



**Cherono v Republic (Criminal Appeal E003 of 2022)
[2024] KEHC 1191 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E003 OF 2022
RB NGETICH, J
FEBRUARY 8, 2024**

BETWEEN

HARON CHERONO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgement of Honourable P.C.Biwott- Senior Principal Magistrate which was delivered by Honourable Wanjala J. - Chief Magistrate on 11/1/2022 at Kabarnet in Kabarnet C.M.C Criminal Case No. E1248 of 2021)

JUDGMENT

Background.

1. The appellant Haron Cherono was charged of the offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. Particulars of the charge are that on the 24th July, 2021 at around 0100Hrs in Baringo central Sub- County unlawfully killed M.J. a minor aged 10 years.
2. The appellant denied the offence and the prosecution called 10 witnesses to establish its case against the appellant. By judgment delivered on 10th January, 2022, the trial court found the accused guilty, convicted and sentenced him to serve life imprisonment.
3. The appellant being aggrieved by the judgment, conviction and sentence of the trial court filed this appeal on 24th January, 2022 setting out the following grounds of appeal:
 - i. The Honourable SPM erred in law and in fact while basing the conviction on a substantially defective trial in that, the Appellant was not called upon to plead to the amended charge on 29th September, 2021.



- ii. The Honourable SPM erred in law and in fact when he convicted the Appellant while relying on hearsay evidence.
 - iii. The Honourable SPM erred in law and in fact when he convicted the Appellant while relying on contradictory evidence.
 - iv. The Honourable CM erred in fact when she meted a manifestly harsh and maximum sentence upon the appellant without considering his mitigation and the fact that he is a first offender.
 - v. The Honourable SPM erred in law and in fact when he convicted the Appellant while relying on evidence which were not proved beyond any reasonable doubt as required in criminal law.
 - vi. The Honourable SPM erred in law and in fact when he allowed the wife of the Appellant to testify against the Appellant in a charge of manslaughter which was contrary to the provisions of the *evidence Act*.
 - vii. The Honourable SPM erred in law and in fact when he failed to analyze all the evidence presented as required under section 169 of the Criminal Procedure Code.
 - viii. The Honourable SPM erred in law and in fact when he convicted the Appellant without considering his Alibi defence as well as the shoddy investigations done by the investigations officer.
4. On the 24th February, 2023 through the firm of Miyienda & Company Advocates, the appellant filed a supplementary grounds of appeal raising the following further grounds of appeal:-
- i. The learned trial magistrate erred in law and fact by entertaining a charge of manslaughter against the appellant without evidence in support.
 - ii. The learned trial magistrate erred in law and fact by convicting and sentencing the appellant without establishing the nexus between the alleged unlawful killing of the deceased and the alleged defilement of the deceased minor.
 - iii. The learned trial magistrate erred in law and fact by convicting the accused by admitting the statement of a minor (deceased) which statement was not put to test, cross-examination or scrutiny and whose authenticity was not established.
 - iv. The learned trial magistrate erred in law and fact by failing to consider defence evidence which was very credible.
 - v. The learned trial magistrate erred in law and fact by meting an excessive sentence against the appellant which is not commensurate to the evidence and circumstance of the case and without any direct evidence linking the appellant with the death of the deceased.
 - vi. The learned trial magistrate erred in law and fact by failing to find and hold that the evidence presented against the appellant was simply fabricated.
5. The appellant prays that appeal be allowed, conviction quashed, sentence set aside and the appellant be set at liberty forthwith.

Submissions

6. The Appellant filed submissions dated 13th October, 2023 and argues that the learned trial magistrate erred in law and fact by entertaining a charge of Manslaughter contrary to Section 202 as read with 205 of the Penal Code against the appellant without evidence in support.



7. Counsel further submit that PW1, (Rodah Kiptui), PW2 (Rodah Kendagor) and wife of the accused/appellant, PW3 (Dr. Wangare Wambugu), PW4 (Linda Kandie Kendagor), PW5 (Benjamin Kendagor), PW6 (Chebii Hosea Kipchumba), PW7 (Josephine Makoma), PW8 (Silvan Chepkonga Kendagor), PW9 (Irene Chepkwony), PW10 (No. 51599 S. Sgt. Hamisi Mdoe) all talked about alleged defilement of the deceased minor Michelle Jematia Chelugui but none of them gave evidence linking the appellant to the death of the said deceased minor.
8. Counsel submit that PW1 (Rodah Kiptui) says at page 13 line 10 of the record of appeal that the deceased told her that Harun defiled her and gave her 10/=. That In the statement of the minor Michelle Jematia Chelugui allegedly recorded on 19th May, 2021 by police, at pages 94- 96 of the record, she does not talk of defilement and Kshs. 10. Further at page 14 of the record, line 14, PW1 said when cross-examined, she said "Rashes on her (Michelle) chest was attributed to Sharon Mutai. She squeezed her".
9. And argue that this suggests that some of the injuries sustained by the deceased were caused by other people and evidence of PW1 does not agree with what is allegedly written in the deceased's statement at pages 94 - 96 of the record; and submit that evidence of PW1 is fabricated.
10. That manslaughter must be proved by evidence beyond reasonable doubt. The on this ground, the prosecution have not proved that the appellant indeed defiled the deceased and not any other persons. That the evidence points out that the deceased had a history of sexual intercourse which suggests that she could have been defiled by other people over a period of time.
11. He further submits that the evidence of the Doctor (PW3) is clear where she told court that there are many causes of renal dysfunction and this therefore means that the death of the deceased would have been as a result of these other causes. PW3 says that the renal dysfunction in the case of the deceased herein was due to sexual infection and from the report from Baringo County Hospital, dated 11th August, 2021 on the accused confirmed that he was found not to have been infected and if there was any defilement, it was not by the appellant and if death was due to sexual infection, then the appellant is absolved as he was tested and not found to have been infected.
12. Counsel further submit that the learned Honourable trial magistrate erred in law and fact by convicting and sentencing the appellant without establishing the nexus between the alleged unlawful killing of the deceased and the alleged defilement of the minor. The Appellant submits that the prosecution did not discharge the duty of proving that the accused/appellant actually defiled the minor. That they failed to prove the following ingredients of the offence of manslaughter as espoused in Section 202 of the Penal Code;
 - i) The prosecution must prove an intentional act (not omission);
 - ii) That the intentional act is unlawful;
 - iii) That it is an act which all sober and reasonable people would inevitably realize must subject the victim to at least some risk of harm.
13. The Appellant submit that all the witnesses who testified for the prosecution talked of the deceased having been defiled but the trial court did not receive any evidence to prove that the accused person indeed caused the death of the deceased; that the prosecution did not prove that the accused committed an unlawful act intentionally and that the act caused or subjected the victim to a risk of harm.
14. Further that the evidence of PW3 (Doctor) indicated that the deceased died as a result of renal dysfunction from infection after sexual assault (page 30, lines 4 - 5 of the record). and the doctor again



- testified that the 'healed bruises in genitalia `was' several months old (page 30, lines 11 - 12). That the victim had prior history and discharge summary notes; that the prosecution did not lead evidence to court to account for 'prior history' and if it related to defilement or some other ailment.
15. Further that the Doctor (PW3) said that there are other causes of renal dysfunction, e.g. acute volume loss, bleeding, etc depending on patient's history. That this suggests that the doctor was not sure of the nature of the infection which caused the death of the deceased.
 16. The Appellants submits that the charge sheet states that on 24th July, 2021 at around 1.00 hrs. in Baringo Central Sub-County within Baringo County unlawfully killed Michelle Chematia a minor aged 10 years and submit that no evidence was led by the prosecution to prove that the appellant killed the deceased on 24th July, 2021. That the Doctor (PW3) produced the post mortem on 3rd August, 2021 barely 11 days after the death of the deceased minor. The doctor's findings state that the healed bruises in genitalia was several months old and that the victim had a prior history and a discharge summary. That therefore, if the appellant is alleged to have killed the deceased 11 days prior to the post mortem done on 3rd August 2021, how could the bruises be months old? That the prosecution did not unravel this discrepancy and did not prove to court that the appellant had any hand in bruises which were months old. Further that no witness told the court that he saw the appellant kill the deceased on 24th July, 2021. That the charge sheet does not point to a particular place where the death is alleged to have been committed. They submit that the charge sheet is ambiguous. That even if they were to consider the evidence relating to defilement referred to by all the witnesses, none of the witnesses say they saw the accused/appellant defile the minor on 24th July, 2021 which defilement led to the death of the deceased.
 17. The Appellant submits that PW4, a clinical officer who examined the minor and filled the P3 form said that the vagina - externally was normal. That the evidence of PW2 the wife of the appellant told court that the deceased never told her at any one time that she had been defiled by the appellant and PW2 was even charged in Kabarnet SPM.CCR. Case No. E1016 of 2021 for negligence over the minor but the case was never concluded. That PW2 said people stated suspecting the accused and he had to run away for his safety as the locals could not know what was happening.
 18. Counsel submit that the appellant sought to introduce additional evidence through application dated 24th February, 2023 but was disallowed and it is on record that there was defilement of the deceased and PW1's sons were covertly named in the application and for that reason pw1 asked the complainant to lie that the appellant is the one who defiled her so that she could exonerate her sons, Kangogo Kigen and Allan Chepkor who are known to have defiled the deceased and this evidence cannot be ignored because it forms part of the court record and posed a question as to where is the nexus between manslaughter and defilement going by the evidence on record and submit that the benefit of doubt be granted to the appellant.
 19. Further that the statement of minor "M.J." deceased was admitted without being put to test by cross examination or scrutiny and whose authenticity was not established. That the statement of Michelle Jematia Chelugui was admitted in evidence as P. Exhibit 6. That the statement is said to have been recorded on 19th May, 2021.
 20. Counsel submits that PW2 denied that the accused defiled the deceased while PW1 insists he defiled her because she knew what she had told the deceased to say. That she (PW1) started with the deceased from school because she knew very well that something was amiss with the deceased because at the back of her mind, she knew that her sons were the ones who severally defiled the deceased and villagers knew as much and that this is why the mob at the station was furious with her. That PW1 was the one behind the recording of the statement because she admitted going to hospital and police station with the deceased and her intention was to cover her sons who were the defilers of the deceased minor.



21. On argument that defence was not considered, the appellant argue that the trial court did not consider the fact that on 24th July, 2021 when it is said the deceased died, the appellant was at Mogotio. He denied having run away from home and submit that people were furious and wanted to kill him and he went to report the matter at Kabartonjo police station. That even though it was found that the deceased died of sexual infection, he was tested and found not to have infection.
22. The appellant further submit that DW2 testified that he was a village elder in the area but never received any report that the deceased Michelle Jematia Chelugui had been defiled and he confirmed that indeed on the day the girl ran away, people became furious and that is why the appellant ran away because he was being threatened; that there was bad blood between PW1 and PW2 which justify evidence implicating the accused/appellant; and the court did not consider the fact that PW2 did not have good relationship with her husband the accused and hence the reason for giving false evidence against him. That DW5 one Isaiah Cheron pointed out that when the deceased resurfaced from her hiding place, people talked to her and she did not say that accused had defiled her and if the trial court had considered all these facts, probably he would have come to different conclusion that the accused did not kill the deceased. That the evidence of alibi is important here because the accused was at Mogotio on 24th July, 2021.
23. That no single witness told court he saw the accused/appellant defile the deceased and PW1 Rodah Kiptui took the deceased to the hospital after she resurfaced from her hiding place and later to police station and a statement was recorded from the deceased in the presence of PW1 who ensured the deceased recorded a statement implicating the accused/appellant.
24. The Appellants proceeds to submit that medical evidence given by PW3 is not conclusive. That the doctors say causes of death was renal dysfunction due to infection after sexual assault and the same doctor says that the victim had a history of sexual assault. And submit that the doctor did not find out what infection it was. That with this kind of evidence where death is not proved as against the accused/appellant and defilement is also shown to have had a history meaning that it was there for many days and this history was not linked to the accused/appellant and PW1 having personally taken the deceased to police station personally to record a statement from the deceased on 19th May, 2021 and given that she had a bad relationship with the accused and PW2 and many other reasons shown hereinabove, the appellant submit that the case against the accused/appellant was far from being proved beyond reasonable doubt. Further that the sentence meted is excessive and unjustified and that the evidence does not support the sentence.

Respondent's Submissions

25. The Respondent submits that death of the deceased in this case was not in dispute. The prosecution called PW3 Dr. Wangare Wambugu who gave evidence and produced a post-mortem form as P.Exhibit-1. That post mortem report was done on the 3rd of August, 2021. That the deceased's name was Michelle Jematia, time and date of death was indicated as 24th of July, 2021 and the cause was of death was as a result of Renal Dysfunction probably due to infection arising in a deceased who was known to have been sexually assaulted.
26. The state counsel submits that the victim herein having been 10 years old at the time of death, sexual assault that led to her death was unlawful and the prosecution proved that indeed the victim herein died and her death was unlawfully caused.
27. On whether the death was caused by the actions of the appellant, the Respondent argue that it was already established during the trial that the death of the deceased was as a result of sexual assault; that evidence of PW3 confirmed that the deceased had been sexually assaulted and the sexual assault seemed



- to be something continuous since the deceased had healed scars on her genitalia which were several months old. The Respondents submits that the conclusion of the cause of death according to her evidence on page 30 of the record of appeal showed the cause of death to be renal dysfunction as a result of infection after sexual assault.
28. That the question that arises was whether the appellant herein committed the acts of defilement leading to the deceased's death. That on page 27 of the record of appeal, PW2 gave evidence that when the deceased was interrogated, she, PW2, was seated 5 meters way, she heard the deceased state, "baba alinifanyia tabia mbaya."
 29. Further that PW2 testified that she had earlier seen the appellant herein trying to touch the deceased in the garden but the deceased refused to be touched by the appellant.
 30. PW7 said on receiving the deceased at Sunshine Children's home on the 19th of May 2021, she was informed that the deceased was a victim of defilement. She interrogated the deceased who informed her that the appellant had been defiling her since 2019 when she joined standard one and the appellant had threatened to kill the deceased if she spoke out about him. She said the deceased had trouble walking and had to use diapers; and on the 23rd of July, 2021 the deceased asked PW7 why the appellant defiled her and not his daughter then slept and never woke up.
 31. That PW9, the children officer also confirmed that the deceased told her that that the appellant defiled her. The investigating officer gave evidence and produced the statement, he recorded from the deceased minor and signed by the deceased minor.
 32. It is the prosecution's argument that from evidence adduced, it is apparent that prior to the minor's death, she wanted her story heard and told her story to people around her that the appellant defiled her and on his defence, the appellant merely denied the allegations and stated that his wife pw2 lied to the court.
 33. The Respondent submit that even if we were to disregard the evidence of the appellant's wife, the deceased minor informed the children officer (PW9), the area assistant chief (PW6), Matron at the Children's home (PW7) and (PW10) The investigating officer that the appellant herein defiled her multiple times. They are independent witnesses who had no relationship with either the appellant or the deceased and their evidence was not rebutted.
 34. The respondent urged the court to find that the prosecution proved beyond reasonable doubt that the appellant defiled the deceased minor aged 10 years old inflicting injuries that led to her death.
 35. On defence of alibi, the respondent submit that the trial court considered as seen on page 70 of the record of appeal.
 36. In respect to sentence, the Respondent submits that section 8 (2) of the [sexual offences act](#) provides the mandatory minimum sentence of life imprisonment and submit that the appellant owed a duty of care to the deceased minor in his home but instead chose to prey upon her. That the victim suffered huge emotional and psychological trauma. She was only 10 years old at the time. She ran away from home to avoid further defilement by the appellant. She sustained renal dysfunction as a result of the defilement and consequently died and cited the case in Bernard Kimani Gacheru vs. Republic [20021 eKLR where the court of Appeal stated as follows:-

“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 exist."

37. The Respondent submits that the trial court exercised its discretion judiciously by taking into account all the factors in question and further submit that they are alive to the court of appeal at Malindi's landmark decision in Criminal Appeal No. 12 of 2021 which termed life imprisonment as unconstitutional. That in that same decision, the court substituted the sentence with that of 40 years imprisonment, by virtue of the young age of the victim and the ramifications of the actions of the appellant on the child's future.
38. That similarly in this case the victim herein was a child of tender age who died by virtue of the actions of the appellant. The Respondent urges this honorable court, if it is inclined to substitute the sentence, to commit the appellant herein to serve a sentence of 40 years imprisonment.
39. In submitting on whether plea was taken after amendment of the charge sheet and consequences thereof, the Respondent admits that it is true that upon amendment of the charge the appellant herein did not take plea however they submit that the said omission did not deny the appellant herein his right to fair trial. That this omission is capable of being cured by Section 382 of the Criminal Procedure Code. Section 382 of the Criminal Procedure Code provides:-

"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."

40. That from the proceedings of the trial court, it is apparent that the appellant knew the offence he was charged with, therefore, failure to take plea on the amended charge did not in any way affect his defence on the evidence tendered. Further, they submit that the only thing amended was the age of the deceased minor, from 11 years to 10 years.
41. That the appellant was also represented during the trial and his counsel did not raise the issue during the course of the hearing and submit that the appellant herein was given an opportunity to recall any witnesses but elected not to recall any witnesses. The Respondent places reliance in the case of Benjamin Kariuki Wairimu v Republic [2013] eKLR where the court of appeal stated:-

"In the circumstances of the instant appeal, we find like in the above, that the lack of opportunity to plead did not occasion a failure of justice and any irregularities arising therefrom were curable under Section 382 of the CPC. This ground of appeal, therefore, fails"

42. In submitting on whether the testimony of the appellant's wife was in line with the provisions of the Evidence Act, the Respondent argues that this issue was extensively dealt with by the trial court and a ruling delivered on the 15th of September, 2021. That they fully associate with the ruling of the trial court which is on page 24 of the record of appeal. That it is imperative to state there was no appeal filed against the ruling of the trial court and urge this honorable court to find that the trial court in allowing the wife of the appellant to testify, applied the right principles.



43. On whether the deceased's statement was rightly admitted into evidence, they submit that the deceased's statement was produced as prosecution exhibit no 6 by the investigating officer who recorded the statement. At the time of production again the appellant was represented by counsel. No objection was raised.
44. The state counsel submit that counsel for the appellant is on a fishing expedition aimed at trying to misdirect this honorable court on the facts of the case and the statement made by the deceased is admissible in evidence under Section 33 (a) of the *Evidence Act*, Cap. 80 and cited the case of Republic v Albanas Kioi Maweo [2019] eKLR where the high court at Nyeri was faced with a similar scenario and stated as follows:-
- “ Counsel also argued that the statement should be ignored because it was made in the absence of the accused and was not subjected to cross-examination. For obvious reasons the deceased cannot be cross-examined on a dying declaration but it was always open to the accused to cross-examine the officer who took and recorded the statement on any of its aspects save for matters that were not within his knowledge. That in the present case, the accused's counsel had the opportunity to cross-examine and indeed did cross-examine the officer who recorded the deceased's dying statement. The officer's evidence after the rigorous cross-examination was not shaken and, at any rate, his answers did not create, in my mind, any doubt that the statement was a true representation of the deceased's utterances before he died”
45. And submit that the deceased's statement was rightfully admitted into evidence and urged this court to find so and find the appellant's appeal unmeritorious and proceed to dismiss the same.

Analysis and Determination

46. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of Okeno Vs Republic [1972] EA 32 where it was stated as follows:-
- “ The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [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 findings and conclusions; 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 v. Sunday Post, [1958] EA 424.)”
47. In view of the above, I have perused and considered the record of appeal and submissions filed herein and wish to consider the following: -
1. Whether ingredients of charge of Manslaughter were proved beyond reasonable doubt.
 2. Whether sentence imposed was harsh and excessive.



(i) Ingredients that establish the charge of manslaughter.

48. In Republic –vs- George Onyango & Another [2016] eKLR, Makau J held the court stated as follows: -

“In a case of manslaughter the prosecution is supposed to prove the primary ingredients of the offence namely:-

- i. The death of the deceased and the cause of the death of the deceased.
- ii. That the accused committed the unlawful act which caused the death of the deceased.”

49. In the present appeal, the prosecution did establish that the deceased, M.J girl aged 10 years met her death as a result of renal dysfunction resulting from sexual assault. The post mortem report was produced by Dr. Wangari who testified as PW3. There is therefore no doubt that the child herein died

(ii) Whether the unlawful act which caused the death of the deceased.”

50. Evidence adduced show that before the deceased died, the minor talked to people other than her mother informing them that the appellant defiled her. Defilement was confirmed by the clinical officer PW5 who filled P3 Form on 19th May, 2021; the history by the doctor is that the child had been defiled severally by a person known to her latest being on 10th May, 2021. That the minor was treated on 18th May, 2021 at Baringo County Referral Hospital. On examining the child, she found that she had pain on the lower abdomen on touching, mid-chest, both thighs were painful and the injuries had taken some days. On further examination, she found that her hymen was absent, cervical opener was open, there was dark brownish discharge from the vagina and urine had numerous blood cells thick in nature. He concluded that there was actual penetration to her vagina. He produced the P3 Form and the treatment documents in court as exhibits.

51. The investigations officer produced the minor’s written statement which she had recorded before her demise on 24th July,2021 as exhibit before court. The matron who took care of the minor at the children’s home confirmed that the minor informed her that the accused/appellant defiled her. The children’s officer too corroborated the evidence that the minor implicated the accused for defiling her. The doctor who produced the postmortem report concluded that the renal dysfunction which the minor succumbed to was as a result of defilement. In my view there was prove beyond reasonable doubt that the child aged 10 years was defiled and serious injuries leading to her death inflicted on her and the offence of manslaughter was therefore proved beyond reasonable doubt.

52. On admission of statement of the deceased minor "M.J." without being subjected to test, the respondent argue that the deceased was not available for cross examination The statement was produced as Prosecution Exhibit No. 6 by the investigating officer who recorded the statement and at the time of production again the appellant was represented by counsel and no objection was raised and was granted opportunity to cross examine the officer who recorded statement. In my view, the appellant did not suffer any prejudice as a result of admission of the statement as it was tested by cross examination of the officer who recorded. Further to the above, she talked to other independent witness about the defilement and they corroborated the contents of her statement in court and were also cross examined.



53. I agree with the decision in the case Albanas Kioi Maweo [2019] eKLR where the court stated as follows:-

“ Counsel also argued that the statement should be ignored because it was made in the absence of the accused and was not subjected to cross-examination. For obvious reasons the deceased cannot be cross-examined on a dying declaration but it was always open to the accused to cross-examine the officer who took and recorded the statement on any of its aspects save for matters that were not within his knowledge. That in the present case, the accused's counsel had the opportunity to cross-examine and indeed did cross-examine the officer who recorded the deceased's dying statement. The officer's evidence after the rigorous cross-examination was not shaken and, at any rate, his answers did not create, in my mind, any doubt that the statement was a true representation of the deceased's utterances before he died”.

54. In view of the above, the trial court did not err in admitting the deceased minor's statement under the provisions of Section 33 (a) of the Evidence Act Cap 80 laws of Kenya. The Appellants too never raised this issue during the hearing at the trial court.

55. On defence of alibi, record show that the trial court considered accused's defence but found the prosecution evidence outweighed the accused defence hence rejected it contrary to the accused's allegations.

(ii) Whether sentence imposed was harsh and excessive

56. The principles guiding interference with sentencing by the appellate Court were properly set out in *S vs. Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

“ A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”

57. Similarly, in *Mokela vs. The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

“ It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

58. 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.”



59. Under Section 205 of the Penal Code prescribe mandatory life imprisonment. The trial court imposed the mandatory life imprisonment on the appellant. However, the Court of Appeal in Malindi Criminal Appeal No.12 of 2021 Between Julius Kitsao Manyeso vs Republic declared the sentence of life imprisonment to be unconstitutional, Justice Nyamweya, Lesiit and Odunga stated that it is unfair for a person to be behind bars until they die.
60. In view of the above, I take note of the circumstances surrounding this case, the relationship between the victim and the appellant, the age of the deceased being - 10 years. The suffering she went through before she died and I am of the view that 30 years imprisonment will be appropriate for the appellant.

Final Orders: -

61.

1. Appeal on conviction is hereby dismissed.
2. Life imprisonment is hereby set aside.
3. Appellant to serve 30 years imprisonment.
4. Sentence to run from the date appellant was arrested.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 8TH DAY OF FEBRUARY 2024.

RACHEL NGETICH

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

-Ms Ratemo for State

-Appellant present.

-Elvis/Momanyi – Court Assistants.

