**Kimaiyo v Republic (Criminal Appeal E031 of 2024)**
**[2025] KEHC 5776 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5776 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ITEN**

**CRIMINAL APPEAL E031 OF 2024**

**JRA WANANDA, J**

**MAY 9, 2025**

**BETWEEN**

**DANIEL CHEBII KIMAIYO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal against the Judgment of Hon. E. Kigen - PM, delivered on 3/07/2024 in Iten Senior Principal Magistrate's Court Criminal Case - Sexual Offences - No. E008 of 2024)***

## JUDGMENT

1. The Appellant, a 50 years old man, was charged in the said criminal case 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 were that on 2/02/2024, at about 1500 hours in [particulars withheld] village, in Kabulwo sub-Location, Keu Location in Keiyo North Sub-County within Elgeyo Marakwet County, he intentionally and unlawfully caused his penis to penetrate the vagina of AJ, a child aged 7 years.

2. The Appellant was also charged with the alternative 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 were on the same date, time and place, he intentionally and unlawfully touched the vagina of the same child aged 7 years with his penis.

3. The Appellant pleaded not guilty to the charges and the case then proceeded to full trial in which the prosecution called 4 witnesses. At the close of the prosecution's case, the Court found the Appellant as having a case to answer and placed him on his defence. He then gave a sworn statement, was cross-examined and called no other witness. By the Judgment delivered on 25/7/2024, the Appellant was convicted on the main charge and sentenced to life imprisonment.

4. Dissatisfied with the decision, the Appellant filed this Appeal on 7/08/2024 against both conviction and sentence. His Petition of Appeal, reproduced verbatim, is crafted as follows:

i. That the Learned trial Magistrate erred in law and fact in convicting the Appellant in a charge with ingredients not proved beyond reasonable doubt.

ii. That the trial Magistrate erred in law and fact in convicting him on evidence on full of contradictions that did not meet the required standard.

iii. That the Learned trial Magistrate erred in law and fact by convicting the Appellant on charges that were not tallying and were unfavourable.

iv. That the learned trial Magistrate erred in law and fact by shifting the burden of proof to the Appellant when it is the duty of the prosecution to prove the case beyond reasonable doubt.

v. That the learned trial Magistrate erred in law and fact by not giving the Appellant proper provision required to defense and ruling hence referring him to the judgment.

vi. That the learned trial Magistrate erred in law and fact by not considering any aspect on conditions that shall not occasion prejudice

vii. That the sentence of life imprisonment is harsh and excessive.

viii. That I pray to be present during the hearing of the Appeal to enable me to lodge more grounds of Appeal.

**Prosecution testimony at the trial Court**

5. PW1 was Philemon Kitony, a Clinical Officer at Iten County Referral Hospital. He stated that he filled the P3 Form for the complainant on 3/02/2024. He also referred to the Post-Rape Care Form dated 2/02/2024. He then stated that he examined the complainant and found that the cause of her injury was a sharp penetration which he classified as grievous harm, her hymen was torn, labia majora and labia minora were inflamed, vestibule was lacerated, clitoris was inflamed and he established that there was vaginal penetration. He also testified that the complainant reported that it was the second time that she had been defiled. He stated further that he established penile penetration. It was also his testimony that the results of laboratory investigation (urinalysis) (Hv) were that a few epithelial cells and pus cells were noted, no spermatozoa was seen and there were moderate pus cells. He reiterated that the Post Rape Care Form (PRCF) revealed that the vaginal area had laceration and inflammation on the labia minora and majora and that the vaginal hose was open and the usual membrane was torn. He then produced the medical documents referred to above. In cross-examination, he testified that they could not do spatula examination due to the tender age of the complainant and that the examination was conducted on 3/02/2024 at 1.30 pm.

6. PW2 was MK, the complainant's mother. She stated that on 3/2/2024 at 3.00 pm she was at home taking lunch with her children, J, A (complainant) and B when the accused came over and she also served him lunch, and they ate outside the house. She stated that she then took utensils to the house and went to take a nap, the accused left, and the children were playing outside. She testified that another child came from school and when she went to serve her, she asked her whether she had seen the complainant and child responded that she had met the complainant at [particulars withheld] village and that "Right" (Appellant) told her that he knew where the children were going. PW2 testified that she was shocked since the accused is her close neighbour and wondered where he was taking the children. She also clarified that the Appellant is also known as "Right", that he had been chased by his own son and moved to another village and it is towards the direction of that village that he was seen taking the children. She stated that she asked around whether the Appellant had been seen when R returned and told her that they had gone to the Appellant's. PW2 stated that the other children,

namely, S, J, and the complainant then also arrived, the complainant had firewood and she told PW2 that they had gone to the Appellant's. PW2 also testified that the complainant was limping, when she caned her to reveal what had happened to her, R and J told her that the Appellant had taken them to his house and told R and J to go and look after goats, that the complainant then also told her that when she wanted to follow J, the Appellant tripped her and she fell, he asked her to remove her pant but she refused, he then forcefully removed it and applied oil on her vagina and defiled her.

7. PW2 testified that he then called and reported the matter to the village elder who asked her to take the complainant to hospital. She testified further that she took the complainant to Cheliget from where she was referred to the Iten County Referral Hospital where she was examined. She stated that the complainant was 7 years old in age as she was born on 4/05/2016. He then identified the Appellant seated in the dock and referred to him as Daniel Chebii alias Right whom, she stated, she had known for many years. She stated that she usually fed him and that she had no grudge against him. In cross-examination, she denied that the Appellant went to her home to discuss about cows and also denied that there was any meeting planned at her home on that date.

8. PW3 was the complainant, AJK. She stated that she was a 7 years Class 1 pupil, and by reason of that age, she was taken through a voire dire examination, upon which the trial Court, not satisfied that the complainant understood the nature or purpose of taking an oath, directed that she gives unsworn statement, which she did.

9. Pursuant thereto, the complainant stated that she did not know her date of birth. She testified that she knew the Appellant and that his name is "Right". She then identified him seated in Court and stated that "he did bad manners" to her. She stated that she was with J, R and the Appellant at home, they ate together, her mother was present, after eating they went to play and the Appellant came and asked them to go and see his house and she went with J and R. She testified that the Appellant's house was not far from theirs, on reaching the house the Appellant ushered them inside but then asked J and R to leave which they did, the complainant remained behind, she wanted to leave but the Appellant tripped her leg and she fell down, he then pulled her, removed his trousers, removed the complainant's pants and trousers and "did bad manners" to her private parts which she uses to penetrate. She testified that the Appellant applied same oil on his penis, which she described as the one used for urinating, he inserted his penis into the complainant's vagina and she felt a lot of pain, he then helped her to wear her trousers, picked a panga and told her to accompany her to go and fetch firewood, he then gave her firewood, escorted them to the road and asked them to go home. She testified further that she told her mother what had happened. She insisted that the Appellant defiled her on the floor when she had fallen down

10. PW4 was Police Constable Alfred Koech. He stated that he was attached to Kabulwo Location, and he was the Investigating Officer in this case. He stated that on 3/02/2024 at about 9:00 a lady by the name M reported that her child had been defiled on 2/02/2024, that a neighbour had gone to her place for lunch and thereafter he requested to give M to give him her children, including the complainant, to go and sweep his goats pen, and that because she knew the Appellant well, she agreed to the request. PW6 testified that she booked the report and issued a P3 Form to be filled at the Iten County Referral Hospital, he sent officers to the Appellant's house but they did not find him, the Appellant was arrested later and upon interrogation, he blamed the devil for the act. He stated that the complainant was 7 years old and he then produced the complainant's Certificate of Birth and added that he visited the scene which is a goat's pen and also serves as a sleeping area for the Appellant, and that the complainant and the Appellant are distant relatives. In cross-examination, he insisted that the Appellant fled after the incident.

**Defence testimony before the trial Court**

11. In his defence, the Appellant gave unsworn testimony. He stated that on 2/02/2024, he had a meeting at 3:00 over a land dispute and denied that he was at the scene. He testified that he left at 4:30 pm and that when he was accused, he thought that it was because of a land dispute.

12. As aforesaid, after the trial, by the Judgment delivered on 25/07/2024, the Appellant was convicted on the main charge of defilement and sentenced to life imprisonment.

13. I then gave the parties the liberty to file written Submissions. However, the Appellant informed the Court that he would not be filing any Submissions. I however note that the Applicant, without leave of the Court, and also without even bringing it to the Court's attention at the time of taking directions, filed what he described as "Supplementary Grounds of Appeal" dated 28/10/2024. He listed 14 lengthy fresh Grounds (some incomprehensible) as follows:

    i. That the trial Magistrate erred in law and fact in being misled that the ingredient of penetration was established when it was indicated by the medical doctor that penetrative sex was caused by a sharp object, while its factual that penile penetration is of a blunt object.

    ii. That the learned trial Magistrate erred in law and fact when he failed to consider that the Appellant was examined medically and cleared of the doubts he was involved in the incident. The Court should discharge him on that account.

    iii. That, the trial Magistrate erred in matters of law and fact by not considering my testimony despite providing an alibi defence confirming that the time when the offence was allegedly committed I was not around the crime scene.

    iv. That, the trial Magistrate erred in matters of law and fact by not ensuring the prosecution supplied all the relevant documents it intended to use to advance its case which violated my right to a fair trial under Article 50 (2) (j) of COK. In this instant the P3 Form was never supplied. Reliance is placed on the case of George Ngothe Juma & Others v A.G [2003] eKLR- it held that the prosecutor was obligated to place in Court all the evidence whether it supported its case or weakened it or it supported the defence case.

    v. That the trial Magistrate erred in matters of law and fact by imposing on me an unusually excessive and harsh sentence of a Life Imprisonment which denied me to a benefit of a less severe sentence under Article 50(2)(p) of the COK. This Court has a good ground to interfere with the discretion of imposing a manifestly excessive sentence of life imprisonment. Reliance is placed on Shadrack Kipkoech Kogo v Rep in Eldoret Criminal Appeal No 253 of 2013

    vi. That the trial Magistrate erred in law and fact by imposing on me a very harsh and an excessive sentence by using the wrong principles on my sentencing which is evidenced by the imposed life sentence where the sentence was not fair, disproportionate and non-application of mitigation on record.

    vii. That the learned trial Magistrate erred in law and fact by convicting and sentencing Appellant not based on sufficient evidence to prove its case beyond reasonable doubt according to Section 107 of the *Evidence Act*.

    viii. That the Honourable Magistrate erred in law and fact as he did not make a finding that a broken hymen per se is not proof of defilement in this case. The state of the hymen was not indicated that it was freshly broken, there was no blood observed, medical doctor was

not stating with certainty that the same is an indication of possible penetration making the conviction to be unsafe

ix. 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 case that would link the Appellant to the alleged offence its only suspicion that he was their neighbour and investigation at the scene of crime nothing was recovered, suspicion can never be a basis of conviction and sentencing.

x. That the learned trial Magistrate erred in law and fact by convicting and sentencing him on the basis of hearsay evidence which is not admissible or applicable to his case making his conviction to be unsafe an example of this are the mothers of the complainants who was only restating what she was told by "Ryan Rael came and told me "were told as they were not around during the incident among other witnesses.

xi. That the learned trial Magistrate erred in law and fact in making a finding that the complainant's allegation were well corroborated while some allegation were never established such as anal penetration. Whatever she was alleging was out of what she was couched to state also she alleged in the history that this was a second time it was happening to her which was not testified on this violated Section 33 of SOA.

xii. That the trial Magistrate erred in matters of law and fact by imposing on me an excessive and harsh sentence of a Life Imprisonment which denied me to a benefit of a less severe sentence under article 50(2)(p) of the COK without going to the constitutionality of the sentence I am serving.

xiii. That the trial Magistrate erred in law and fact without making a finding that the complainant was forced to implicate the Appellant as she was hit with a cane to implicate the Appellant in this case.

xiv. That the Appellant is praying that when his appeal on sentence become successful to a determinate period the Court may order a period of 6 months be reduced from the new sentence pursuant to Section 333 (2) of the criminal procedure code.

14. On its part, the Respondent, through Prosecution Counsel Calvin Kirui, filed the Submissions dated 25/11/2024.

**Respondent's Submissions**

15. In respect to "identification", the Appellant submitted that the complainant is 7 years old hence old enough to have a clear recollection of the incident, the complainant's mother (PW2) also testified that she has known the Appellant for over 7 years, and that the Appellant used to be fed in the complainant's house and so he was not a stranger. According to Counsel therefore, "identification" was by recognition.

16. Regarding "penetration", he cited the definition given in Section 2 of the *Sexual Offences Act* and then cited Section 124 of the *Evidence Act* and submitted that the complainant's testimony was corroborated by the medical evidence.

17. On the issue of "age", he submitted that the evidence thereof was supported by the Certificate of Birth and also that the Appellant did not challenge the same and no contrary evidence was produced. He also urged that the Appellant's defence was simply a mere denial of the incident which was, in any case, untrustworthy and that therefore, the prosecution discharged its burden to prove all the ingredients

of the offence beyond any reasonable doubt. According to Counsel, the prosecution witnesses and evidence adduced were credible and consistent.

18. Regarding "sentencing", he urged that the same is a discretion of the trial Court and being so, it must be done judiciously. He cited the case of Shadrack Kipkoech Kogo v R, Eldoret Criminal Appeal No. 253 of 2003. He also pointed out that before the Appellant was sentenced, he was granted a chance to mitigate and he prayed for a lenient sentence, the prosecution made sentencing submissions and highlighted the prevalence of the offence, the victim's age was an aggravating factor, the prosecution prayed for a deterrence sentence and that the trial Court considered both submissions and meted out an appropriate sentence.

**Determination**

19. 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 v Republic [1972] E.A 32).

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

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

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

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

**i. Whether the charge of defilement was proved beyond reasonable doubt**

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

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

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

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

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

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

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

26. In this case, the complainant testified that she was 7 years old, testimony that was also reiterated by her mother (PW2) and also the Investigating Officer (PW4) who then produced the complainant's Certificate of Birth. The Certificate indicates that the complainant was born on 4/05/2016. The incident having been alleged to have occurred on 2/02/2024, it means that the complainant was about 7 years and 8 months old as at that date.

27. In the circumstances, I cannot find any reason to fault the trial Magistrate's finding that the "age" of the complainant as being a minor was proved. This ground, too, therefore fails.

28. On the issue of "penetration", Section 2(1) of the *Sexual Offences Act* defines the term as:

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

29. In regard thereto, the Court of Appeal, in the case of Mark Oiruri Mose v R (2013 eKLR, guided as follows:

> "..... In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence if 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."

30. In this case, the complainant testified that the Appellant was well known to her and described how the Appellant led and lured the 3 children, including the complainant, into his house then tricked the other 2 to leave the house by asking them to go out to and tend to goats and how he then ensured that retained the complainant behind alone. She described how she tried to run after the other children but the Appellant tripped her with his left leg and she feel down, whereupon the Appellant undressed her and also removed his own trousers and then, in her own words, "did to her bad manners". She vividly described how the Appellant applied some oil on his penis and also on the complainant's vagina before penetrating her by inserting his penis into her private parts and that she felt pain. She elaborately described the Appellant's penis and her own vagina as the places that people use for urinating. This is the same account that her mother (PW2) and also the Investigating Officer (PW3) both confirmed that the complainant told them. It is therefore clear that besides being very elaborate with details, the complainant was also consistent

31. Regarding the complainant's use of the term "he did to me bad manners", the Court of Appeal, in the case of Muganga Chilejo Saha v Republic [2017] eKLR, acknowledged that this is an acceptable description of defilement especially where penetration is established. In accepting that in Kenya, the

society has adopted such terms as a euphemism to mean phrases generally used by children, and even adults, to describe sexual acts, the Court of Appeal stated as follows:

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

32. In a charge of defilement, the complainant's testimony requires to be corroborated. Further, the complainant, having given unsworn statement, again, her testimony needed to be corroborated. In that regard, I cite the case of Oloo v R [2009] KLR, where the Court of Appeal stated the following:

> " In our view, corroboration of evidence of a child of tender years is only necessary where such a child gives child unsworn evidence. (See Johnson Muiruri v Republic [1983] KLR) .....
>
> .... in law evidence of a child given on oath after voire dire examination requires no corroboration in law but the Court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration of it". (Emphasis mine)

33. Regarding corroboration, PW1, the Clinical Officer testified that he examined the complainant and found that the cause of her injury was a sharp penetration which he classified as grievous harm, her hymen was torn, labia majora and labia minora were inflamed, vestibule was lacerated, clitoris was inflamed and he established that there was vaginal-penile penetration. It was also his testimony that the results of the laboratory investigation (urinalysis) noted the existence of a-few epithelial cells and pus cells and that although there was no spermatozoa, there were moderate pus cells. He also testified that the vaginal hose was open with was the usual membrane torn.

34. In view of the foregoing, it is evident that the medical evidence confirmed "penetration" and that indeed the complainant was defiled. There was therefore sufficient corroboration.

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

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable

to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him."

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

36. From the foregoing, it is clear that the proviso to Section 124 of the *Evidence Act* allows the Court to convict on the sole evidence of a minor-victim of a sexual offence if it is satisfied that the minor is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on that fact. In this case however, Section 124 is not even relevant since the complainant's testimony on penetration was sufficiently corroborated by the medical evidence on record.

37. In view thereof, I cannot also find any reason to fault the trial Magistrate's finding that "penetration" was proven. This ground, too, therefore fails.

38. On the issue of "identification", the Court of Appeal, in the case of Cleophas Wamunga v Republic [1989] eKLR cautioned as follows:

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

39. In this case, the Appellant did not deny the complainant's (PW1) and her mother's (PW2) testimonies that the Appellant was well known to both of them prior to the incident as he lives in the same neighbourhood as they. In fact, there is testimony that the Appellant used to go to the complainant's home for food as it appears that he was living alone.

40. The complainant's mother (PW2) testified that she had known the Appellant for 7 years and that he had been chased away by his son. This may explain why the Appellant was said to have been living alone. In fact, the complainant testified that the Appellant was also known as "Right", an allegation which the Appellant did not deny nor cross-examine on. As also aforesaid, the complainant's mother (PW2) and the investigating officer (PW4) both testified that the complainant specifically gave the name of the Appellant as the perpetrator. In the P3 From, the Appellant is also expressly mentioned as the name of the person that the complainant reported as having defiled her. I also note that the incident is alleged to have occurred during the day at around 3.00 pm thus the possibility of mistaken identity is very minimal. No theory has been advanced why all the witnesses would gang up to frame the Appellant.

41. I therefore find the above to be a case of "recognition" rather than identification of a stranger. Such evidence of "recognition" is clearly more reliable and believable in "identification". In respect thereto, in the case of Reuben Tabu Anjononi & 2 Others v Republic [1980] eKLR, the Court of Appeal guided as follows:

> "..... This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).

> We consider that in the present case the recognition of the Appellants by Wanyoni and Joice to whom they were previously well known personally, the first Appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the Appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyoni reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three Appellants to the police as the robbers who had robbed him.
>
> We are satisfied that there was no mistake as to the identity of the three Appellants and they were properly found guilty of the offence with which they were charged in count 1."

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

43. I also agree that the Appellant's defence was simply a mere denial of the incident which did not tackle the specific accusations raised against him. His purported alibi defence was also obviously false as he was placed at the scene of crime by the evidence on record. During his cross-examination, he never also alluded to any alibi defence. Raising the same for the first time when giving his unsworn statement was therefore clearly an afterthought. According to the Investigating Officer (PW4), the Appellant, when he was arrested blamed the devil for his committing of the offence. He did not cross-examine PW4 on this statement.

44. The primary testimony against the Appellant in this case was that given by the complainant (PW1) who, although she gave unsworn testimony, I find that such testimony was sufficiently corroborated by the testimony of the rest of the witnesses and also by documentary evidence. No justification has therefore been demonstrated to warrant this appellate Court's interference with the verdict of conviction arrived at by the trial Court.

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

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

> " It is now settled law, following several authorities by this Court and the high Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial Court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial Court on sentence unless, anyone of the matters already stated is shown to exist".

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

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

47. Section 8(2) above therefore prescribes only one mandatory sentence – life imprisonment. In view thereof, it is clear that the sentence imposed by the trial Court, although the maximum stipulated, was within the statute. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory or minimum sentences should be discouraged and that Courts should retain the discretion to depart from such mandatory sentences, where justified. This was stated in the Supreme Court case of Francis Karioko Muruatetu and Another v Republic [2017] eKLR.

48. On the strength of the Murautetu decision and reasoning, the High Court and even the Court of Appeal routinely reviewed mandatory minimum/maximum sentences imposed on convicts for different offences other than murder, including for sexual offences and robbery with violence. Examples are the Court of Appeal decisions in the case of Dismas Wafula Kilwake v Republic [2018] eKLR, the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), and also the case of Joshua Gichuki Mwangi v Republic [2022] eKLR. I may also mention the oft-cited decision of Odunga J (as he then was), in the case of Maingi & 5 others *v Director of Public Prosecutions & another (Petition E017 of 2021*) [2022] KEHC 13118 (KLR).

49. However, by the subsequent clarification made by the same Supreme Court in its subsequent directions given in Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Supreme Court made it clear that Muruatetu only applied to murder cases, and not to any other type of case, not even sexual offences.

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

51. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will therefore be acting ultra vires were it to set aside the sentence of life imprisonment on the sole basis that the same, being a mandatory sentence stipulated by statute, is unconstitutional. As clearly spelt out by the Supreme Court, Muruatetu is not applicable to cases under the *Sexual Offences Act*.

52. I am however also aware that, in respect to the sentence of life imprisonment, there is emerging jurisprudence questioning its constitutionality. In regard thereto, I cite the Court of Appeal case of Manyeso *v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR) 7 July 2023) (Judgment), which dealt with a case of a 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, the Court of Appeal substituted the same with a prison sentence of 40 years. However, on further appeal, the Supreme Court faulted the Court of Appeal for usurping the role of the Legislature by purporting to declare the life sentence imprisonment as unconstitutional. It then swiftly reinstated the sentence. This was in Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment) [2025] KESC 16 (KLR) in which the Supreme Court held as follows:

> "70. Our findings hereinabove effectively lead us to the conclusion that the Judgement of the Court of Appeal delivered on 7th July 2023 is one for setting aside. The Court of Appeal did not have jurisdiction to interfere with the sentence imposed by the trial court and affirmed by the first appellate court.

Consequently, the life imprisonment sentence remains lawful and in line with Section 8 of the *Sexual Offences Act*."

53. My above observations do not however mean that this Court is barred from determining the issue whether the sentence was manifestly excessive or harsh, which I now hereby do.

54. 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.

55. 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. ....."

56. Similarly, in the case of Daniel Kipkosgei Letting v 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. ....."

57. Applying the above principles to the facts of this case, I consider that the crime of defilement is treated as a serious offence under Kenyan law and society at large, and is always severely punished. It is also relevant to note that the victim in this case was a 7 years child of tender age, such a vulnerable human being who needed protection from all, including the Appellant. Sadly, the trust of the minor was shattered by the Appellant's heinous and beastly act. Instead of stepping in to act as her protector, the Appellant turned out to be the very savage monster he was supposed to protect the child against. I do not have to be a psychologist to discern that the child will suffer lifelong trauma resulting from the act and will forever remember that her chastity was robbed from her by a person who was supposed to protect her. The complainant's family must also be silently suffering from serious trauma caused by

the act. Taking all these factors into account, it cannot be denied that the Appellant merits a stiff and deterrent sentence.

58. Having said so however, I also find the existence of some mitigating factors. For instance, the Appellant is recorded to have been a 1st offender. 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 life but by giving him a chance to come out of jail alive at some point in his life. In the circumstances, I, will impose a determinate custodial sentence.

**Final orders**

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

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

    ii. On sentence, I hereby set aside the sentence of life imprisonment imposed by the trial Court and substitute it with a sentence of 40 years imprisonment.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 9TH DAY OF MAY 2025**

**.....**

**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of:

Appellant Present

Ms. Mwangi for the State

Court Assistant: Edwin Lotieng