cases was dropped as the charge could not be sustained which should have been extended to this case through an acquittal.

    v. That the trial magistrate erred in law and fact by not complying with Section 33 of the *sexual offences Act* as the narrative that the complainant was defiled was never explained or a description offered on the circumstance surrounding how it happened and there was no evidence to support the conviction.

    vi. That the trial magistrate erred in law by misdirecting herself when she convicted and sentenced the Appellant by failing to appreciate nothing linked the Appellant medically with the alleged offence as he was not tested even on being hospitalized and the test done on the complainant did not yield much as he notes a fault on the doctors finding that a dry blood was flowing from the vagina, the cut wound extending from anus to vagina was never explained had been caused by a sharp or blunt object or accident.

    vii. That the Honourable magistrate erred in law and fact by not making a finding that a broken hymen per se is not proof of defilement in this case just as the case she dropped which the medical doctor was not stating with certainty that the same is an indication of possible penetration making the conviction to be unsafe.

viii. That 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's case that would link the Appellant to the alleged offence. That it is only suspicion of wearing a red T-shirt, black trouser, footprints and investigations at the scene of crime, nothing was recovered which can never be a basis of a conviction and sentencing.

ix. That the learned trial magistrate erred in law and in fact by convicting and sentencing the Appellant on the basis of hearsay evidence which is not admissible or applicable to this case making his conviction to be an unsafe an example of this are mothers of the complainants who were only restating what they were told as they were not around during the incident among other witnesses.

x. That the learned trial magistrate erred in both law and fact where she did not conduct a proper voire dire examination on the complainant unlike what she did to Precious PW5. That she only advanced two questions and never gave an opinion of the court regarding her suitability for oath taking. That she went against the interest of justice by failing to declare the complainant a vulnerable witness and should have allowed an intermediary for her under Article 50(7) of *the Constitution*.

xi. That the learned trial magistrate erred in both law and fact as she failed to consider the exonerating evidence that were presented by the prosecution witnesses that the person who did bad manners to her came alone and she did not see other people with him contradicting PW3's testimony, she also contradicted herself about not seeing before the Appellant. These contradictions were material to the case.

xii. That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant on fictitious evidence as it is possible the children were screaming for having a stranger entering their house abruptly and not for the reason of being defiled as it was not practical for the person who was being hotly pursued for theft related offence to have time, space and capacity to commit the alleged offence.

xiii. That the trial magistrate erred in law and fact by imposing on the Appellant a 30-year sentence which is very harsh and excessive in the circumstances of the case which violated his right to a fair trial under Article 50(2) (p) for a least severe sentence besides the principle of mitigation and proportionality not being considered in his case.

xiv. That the Appellant is faulting the police for conducting a very shoddy investigation which does not meet the minimum standard for the police investigations procedure. The police relied on witnesses purported investigation of following foot prints to where it was alleged to be his hide out.

xv. That the learned trial magistrate erred in both law and fact where he failed to consider the time that was spent in remand custody of one year one month while undergoing the trial as part of his sentence of 30 years pursuant to Section 333(2) of the *Criminal Procedure Code*.

7. The Appellant prays that the Honourable court be pleased to allow the Appeal, quash the conviction, set aside the sentence and he be set at liberty.

8. The Appellant filed written submissions while the prosecution submitted orally.

Appellant's Submissions

9. The Appellant submits that the prosecution had legal duty to prove its case beyond reasonable doubt as provided section 107 of the *evidence Act* and the ingredients of the offence namely penetration and positive identification were not established. The Appellant submits that Pw1 said she had not known the accused before and on penetration, he submits that the medical examination by the doctor revealed there was a cut that was running from the anus to the vagina but the doctor did not indicate the nature of injury wand weapon used.

10. Further that the trial magistrate was wrong in finding him guilty based on a defective charge. That he was charged with two counts of defilement offence contrary to Section 8(1) & 8(2) of the *Sexual Offences Act* but the particulars of the charge were at variance with evidence adduced; that evidence adduced was on house breaking and stealing and the variance of particulars of his case and the testimony of the witnesses violated Section 134 of *Criminal Procedure Code* hence making the charge to become defective; that bringing up theft case was meant to paint him in bad light and it culminated in the conviction and sentence of 30 years.

11. The Appellant further submits that the trial court did not consider the general and alibi defence presented in court contrary to Section 169 of the *Criminal Procedure Code*. That he went ahead to bring in court a defence witness who was with him at a drinking den while he was selling tomatoes and thereafter taking alcohol. That the defence evidence was not given adequate attention and the evidence remained unchallenged as the court cited bad timing in bringing up the defence and urges the appellate court to revisit this omission and discharge the Appellant on this ground.

12. The appellant submit that the complainant did not explain the circumstances under which the offence was committed. That the complainant in the first count spoke about going to Mombo's bed and tabia mbaya was done to her but did not account the surrounding circumstance whether Mombo was present during the ordeal or not. That equally PW5 who was said to have been defiled alongside PW4 did not corroborate this story as she was stood down and failure to probe this aspect resulted to non-compliance with this provision prejudicing the appellant's case.

13. The Appellant further submit that he was never linked to this case medically or otherwise. That after being assaulted with a panga, the appellant got hospitalized and an opportunity presented itself to the prosecution to conduct a physical exam and medical tests. That the cut on the anus and the status of the anus was not explained neither was there mention of a dry blood flow.

14. The Appellant further submits that the broken hymen did not exactly prove defilement an example being the incident about PW5 where the doctor's finding was that the complainant was not defiled despite having a broken hymen. That PW4 was found to have a broken hymen but he wonders why the same reasoning was not applied to this case and it was not indicated whether the broken hymen was fresh or old and submit that this piece of evidence was deliberately omitted so as not to prejudice the prosecution's case. That the broken hymen may be attributed to the fact that the children were engaged in dangerous plays which lead to raptures of the hymen and urged this court to find that broken hymen could have been raptured by other means other than penile penetration and allow this appeal.

15. The Appellant further submit that police did not follow the laid down procedure in investigations. That the appellant was arrested 4 days after the alleged incident and was assaulted by the people who arrested him and police chose not to act when he was cut with a panga and police testified that nothing was recovered at the scene of crime to prove occurrence of the incident.

16. The appellant further submitted that the prosecution relied on hearsay on the charge of stealing.

17. The Appellant submits that the trial magistrate did not conduct a proper voire dire examination on the complainant as done for PW5 on PW4; that she asked the complainant two questions then ruled on her unsuitability for oath taking. He submits that the witness was a child of tender years (4 years); that he doubts her competency and believes she ought to have been declared a vulnerable witness and an intermediary appointed to speak on her behalf as per Article 50(7) of Constitution of Kenya and the *Sexual Offences Act* Section 31. He submits that he had challenges testing the credibility of the complainant's testimony as she could not comprehend some issues that violating his rights under Article 50 (2) (k) of COK.

18. The Appellant further submits that the presented testimonies in his case were full of contradictions and inconsistencies and the trial magistrate rightly made a finding that the complainant did not positively identify the appellant as he did not know the appellant and had never seen him before but the court went on the overdrive to look outside the box to place the appellant at the scene of crime. He submits that the complainant indicated that the person who did bad manners to her did see any other people at the home contradicting PW-3 who said he was in the home pursuing the appellant. That it was outrightly illegal to consider extraneous issues to find the appellant guilty making the trial process improper and was not in conformity with the provision of Article 50 (1) and (2) of Constitution of Kenya.

19. The Appellant submits that the trial magistrate failed to make a finding that some of the facts presented in court were fictitious and not a true account of events surrounding the alleged offence. That the case lacked factual foundation since no incriminating evidence was presented in court to link the appellant in the alleged offence. That the suspicion was only raised for being found harvesting maize while wearing a Red T-shirt, a black trouser and foot prints of nginyira sandals that was traced for three (3) kilometres. That it was not realistic and logical for a person who was fleeing from those who were after his life to put his life in danger by strangulating children. That the story presented in court by complainant that she walked to the house with a stranger to be defiled is not credible and untruthfully.

20. That the statement of the children being strangulated was not corroborated by the children and the medical doctor and suspicion can never be used as a basis of conviction but on hard evidence. He submits that the appellate court should look beyond this fictions/suspicions and make a finding that they were stories cooked up against him to implicate him in the said offence.

21. The appellant abandoned prayer for remand period to be computed as per Section 333 (2) of *Criminal Procedure Code* as the trial magistrate complied.

22. The appellant abandoned appeal on sentence arguing that the supreme court pronounced itself on applicability of mandatory sentence after the sentence herein.

Submissions By Prosecution

23. On age, the prosecution submit that the complainant's mother testified and informed the court that the minor was 4 years old at the time she was defiled and further, the court took judicial notice of the fact that the girl who was before court was of tender age and it has been held that where there is no evidence of birth certificate, baptismal card or birth notification and the evidence of the mother is sufficient to prove the age and where documents are not available, the court by observing can also take judicial notice of the child by physical appearance and talk by the child and determine age and submit that age of the minor was proved.

24. On penetration, the appellant submit that it was proved by P3 form and medical examination form. That further, the child informed court that she was defiled which corroborated the evidence of doctor who testified and submit that the ingredient of penetration was proved beyond reasonable doubt.

25. On identification, the prosecution counsel submit that the Appellant was positively identified by the prosecution witnesses and in particular PW3, PW6 and PW7 who confirmed that the Appellant was found in the house where the two children were and where defilement happened and although the girl was not able to identify the Appellant, the court noted that the Appellant was new to the child who was of tender age and in that instance, the Appellant was placed on the scene of crime and identified as the perpetrator.

26. That it is worth noting that at the time of the offence, there was no other person at the scene of the offence and relied on the case of R. Vs. Kipkering Arap Kosgei & Another (EAC 135) where the court held that circumstantial evidence is the best evidence and which can be relied upon whenever inference of guilt is sought to be drawn and where the evidence points towards the guilt of the accused when evidence is taken cumulatively it forms a chain so complete and there is no doubt that the offence was committed by accused and no one else.

27. The prosecution counsel further submits that the evidence of PW3, PW6 and PW7 was not shaken and formed a complete chain that it was so complete to place the accused at the scene of crime and indeed satisfied the court that it was the Appellant and no one else who defiled the girl. That the Appellant was even identified by the clothing he wore at the scene of crime which he was wearing at the time of arrest; and submit that the prosecution proved identification of the perpetrator without any doubt.

28. On allegation that defence of alibi was not considered, the prosecution submit that they agree with the decision of the trial court that alibi defence did not shake the evidence adduced. That further in relying on the alibi defence, the Appellant did not notify the prosecution of alibi defence so as to prepare to rebut but was raised at the tail end of the prosecution and submit that the alibi defence was just an afterthought and a mere defence on the part of the Appellant; and relied on the case of Victor Mwenda Mulenge Vs Republic [2014] eKLR in support of their submissions that the alibi defence of the Appellant be dismissed as it was an afterthought.

28. On appeal against sentence, the Respondent submit that whereas the accused was sentenced to serve 30 years imprisonment, he says it is harsh in the circumstances, but the section under which the Appellant was charged provides for sentence of life imprisonment. They submit that the trial court was lenient and pray for the sentence to be enhanced to 50 years as it is reasonable and lawful and should not be interfered with.

29. In conclusion, the prosecution submit that they proved its case beyond reasonable doubt and pray that the Appeal be dismissed in its entirety.

Analysis And Determination

30. This being the first appellate court, I am required to analyze and evaluate afresh all the evidence adduced before the lower court. The duty of first appellate court were set out in the case of Okeno vs. Republic [1972] EA 32 was set out by the court of appeal as follows: -

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is

not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

31. In view of the above, I have perused and considered evidence adduced before the trial court together with grounds of appeal and submissions filed herein. Section 8(1) 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.
>
> (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.

32. From the foregoing provision, the elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See C.W.K v Republic [2015] eKLR. I now wish to consider whether the 3 ingredients for the offence of defilement were proved beyond reasonable doubt.

(a) Proof of penetration

33. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows: -

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

34. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.

35. From the record, Pw1 who was the mother of the complainant testified that on 12th August 2023, at 6:00 p.m., she returned home from the farm and her daughter aged 12 informed her that her daughter J had been strangled at Ngala's home and was sick. On examining the minor who testified as pw4, she found that she was injured around her buttocks and was bleeding and had whitish discharge. She took the child to Hospital. The child was referred to Marigat Sub- County Hospital where she was admitted.

36. Pw4 testified that the Appellant found her outside victor's home, took her inside and did bad manners to her on Mombo's bed while she was at Mama Victor's home. The doctor PW8 Doctor Chrispine Ngelechei testified that he examined J.L. and P.M. who were taken to the facility with a history of

having been defiled by a person unknown to them. He said that J.L. aged 4 years gave a history that she was playing outside when unknown person approached her around 1p.m while she was with her sister and defiled her and on examination, he noted that she had redness on the genitalia with blood stains. The hymen was broken and there was a bloody dry discharge and urinalysis done showed that the child had an infection. He concluded that she had been defiled.

37. From the evidence adduced, the minor narrated how the Appellant found her outside victor's home and took her inside the house and defiled her on Mombo's bed. The doctor confirmed that the child who was aged 4 years was defiled. The doctor's evidence therefore proves beyond reasonable doubt that there was penetration.

(b) Proof of age of victim

38. The second ingredient of the offence of defilement is proof of age of the victim. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

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

39. The complainant's mother testified that the complainant was aged 4 years. I note that the trial court also took judicial notice that PW4 was a child of tender years when she gave her testimony in court. In view of the above there is no doubt that the age of the child was proved beyond reasonable doubt.

(c) Proof of identity of assailant

40. The evidence linking the Appellant to the crime is that of PW3, PW6 and PW7. They gave evidence concerning a theft that had earlier occurred at PW6's house. PW6 testified that he caught the accused person removing iron sheets of house, he confronted him but the Appellant attacked him and ran away. PW6 together with PW3 and PW7 started to look for the accused, they described the clothes the Appellant wore on the date of incident being a red shirt, black trouser the clothes he wore till the time of his arrest. PW7 informed the court that he saw the appellant wearing the above clothes at the home of Victor where the defilement incident occurred. The evidence of PW6 and PW7 all points to the appellant as the person who committed the offence. The Appellant was positively identified.

(d) Whether voire examination was procedurally done and whether and its effect on the decision of the court

41. Voire dire examination is a procedure a trial court takes through a child of tender age to establish whether the child is conscious of the truth. The purpose of voire dire was explained by the court in Johnson Muiruri vs Republic [1983] KLR 445 as follows:-

    1. "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted

on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

42. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

43. In the case of Maripett Loonkomok v Republic [2016] eKLR, the Court of Appeal sitting at Mombasa held that:-

> " It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;
>
> "In appropriate case where voire dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

44. It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. The Court of Appeal in Athumani Ali Mwinyi v R Cr. Appeal No.11 of 2015 held that:-

> " In appropriate case where voire dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

45. Upon perusing the trial court record, even if one was to find that voire dire examination was not properly conducted, there is sufficient independent evidence by the doctor which confirm that the child was defiled.

46. On allegation that the appellant's defence was not considered, I note from the judgment at paragraph 22 that the learned magistrate considered the accused's defence and it is therefore not true that his defence was not taken into consideration. The defence did not shake evidence adduced against the appellant.

47. As to whether the charge sheet was defective, the Appellant has raised this ground in his appeal, however, no particular defect was pointed out. The record shows that the Appellant fully participated in the proceedings and he understood the charge he was facing.

48. Section 382 of the *Criminal Procedure Code* states that: -

> " 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 proceeding."

49. Accordingly, I find no defect in the charge sheet that can occasion a failure of justice.

(c) Whether sentence imposed was harsh and excessive

50. On whether to interfere with the sentence of a trial court on appeal, the principles to be considered were enunciated in the case of Mbogo & Another vs. Shah (1968) 1 E.A. 93 thus:-

> " ...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

51. Further, the Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows: -

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

52. On whether the sentence is manifestly excessive in view of the circumstances of the case, the court of appeal in the case of Shadrack Kipkoech Kogo -vs- R. Eldoret Criminal Appeal No.253 of 2003 stated as follows: -

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka – vs- R. (1989 KLR 306)."

53. Further in the case of Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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 some wrong material, or acted on a 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 states is shown to

54. Under *Sexual Offences Act*, sentence for defilement is prescribed based on the age of the victim of the sexual assault and from the penalty provisions of the *sexual offences Act*, it is evident that the younger the victim, the more severe the sentence. From the foregoing, the age of the victim of sexual offence is an aggravating factor which the court should always consider amongst others in sentencing.

55. The complainant herein was 4 years old at the time she was defiled. Thus, the appropriate penalty clause is Section 8(2) of the Act which prescribes the mandatory minimum sentence of life imprisonment where the victim is 4 years an.

56. I find that the trial court took into consideration all the requisite factors in sentencing the appellant to 30 years imprisonment. The sentence was proper/legal and I therefore find no reason to interfere with the trial court's decision on the sentence. I also note that the trial court took into consideration the period appellant served in remand.

57. Final Orders:-

Appeal on both conviction and sentence is hereby dismissed.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 15TH DAY OF MAY 2025.

.....

RACHEL NGETICH

JUDGE

In the presence of :

- Ms. Kosgei for State.

- Appellant present.

- Elvis/Momanyi – Court Assistants.