Koech v Republic (Criminal Appeal 3 of 2024)
[2025] KEHC 9586 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9586 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL 3 OF 2024

JRA WANANDA, J

JULY 4, 2025

BETWEEN

COLLINS KIPLAGAT KOECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment delivered on 9/09/2022 by Hon. C. Ateya-SRM, and the sentence passed on 16/02/2022 by Hon. V. Karanja-PM, in Iten Senior Principal Magistrates' Criminal Court Case (SO) No. E027 of 2019)

JUDGMENT

1. The Appellant was initially charged in Iten Senior Principal Magistrates' Court Criminal Case (S.O.) No. 29 of 2017, with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. He pleaded guilty, was convicted and, on 19/09/2017, was sentenced to serve 20 years' imprisonment.

2. The Appellant then Appealed against the decision, in Eldoret High Court Criminal Appeal No. 95 of 2017. By the Judgement delivered in the Appeal on 25/07/2019 by O. Sewe J, the manner in which the plea process was conducted and the plea of guilty entered, were found to have been flawed. For this reason, conviction and sentence were quashed and the case referred back to the trial Court for retrial.

3. In compliance with the order for re-trial, the Appellant was then charged afresh in Iten Senior Principal Magistrates' Court Criminal Case (S.O.) No. E027 of 2019 with the same offence. The particulars were that on the 3rd to 12th day of September 2017 at an unknown time within Elgeyo Marakwet County, he intentionally and unlawfully caused his penis to penetrate the vagina of FJK, a girl aged 15 years. He was also charged with the alternative offence of committing an indecent act with the same child, contrary to Section 11(1) of the same Act.

4. The Appellant pleaded not guilty and the case then proceeded to full trial in which the prosecution called 5 witnesses. At the close of the Prosecution's case, the Court found the Appellant had a case to answer and placed him on his defence. In his defence, he gave an unsworn statement and called no other witness. By the Judgement delivered on 16/02/2022, he was convicted of the main charge and once again, sentenced to serve 20 years imprisonment.

5. Again, dissatisfied with the decision, the Appellant filed this present Appeal, in person, by way of the undated Petition of Appeal filed on 31/05/2023. He raised the following 5 grounds, reproduced verbatim:

    i. That, the trial Court erred both in laws and facts by convicting and sentencing the Appellant yet failed to observe that the three key elements of defilement more so the age of the victims was not proved beyond any reasonable doubt.

    ii. That the trial Magistrate erred when it relied on the prosecution case that was not proven to the required standard of law but shifted the burden of proof to the accused.

    iii. That the investigation to this instant case was shambolic and shoddy as it was held by the high Court initially resulting to the re-trial, thus this resentence, without warning itself on the consequences of the same irregularities.

    iv. That the trial Magistrate erred in law and facts by convicting the Appellant herein without appreciating that the medical findings were not conclusive and supportive for the charge of defilement.

    v. That, the Appellants' alibi - defence evidence was dismissed by the trial Court without any cogent cause.

6. Conduct of the Appeal on behalf of the Appellant was however subsequently taken over by Messrs Isaboke Bw'orina & Co. Advocates.

Prosecution evidence at the trial Court

7. PW1 was the minor-complainant, FK. She stated that she was born on 19/11/2001 and referred to her Certificate of Birth. She stated that at the time of the incident, in 2017, she was 15 years old and in Class 7, that on 02/09/2017 she was at home and her mother, GC, had sent her sister, N, to go and buy vegetables but since N delayed to return, her mother instructed her to follow N, which she did, that on the way, she met N who asked her to exchange clothes with her, which they did, and gave her the vegetables to take home. She stated that she then returned home with the vegetables and left N on the road, that upon arriving home, she told her mother that N was afraid to return home as she was afraid that she would be beaten, that her mother told her to go back for N, which was at around 7.00 pm. She stated that she then went to look for N but did not find her and instead, went to her Aunt L's place, a walking distance away, as she, too, was afraid of her mother.

8. She stated that her aunt (her mothers' sister) was one FC whom she told what had happened and that her mother later came over and instructed her to return home which she did. She testified that on the way, she met the Appellant (whom she referred to as "Collins") whom she also knew as "Kipla" who used to buy oranges from them and used to ride a bodaboda (motor-cycle taxi). She stated that the Appellant convinced her to go to his home although she had never been there before, that it was dark as it was now around 10.00 pm. She stated that she went with him, she slept on the sofa while the Appellant slept on the bed, that the house is at a place known as Lilly's, the Appellant lived alone and it was a roomed house. She testified that she stayed there for 2 weeks during which they had sex once as

they slept on the bed, although she could not recall the date it happened and that she had never had sex before. She testified further that the following day after they had sex, she left and went to the home of one NC, neighbour, that she left the Appellant's house because the Appellant wanted to have sex all the time. She stated that when still at NC's house, the police came on a certain day after she had come from the shop and asked for the Appellant, that the police then tricked the Appellant to come over because allegedly there was a sick child and when he came, they (herself and the Appellant) were both arrested and taken to the Iten Police Station and taken to Iten Hospital. She referred to her treatment notes and the P3 form. She then reiterated that they only had sex once and before that, the Appellant had seduced her but she had not agreed.

9. PW2 was FJK who stated that on 2nd to 3rd September 2017 at around 7.00 pm, her sister GC(PW3) phoned and asked her whether the minor (PW3's daughter) had gone to her place and she told her mother that she would confirm once she reaches home. She stated that she did not find the minor when she reached home and phoned the mother back and told her so, that at around 12.28 am, someone knocked on her door and when she opened, she found that it was the minor. She stated that she then phoned the mother and informed her about the minor's appearance but that the minor then went outside and disappeared again, that her efforts to trace the minor did not bear fruit and she again phoned the mother and told her so. She stated that in the morning (3/09/2017), the mother phoned and informed her that the minor never returned home, that in view of this, on 4/09/2017, she reported the matter to the village elder who referred her to the Chief. She testified further that on 13/09/2017, as she was going to the shop at around 6.00 pm, she spotted the minor with 2 other children whom she identified as the children of the said NC, that they bought charcoal and then entered through a certain gate, hat she followed them and noted the house they went into, she then reported this fact to the village elder who referred them to the Chief whom she went and reported to, and who told her to keep surveying, which she did, and then shortly, "Kipla" (Appellant) arrived on a motor cycle. She testified that a police motor vehicle arrived and when they (herself included) went into the house, they found the Appellant and the minor seated down, and that NC told them that "Kipla" was the minor's husband. PW2 stated that she had never seen the Appellant before.

10. PW3 was GC, the minor's mother who stated that the minor was born on 19/10/2001. She stated that on 02/09/2017 at around 7.00 pm, the minor left home and the mother did not know where she went, that she then phoned her sister (PW2) about it and who upon reaching her home, called back and told her that the minor was not there as well, that however, at around 12.30 am, the sister phoned and told her that the minor had shown up but again, at 12.35 am, the sister called and told her that the minor had again left and she could not trace her. She stated that in the morning, she again communicated with her sister who told here that she had reported the matter to the village elder and Chief, that on 13/09/2017, her sister phoned and told her that she had spotted the minor and she (PW3) told her to look for the Chief, at 8.00 pm, she received a phone-call from the Chief who told her that he had found the minor at Lillies with her boyfriend, and told her to go to the police station in the morning, which she did, and recorded her statement and the minor was taken to the hospital by police officers. She stated that it was the first time that the minor had left home and that it was the first time that she had met the Appellant.

11. PW4 was Wilson Talam, a clinical officer at Iten County Referral Hospital. He testified on behalf of one Chemjor who had conducted the examination on the minor, and whom he he stated that he had worked with and was familiar with his signature. He then referred to the P3 Form for the minor whom, he stated was, according the Form, 15 years old in 2017 and who was alleged to have been defiled by a person known to her between 2/09/2017 and 13/09/2017. He stated that the minor's external genitalia was normal and her hymen was broken, her cervix was hyperemic, there was blood in her underwear, no spermatozoa was seen, and moderate pus cells were seen in her urine. He stated that, according to

the Report, there was evidence of penetrative sexual intercourse due to the raptured hymen and urinary tract infection. He then produced the P3 form. He also referred to and produced the P3 Form for the Appellant who was stated to have been 20 years old at the time and then read out the findings made in the P3 Form, which basically returned a normal verdict save that he, too, had a urinary tract infection for which he was treated.

12. PW5 was Corporal Margaret Bitok, the Investigating Officer in the matter, and who stated that she was previously stationed at the Iten Police Station. She testified that on 13/09/2017 at 7.00 pm, the Appellant was arrested for a case of defilement, and that on 14/09/2017, she called the witnesses and recorded their Statements. She stated further that she escorted the minor to Iten County Referral Hospital where she was examined and the P3 Form filled. She also stated that the minor was 15 years old class 7 student and produced the minor's Certificate of Birth indicating the date of birth as 19/10/2001. She then identified the Appellant seated in Court and stated that she never knew him previously.

13. After close of the Prosecution case, as aforesaid, the trial Court found the Appellant to have a case to answer and placed him on his defence.

Defence evidence before the trial Court

14. The Appellant testified as DW1 and gave unsworn testimony. He stated that while at Iten, he received a phone-call asking him to go to Lillies as there was a sick child to be taken to hospital, which he did, but when he arrived at the gate, he was arrested and taken to the lady who was in Court and who stated that "it was him", which he did not understand. He stated that he was then taken to the police station, then to hospital, and later to Court.

15. A date was then set for Judgment but the Appellant, although he was out on bond, failed to attend Court on the date of reading of the Judgement and a warrant of arrest was issued, and his surety was summoned. The Judgment was however still read in his absence on 9/09/2022. The Appellant however later showed up, about 6 months later, with the surety. The Judgment was read to hm and after the trial Court heard his mitigation, sentenced him, as aforesaid, to serve 20 years imprisonment.

Hearing of the Appeal

16. The Appeal was then canvassed by way of written Submissions. The Appellant's Advocates filed the Submissions dated 06/02/2025 while Prosecution Counsel Mr. Calvin Kirui filed the Submissions dated 31/10/2024.

Appellant's Submissions

17. Counsel urged that fundamental questions arises when one goes through the proceedings with a tooth-comb, namely, whether the trial that was conducted was fair to the Appellant, whether the Appellant really understood the nature of the charges that he was facing, whether the Appellant was availed Witness Statements to enable him prepare for the re-trial, in light of the initial trial having been set aside, and whether the failure by the State to provide the Appellant with witness Statements and other documents prejudiced him. He reproduced the typed proceedings for the taking of plea and cited the locus classicus case of Adan v Republic (1973) EA 445. He submitted that the Appellant is a rural-genteel Keiyo boy whose academic background was never inquired by the trial Court, that one can conclude that his plea of not guilty was due to the advice he got, probably from either his other inmates or remandees in custody. According to him, the trial that the Appellant underwent was not fair to him considering his background, and the failure by the trial Court to carry out its duty as enunciated in the Adan case.

18. He submitted that it is not in dispute that the Prosecution led very cogent and coherent evidence against the Appellant upon which the trial Court established, was beyond reasonable doubt. He however submitted that a fundamental question still remains unanswered; whether the Appellant was alive to the nature of the charge and the consequences thereof. He submitted that it is a fundamental constitutional requirement that for an accused person to have a fair trial, he must be availed Witness Statements to make him aware of the case he is facing and to enable him prepare to confront it, that from the proceedings, there is no evidence on whether the trial Court conducted a pre-trial conference for the Prosecution to either supply the Appellant with Witness statements and other documents, or confirmation by the Appellant, that the Statements had been delivered to him. He stated that a cursory look at the proceedings makes one wonder why the Appellant never asked one single question to the witnesses. He cited Article 50(2) of *the Constitution* and urged that the lack of timeous disclosure and/or supply of Statements had the effect of disabling the Appellant from conducting an effective cross-examination. Regarding sentence, he submitted that the Appellant was 20 years old at the time of the offence and therefore, if the sentence is not re-considered, he will come out of prison after his prime and active years have been spent. He reiterated that the Appellant did not get a fair trial and this Court should remit back the case for retrial, that although it may be the second time, it will neither prejudice the complainant nor the Prosecution. In conclusion, he wondered; what is the importance of having a very well written and liberal Constitution if the rights enshrined therein and guaranteed are not protected by the Courts?

Respondents' Submissions

19. Prosecution Counsel Mr. Kirui, on his part, submitted that the case was proved beyond reasonable doubt. He recited the ingredients of the offence of defilement as set out in Section 8(1) and (3) of the *Sexual Offences Act* and also in the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013 as "age of the complainant, proof of penetration and positive identification of the assailant." On "identification", he cited the case of Watuku *v Republic (Criminal Appeal 08 of 2020)* [2022] KEHC 4 (KLR) and urged that in this case, identification was by way of recognition. He pointed out that PW1 testified that she knew the Appellant as "Kipla" as he used to buy oranges from them, and that the Appellant was a boda boda rider. He also cited the case of Mungania *& 2 others v Republic & 2 others (Criminal Appeal 21 of 2020* & E003 & E068 of 2021 (Consolidated)) [2022] KEHC 167 KLR. He urged further that PW1 knew the Appellant prior to the incident and she stayed with him in his house for 2 weeks during which the Appellant defiled her. According to him therefore, the identification was free from any error, and was proved beyond any reasonable doubt.

20. On "penetration", he cited the definition set out under Section 2 of the Act and stated that the complainant testified that the Appellant convinced her to go to his house and stayed therein for 2 weeks, during which they had sex once. On whether that evidence requires "corroboration", he cited Section 124 of the *Evidence Act*, and urged that the evidence of the complainant on the fact of her being penetrated was corroborated by that of the clinical officer (PW4) who stated that upon examining the complainant, he noted that her hymen was broken, cervix was hyperemic, there was blood in her underwear and the lab results shows that she had moderate pus cells, which is an indication of an infection, and that it was concluded that there was penetrative sexual intercourse. On the issue of "age", he urged that the Investigating Officer (PW5) produced the complainant's Certificate of Birth which indicated that the complainant was born on 19/10/2001. He submitted that the incident having happened between 3rd and 12th September 2017, it means that the complainant was 15 years old at the time of the incident. He cited the case of Moses Mutahi Mugo v Republic [2022] eKLR.

Determination

21. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See Okeno vs. Republic [1972] E.A 32)

22. This is an interesting Appeal in that the Appellant's Counsel has no qualms with the evidence adduced and the conviction founded upon it, but is only faulting the manner in which the trial was conducted, which in his view, denied the Appellant a fair trial. In fact, in his own words, he submitted that in this Appeal "it is neither doubt or question as to the quantity of witnesses that were called by the prosecution and the quality of the testimonies they tendered" and that "it is not in dispute that the Prosecution led very cogent and coherent evidence against the Appellant that the trial Court established was beyond reasonable doubt".

23. Although in the Petition of Appeal filed by the Appellant in person, he had raised grounds that were basically in respect to the issue of whether the case against him was proved beyond reasonable doubt, the conduct of the Appeal was later taken over by Counsel, who in his Submissions, did not urge that line of Appeal and, instead, solely dealt entirely with the separate issue of the manner in which the trial was conducted, which in his opinion, was flawed. The presumption is therefore, that the limb of the Appeal based on the ground of absence of "proof beyond reasonable doubt" had been abandoned. Prosecution Counsel Mr. Kirui seems to have missed this turn-around in Appellant's of Counsel's Submissions as he entirely still dwelt on the issue of "proof beyond reasonable doubt".

24. A perusal of the Appellant's Submissions therefore reveals the issues remaining for determination to be the following

    i. Whether the proceedings, as conducted, amounted to a violation of the Appellant's right to a fair trial.

    ii. Whether the sentence of 20 years imprisonment was merited.

25. In answering the first issue, I may state that although Counsel has criticized the trial Magistrate for failing to ensure, at the stage of plea-taking, that the Appellant's rights were observed, this ground was urged entirely in a vacuum as it does not anywhere appear in the Grounds of Appeal. Had Counsel wished to change his line of Appeal, the law required him to have first sought leave to amend the Petition of Appeal, which he never did.

26. Further, and more fundamentally, Counsel did not specifically identify the irregularity that informs his complaint on violation of the Appellant's right to fair trial. He has simply reproduced the entire plea-taking portion of the proceedings and left it at that. He has simply criticized the process in a general manner leaving the Court in the dark. Insofar as Counsel has not pointed out his specific point of grievance in respect to the plea-taking process, I am unable to decipher the exact nature of the flaw he refers to.

27. What I gather Counsel seeks is for this Court to peruse the proceedings, generally, and form the opinion that the trial was not conducted in a manner that ensured fairness to the Appellant. Counsel submitted that the Appellant is a rural-genteel Keiyo boy whose academic background was never inquired by the trial Court, and that one can conclude that his plea of not guilty was due to advice he got, probably from either other inmates or remandees in custody. According to him, the trial was not fair to the Appellant considering his background. In his assessment, a fundamental question still remains unanswered; namely, whether the Appellant was alive to the nature of the charge and the

attendant consequences thereof. I therefore understand Counsel to be calling upon this Court to determine whether the Appellant really understood the nature of the charges that he was facing.

28. In answering the above question, I agree that the Appellant was unrepresented. However, the charge he was facing, not being for a capital offence, did not automatically qualify him for legal representation at the State's expense. Under such circumstances, as correctly observed by Counsel for the Appellant, the trial Court is under an even higher duty to ensure that the trial is conducted in a manner that ensures the accused person's right to a fair trial under Article 50 of *the Constitution* is fully observed.

29. I have carefully gone through the proceedings. What I note, and agree, is that the Appellant did not conduct any serious cross-examination on the Prosecution witnesses. Not being legally trained and being unrepresented, this is not anything so much out of the ordinary and it happens quite often in such circumstances. In this case however, it is curious that out of the 5 Prosecution witnesses, the Appellant did not at all ask a single question to 3 of them. Even for the 2 witnesses that he asked one or two questions, the same were quite insignificant. While this may be a matter of concern, this fact alone cannot base a judicial conclusion that the Appellant did not understand the charge. There are many reasons why an accused person would not cross-examine witnesses. While it could yes, be, out of failure to comprehend the proceedings, or to understand the charges, it may as well also be as a result of sheer acceptance of defeat (where, for instance, the evidence is too overwhelming to be controverted), or simply indifference or lack of empathy, or even an arrogant display of non-remorse, or even just defiance against submitting to authority. Psychologists will give even more reasons. It might even be a tactical move not to incriminate oneself, particularly where the witness has said something that sufficiently absolves the accused person of blame, and the accused deems that cross-examining the witness may give the witness an opportunity to clarify answers, and which clarification may be to the detriment of the accused. Unless there is therefore further evidence of failure to understand the nature of charges by a witness, mere failure to ask questions in cross-examination, cannot solely, by itself support the assumption that it was as a result failure to understand the charges.

30. In this case, although Counsel argues that a consideration of the proceedings, in general, demonstrates that the Appellant did no understand the charges, he has not stated what more the trial Court should have done which it did not. This was not a 1-day plea of guilty trial, but rather, a long-drawn case in which the Appellant pleaded not guilty and was taken through a full trial. The plea was taken on 31/07/2019 and the trial closed on 5/05/2022, more than 3 years later, during which period the Appellant was mostly out on bond. Is Counsel seriously arguing that during all this time, the Appellant still did not understand the charges? Even when he was leaving home to attend Court for 3 years, he still did not understand the charges? Even when he elected to give unsworn testimony after close of the Prosecution case and being found to have a case to answer? Even when he told the Court that he would be calling one witness in his defence? Even wheh he conducted his own defence? Even when in mitigation he stated that he was sorry? Even when he absconded Court in May 2022 after a date for Judgment was set and was only dragged back by his surety in February 2022 after a warrant of arrest was issued? I cannot agree.

31. I also consider that, as aforesaid, the Appellant had initially been charged with the same offence in a different criminal case on 15/09/2017, upon which he pleaded guilty and was sentenced to serve 20 years imprisonment. He then filed an Appeal, namely, Eldoret High Court Criminal Appeal No. 95 of 2017 in which, by the Judgment dated 25/07/2019, the conviction and sentence was quashed after the plea of guilty was found not to have been unequivocal, and the case remitted back to the lower Court for retrial. With this history of long litigation, and also noting that the Appellant had already served more than 2 years in prison courtesy of the initial conviction, can it still be seriously argued that he still did not understand the charges? I do not think so.

32. The other issue raised by Counsel in respect to the issue of fair trial is quite speculatory, namely, that "probably" the Appellant "may not" have been supplied with copies of Witness Statements. Granted, the record does not disclose whether the Appellant was supplied with Statements. It however also equally means there is no record that the Appellant was not supplied with the Statements. However, weighing the matter in totality, and considering the history and chronology that I have set out above, I am not persuaded that the Appellant was not supplied with the Witness Statements, the absence of such record notwithstanding. From his long dalliance with the Courts and with other inmates and prisoners since 2017 in respect to this same charge, I refuse to accept that he did not know of his right to be supplied with the Statements. He would have definitely raised the alarm if at all he had not been so supplied. The current claim that he "may" not have been supplied with Statements reeks of an afterthought. No wonder it does not appear anywhere in the Grounds of Appeal presented. This ground of Appeal therefore fails.

33. Regarding sentence, the applicable principles in re-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".

34. Section 8(3) of the *Sexual Offences Act* under which the conviction of the Appellant is founded, provides as follows:

> " 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."

35. In view of the above, it is clear that the sentence imposed by the trial Court, although the minimum, was within the law. This observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh, which I now hereby do.

36. The Supreme Court, in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR), guided that, in 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.

37. 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. ....."

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

> " ..... we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ....."

39. Applying the above principles, it is not in dispute that the Appellant was given the opportunity to mitigate, which he did. The crime of defilement is also treated as a serious offence under Kenyan law and society and for this reason, it is always severely punished. The Appellant preyed on a young class 7 primary school pupil and took advantage of her naivety to quench his sexual urges. He kept her in his house for a whole 2 weeks knowing very well that this was a primary school pupil and also knowing that the family was frantically searching for her all over. He could have very easily impregnated her and, at that young age, made her a mother, and he could have therefore even shattered her pursuance of education. This is totally unacceptable. Even if the complainant seemingly agreed to the sexual act, due to her age, the law considers her as lacking the capacity to give consent for her participation to the sexual act. I also consider that, while out on bond, the Appellant absconded Court the moment a date for Judgment was fixed, and was only produced 6 months later, by the surety.

40. Nevertheless, I find the existence of some "mitigating factors" which prompt me to deem it necessary to give the Appellant the opportunity to reform while in prison and thereafter to be released to achieve social re-adaptation. I believe that after a reasonable prison term, the Appellant will have suffered sufficient retribution for his actions and will be ready for rehabilitation into the society. He was also a 1st offender and was only himself about 20 years old at the time of the offence. Currently, he should be about 27 years, still relatively young, and at a most productive age. Although the offence he was convicted of merits his being put away for a long time, I believe that retribution will be best achieved, not by incarcerating him for an unreasonably long period of time, but by giving him a chance to come out of jail at some point while still productive his life. The trial Magistrate also did not also state why she thought it necessary to impose the statutory minimum sentence. For these mitigating reasons, I find the sentence of 20 years imprisonment to have been considerably excessive.

Final Order

41. In the end, I make the following Orders:

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

ii. The sentence of 20 years imprisonment imposed by the trial Court is however set aside and substituted with a sentence of 15 years imprisonment.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF JULY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

The Appellant (present virtually from Eldoret Main Prison)

Ms. Mwangi for the State

C/A: Brian Kimathi