



**EK alias E v Republic (Criminal Appeal E031 of 2023)
[2024] KEHC 1065 (KLR) (6 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1065 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E031 OF 2023
HM NYAGA, J
FEBRUARY 6, 2024**

BETWEEN

EK ALIAS E APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence by Hon. M.W. Kamau, Resident Magistrate in Molo Chief Magistrate’s Court SO Case No. E 031 of 2023 delivered on the 29th August, 2023)

The Children Act, 2022 does not adequately address the complexity of a situation of an accused charged as a child but found guilty as an adult.

In the instant appeal, the appellant faulted the trial court for, among other matters, treating him as an adult for purposes of sentencing thus offending the provisions of article 53 of the Constitution as well as section 221 as read with section 239 of the Children Act, 2022. The main issue for determination was whether there was a lacuna in sections 221 and 239 of the Children Act No 19 of 2022 for failing to provide protection to children above 14 years who were charged with an offence as children but found guilty after they turned 18 years. The court found that the law had taken care of the children in conflict with the law up to the age of fourteen. They were to be treated as children even if they attained the age of majority in the course of the trial. The same protection was not provided to children above 14 years of age. The law ought to have provided some form of protection as well, even if not identical to the one under section 221 of the Children Act. There was no discernible reason to call them children and then deal with them like adults.

Reported by Moses Rotich

Criminal Law - sexual offences - offence of defilement - ingredients necessary to prove the offence of defilement - whether the court could convict an accused person on the sole evidence of a victim - Sexual Offences Act, cap 63A, sections 2(1) and 8 (1); Evidence Act, cap 80, section 124.

Statutes - interpretation of statutes - interpretation of section 221 as read with section 239 of the Children Act No 29 of 2022 - whether there was a lacuna in section 221 and 239 of the Children Act, No 29 of 2022 for failing



to provide protection to accused persons who were charged with an offence as children but found guilty as adults - Children Act No 29 of 2022, sections 221 and 239; Children Act, No 8 of 2001(repealed), sections 190.

Brief facts

The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, cap 63A, Laws of Kenya (the Sexual Offences Act). He also faced an alternative charge of committing indecent act with a child contrary to section 11(1) of the Sexual Offences Act. He pleaded not guilty. At the close of the trial, the appellant was convicted on the main charge and sentenced to serve twenty (20) years imprisonment. Aggrieved, he lodged the instant appeal.

He faulted the trial court for, among other matters, convicting him on account of insufficient evidence and for treating him as an adult for purposes of sentencing thus offending the provisions of article 53 of the Constitution as well as section 221 as read with section 239 of the Children Act, 2022.

Issues

- i. What were the ingredients needed to prove the offence of defilement?
- ii. Whether there was a *lacuna* in sections 221 and 239 of the Children Act No 19 of 2022 for failing to provide protection to children above 14 years who were charged with an offence as children but found guilty after they turned 18 years.

Relevant provisions of the Law

Children Act, No 29 of 2022

Section 221 - Criminal liability of a child

1. *A person under the age of twelve years shall not be criminally responsible for any act or omission.*
2. *A child who commits an offence while under the age of fourteen years shall be presumed not to be capable of differentiating between right and wrong, unless the Court is satisfied on evidence to the contrary.*
3. *The provisions of this Part shall apply to a person who reaches the age of eighteen years before proceedings instituted against them pursuant to the provisions of this Act have been concluded.*

Section 239 - Methods of dealing with children in conflict with the law



1. *Where a child is tried for an offence, and the Court is satisfied as to their guilt, the Court may deal with the case in one or more of the following ways—*
 - a. *discharge the child under section 35(1) of the Penal Code (Cap. 63);*
 - b. *discharge the child on his or her entering into a recognisance, with or without sureties;*
 - c. *make a probation order against the offender under the provisions of the Probation of Offenders Act;*
 - d. *commit the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake the care of the offender;*
 - e. *if the child is between twelve years and fifteen years of age, order that the child be sent to a rehabilitation institution suitable to the child's needs and circumstances;*
 - f. *order the child to pay a fine, compensation or costs, or any or all of them, having regard to the means of the child's parents or guardian;*
 - g. *in the case of a child who has attained the age of sixteen years, deal with the child in accordance with the Borstal Institutions Act;*
 - h. *place the child under the care of a qualified counsellor or psychologist;*
 - i. *order that the child be placed in an educational institution or vocational training programme;*
 - j. *order that the child be placed in a probation hostel under the provisions of the Probation of Offenders Act;*
 - k. *make a community service order;*
 - l. *make a restorative justice order;*
 - m. *make a supervision order;*
 - n. *make any other orders of diversion provided for in this Part; or*
 - o. *deal with the child in any other lawful manner as may be provided under any written law.*
2. *A child against whom a community service order has been made may, having regard to the child's age and development, be required to perform the service without remuneration, or for the benefit of the community, under the supervision or control of an organisation or institution identified by the probation officer.*
3. *In addition, or as an alternative, to the orders prescribed in subsection (2), the Court may impose on a child such other sanctions as the Court may consider just.*
4. *Any community service performed by a child shall be for a maximum period of fifty hours, and shall be completed within a period not exceeding six months.*
5. *If a child fails to comply with any condition imposed on diversion, the Court shall make such orders as it considers fit, including an order directing that the child to be subjected to an alternative level of diversion.*
6. *The orders imposed on a child upon a finding of guilt shall be proportionate to the circumstances of the child, the nature of the offence and the public interest, and a child shall not be treated more severely than an adult would have been treated in the same circumstances.*

Held

1. The specific elements of the offence defilement arising from section 8 (1) of the Sexual Offences Act which the prosecution ought to prove beyond reasonable doubt were; age of the complainant; proof of penetration in accordance with section 2(1) of the Sexual Offences Act; and; positive identification of the assailant. The offence of defilement was rooted on those elements and ought to be proven for a conviction to issue.
2. A child was defined as a person under the age of eighteen years. Based on the evidence on record including the complainant/victim's birth certificate, it was shown that the complainant was 14 years at the time of the commission of the offence. Accordingly, the age of the victim was conclusively determined.
3. The key evidence relied by the courts in defilement cases in order to prove penetration was the complainant's own testimony, which was usually corroborated by the report presented by the medical



- officer. Although, in the instant appeal, the issue of penetration was not in dispute, a critical analysis of the evidence of the victim and the clinical officer proved the element of penetration beyond reasonable.
4. The third element of the offence was the identity of the perpetrator. There were clear guiding principles upon which the court had to analyze evidence of identification. As a rule, the best evidence of identification was that of recognition.
 5. Under section 124 of the Evidence Act, a court could convict an accused person on the sole evidence of a victim as long as the court was convinced the victim was telling the truth and recorded reasons for such belief. In the instant case, the trial magistrate opined that there was no evidence advanced by the defence to prove the victim would benefit if at all the appellant was incarcerated.
 6. Having looked at the record, the complainant was clear in her testimony as to what exactly happened. She was also steadfast during cross-examination. There was no motive in telling lies and her credibility and that of her mother were beyond doubt. Accordingly, the trial correctly held that the appellant committed the offence.
 7. The record reflected that the prosecution witnesses gave different evidence on the number of issues as pointed out by the appellant. However, the contradictions pinpointed by the appellant were not material to the main issues in question.
 8. Based on the foregoing, the trial magistrate properly directed itself in reaching the conviction. The evidence of the prosecution was watertight. The victim and her mother knew the accused well. Thus, the defence raised by the appellant regarding his name was of no probative value. Further, the appellant's insinuation that he could have been framed up because of a land dispute between his parents and those of the victim was uncorroborated and unproved.
 9. The record of appeal contained a finding by the trial magistrate that the court made an enquiry as to the age of the appellant after it returned a verdict of guilty. The appellant, as per the certificate of birth tendered in court, was born on July 5, 2005. At the time of his finding of guilty and sentencing he had just crossed the age of majority, by around six to seven weeks.
 10. Faced with the situation of an accused charged as a child but found guilty as an adult, the trial faced a dilemma on how to sentence the appellant. Section 191 of the Children Act, 2001, which provided for methods for dealing with child offenders, was repealed and replaced by section 221 of the Children Act, 2022.
 11. From the wording of section 221(2) of the Children Act, 2022, it was to be presumed that a child over the age of 14 years was capable of differentiating between right and wrong, unlike a child under that age for whom a presumption to the contrary arose. Sections 238 and 239 of the Children Act, 2022 then provided the methods of dealing with a child in conflict with the law.
 12. At the time the appellant was charged with the offence, he was still a child and at the time of the finding of guilty he had attained the age of 18 years. The enactment of the Children Act, 2022 had not adequately addressed the complexity of a situation of an accused person charged as a child but found guilty as an adult. While it was acknowledged as a milestone in further securing the rights of children, the Act failed to address the issue of treatment of a certain category of children in conflict with the law, such as the one the appellant was in. The Act, just like its predecessor, seemed to throw such children to the vagaries and uncertainty of the law.
 13. The law had taken care of the children in conflict with the law up to the age of fourteen. They were to be treated as children even if they attained the age of majority in the course of the trial. The same protection was not provided to children above 14 years of age. The question was whether they were also children deserving of some form of protection. Further, it was questionable that they were termed children and then were abandoned at the most crucial moment, just when the court was determining their fate. It was doubtful whether there was so much difference between a child who was 14 years and one who was, say, 15 years old that they would be treated so differently by the law.



14. The law ought to have provided some form of protection as well, even if not identical to the one under section 221 of the Children Act. If the Act intended them to be treated differently, it ought to have expressly stated so. There was no discernible reason to call them children and then deal with them like adults. It would easily be found that the children in that age bracket (over 14 years) had not been adequately protected, so there was an element of discrimination. There was no explanation why the *lacuna* in the law continued to exist despite several decisions from the superior court addressing the issue.
15. In the absence of the law expressly providing for former children such as the appellant, then the courts had to be guided by the existing legal provisions and the precedents of the superior courts. The ball was squarely on the legislature to come up with a proper regimen to handle those type of cases.
16. The trial court when sentencing the appellant to 20 years' imprisonment stated that in accordance with section 8 (3) of the Sexual Offences Act, that was the minimum sentence and it had no discretion.
17. From the analysis of various precedents of the superior courts, it was settled law that any provision for a mandatory minimum sentence was unconstitutional and a court dealing with such a sentence had discretion over the matter. Needless to state, that discretion ought to be exercised judiciously, taking account all the circumstances of the case, the aggravating and mitigating factors.
18. The court ought not to forget that offences of defilement were serious in nature and merited stiff sentences and there had to be a good reason to depart from the indicative sentence prescribed by law. The court would not be wrong if it found that a convicted person would deserve a sentence equivalent to the minimum sentence or more, provided that the reasons were stated. Thus, in the instant case, the trial magistrate erred when deciding that it had no discretion in the matter.
19. An appellate court ought not to lose sight of the fact that in sentencing, if the trial court exercised its discretion and such discretion was exercised judicially and not capriciously, the appellate court should be slow to interfere with any orders so issued. In the instant case, the trial court was wrong to hold that she had no discretion at all. Thus, the instant court was entitled to examine the sentence imposed and to make a determination thereon.
20. With a discretion in sentencing, the trial court ought not to have lost sight of the age of the accused when the offence was committed. The delay in the conclusion of a case, which ultimately led to his attaining the age of majority, should have been a factor to be considered in favour of, and not to the prejudice of the appellant. Therefore, it was the duty of the instant court, if it was to find that the sentence was manifestly excessive, to mete out one that it deemed appropriate in the circumstances.
21. The Sentencing Policy Guidelines required the court, in sentencing an offender, to take into account both aggravating and mitigating factors. The aggravating factors included use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender.
22. The trial court should have considered the peculiar situation of the appellant. Meting out a 20-year prison sentence to the appellant was excessive by all accounts. The appellant was not to blame for the delay in the case, so there was no reason for him to suffer such a lengthy prison term arising out a problem not of his own making. Of course those sentiments should not be taken to mean that the court could lose sight of the nature of the offence and the manner it was committed.
23. The appellant ambushed the complainant and had sex with her in a violent manner. She did not consent to it and tried to fight off the appellant, who was too strong for her. The appellant ought to answer for his indiscretion. At the same time, the victim ought to have some sense of justice being done to her. Those were the aggravating circumstances. The mitigating circumstances were the age of the appellant at the material time. In the circumstances of the case, the sentence meted by the trial court was excessive.

Appeal partly allowed.



Orders

- i. The 20 years' imprisonment was set aside and substituted with a sentence of five (5) years imprisonment.*
- ii. As the appellant was in custody throughout the trial, under section 333(2) of the Criminal Procedure Code, the five (5) year sentence was to commence from March 7, 2023, when he was first remanded into lawful custody.*

Citations

Cases

Kenya

1. *Cheruiyot, Amos Kipchirchir v Republic* Criminal Appeal 133 of 2019; [2020] KEHC 487 (KLR) - (Explained)
2. *Francis, Muchiri Joseph v Republic* Criminal Appeal 56 of 2014; [2014] KECA 199 (KLR) - (Mentioned)
3. *GOO v Republic* Criminal Appeal 37 of 2015; [2016] KEHC 800 (KLR) - (Mentioned)
4. *Injiri, Jared Koita v Republic* Criminal Appeal 93 of 2019; [2018] KECA 78 (KLR) - (Mentioned)
5. *JKK v Republic* Criminal Appeal 118 of 2011; [2013] KECA 241 (KLR) - (Explained)
6. *JKM v Republic* Criminal Appeal E006 of 2023; [2024] KEHC 11802 (KLR) - (Explained)
7. *Karani, Charles Wamukoya v Republic* Criminal Appeal 72 of 2013; - (Explained)
8. *Kilwake, Dismas Wafula v Republic* Criminal Appeal 129 of 2014; [2019] KECA 5 (KLR) - (Explained)
9. *Kimani v Republic* [1979] KECA 5 (KLR); [1979] KLR 282 - (Explained)
10. *Kimori, Simon Kipkurui v Republic* Criminal Appeal 27 of 2018; [2019] KEHC 11444 (KLR) - (Explained)
11. *Mainingi & 5 others v Director of Public Prosecutions & another* Petition E017 of 2021; [2022] KEHC 13118 (KLR) - (Explained)
12. *Manga, Arthur Mshila v Republic* Criminal Appeal 24 of 2014; [2016] KECA 691 (KLR) - (Explained)
13. *Mohamed v Republic* [2003] KEHC 937 (KLR); [2006] 2 KLR 138 - (Explained)
14. *Munene, Richard v Republic* Criminal Appeal 74 of 2016; [2018] KECA 186 (KLR) - (Explained)
15. *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2021] KESC 31 (KLR) - (Explained)
16. *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2017] KESC 2 (KLR); [2017] 2 KLR 101 - (Followed)
17. *Mwachongo, Hadson Ali v Republic* Criminal Appeal 65 of 2015; [2016] KECA 521 (KLR) - (Explained)
18. *Mwareng, Dominic Kibet v Republic* Criminal Appeal 155 of 2011; [2013] KEHC 1353 (KLR) - (Mentioned)
19. *Ngui, Fappyton Mutuku v Republic* Criminal Appeal 296 of 2010; [2012] KEHC 5491 (KLR) - (Explained)
20. *Ochieng, Christopher v Republic* Criminal Appeal 202 of 2011; [2018] KECA 59 (KLR) - (Mentioned)
21. *Omar, Sahali v Republic* Criminal Appeal 44 of 2016; [2017] KECA 357 (KLR) - (Explained)
22. *Ondeng, Erick Onyango v Republic* Criminal Appeal 5 of 2013; [2014] KECA 523 (KLR) - (Explained)
23. *Onsongo, Edwin Nyambaso v Republic* Criminal Appeal 39 of 2014; [2016] KEHC 4738 (KLR) - (Explained)
24. *Watu, Philip Nzaka v Republic* Criminal Appeal 29 of 2015; [2016] KECA 696 (KLR) - (Explained)

Uganda

Francis Omuroni v Uganda Criminal Appeal No 2 of 2000 - (Explained)

South Africa

S v Malgas 2001(2) SA 1222 SCA 1235 - (Explained)



Regional Court

Okeno v Republic [1972] EA 32 - (Mentioned)

Texts

The Judiciary of Kenya (2019), *Sentencing Policy Guidelines* Nairobi; The Judiciary of Kenya

Statutes

Kenya

1. Borstal Institutions Act (cap 92) In general - (Cited)
2. Children Act (cap 141) sections 221, 221(2); 238; 239 - (Interpreted)
3. Children Act, 2002 (Repealed) ((Act No 8 of 2001)) section 191(1) - (Interpreted)
4. Constitution of Kenya article 49, 53 - (Interpreted)
5. Criminal Procedure Code (cap 75) section 333(2) - (Interpreted)
6. Evidence Act (cap 80) sections 78, 124 - (Interpreted)
7. Sexual Offences Act (cap 63A) sections 2(1); 8(1); 8(3); 11(1) - (Interpreted)

Advocates

Mr Bore for the appellant.

Wanjiku for the state.

JUDGMENT

1. The appellant (particulars to redacted to read EK *alias* E) was charged 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. It was alleged that on March 5, 2023 at around 1230hrs in Kuresoi South Sub-County within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the vagina of HC, a child aged 14 years.
2. In the alternative, the appellant was charged with committing an indecent Act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The Particulars of this count are that on March 5, 2023 at around 1230hrs in Kuresoi South Sub-County within Nakuru County, he intentionally touched the vagina of HC a child aged fourteen (14) years.
3. The appellant pleaded not guilty and the matter was heard to conclusion. At the close of the trial, the appellant was convicted on the main charge and sentenced to serve twenty (20) years imprisonment.
4. Being dissatisfied with the said conviction and sentence, the appellant lodged an appeal based on the following grounds:
 - i. That the learned trial magistrate erred both in law and fact by convicting the appellant on account of insufficient evidence laden with glaring contradictions, gaps, inconsistencies, falsehood, uncorroborated evidence and which evidence in totality did not meet the threshold of proof reasonable doubt.
 - ii. That learned magistrate erred both in law and fact by disregarding dismissing and/or according undue weight to the appellant's defence without critically analysing the same.
 - iii. That the learned magistrate erred both in law and in fact by relying on extraneous evidence and by shifting the burden of proof to the appellant.
 - iv. That the learned magistrate erred both in law and in fact by relying on a defective, fabricating and contrived pre-sentence report filed as pre-bail report, in sentencing the appellant.



- v. That the learned magistrate erred both in law and in fact by treating the appellant as an adult for purposes of sentence thus offending the provisions of article 53 of the Constitution as well as section 221 as read with section 239 of the Children Act, 2022
 - vi. That the learned magistrate erred both in law and in fact in relying on the provisions of section 191 of the repealed Children Act, 2001 as well as the judicial authorities relating to the same repealed sections of the Children Act 2002 in sentencing the appellant
 - vii. That the learned magistrate erred in law and in fact by referring to the appellant as “accused person” and by using the words “convict” and “sentence” when dealing with the appellant who was a minor at the time of his trial.
 - viii. That the learned magistrate erred both in law and in fact by harshly and unlawfully sentencing the appellant to the minimum sentence provided for under the law, which sentence went against the weight of the evidence adduced, did not reflect the appellant’s previous record and did not capture the mitigation adduced by the applicant.
5. The prosecution opposed the appeal. The appeal was canvassed by way of written submissions.

Appellant’s Submissions

6. In regards to ground one of the appeal, the appellant submitted that the prosecution did not prove its case against him beyond reasonable doubt as the evidence of its witnesses was inconsistent and contradictory.
7. He saw a contradiction in the evidence of PW1 that the alleged torn underwear was purchased by her mother(PW2), yet PW2 told the court that the underwear was bought by PW1’s father. That she knew the appellant because her parents sold their land to his parents, but PW2 told the court that the land the appellant’s family lived on was bought from her brother. That according to the victim, the underwear was torn by the appellant, but PW2 stated that it got torn while on the line. That the victim stated that the appellant used his hands to cover her mouth so that she could not scream, but the investigation officer (PW4) told court that the appellant threatened PW1 not to make noise.
8. The appellant also saw contradictions in the evidence of PW2 when she stated that upon reaching home she found PW1 had already changed her clothes and washed her panty, yet PW3, a clinical officer, stated that on examination of PW1’s clothes, they were stained and had a small tear.
9. The appellant thus urged the court to be guided by the decision of the Court of Appeal in Ndungu Kimani v Republic [1979] KLR 282 wherein it was held that the witness upon whose evidence it is proposed to rely on should not create an impression in the mind of the court that she is not a straightforward person.
10. With respect to ground two of the appeal, the appellant submitted that the trial court dismissed his evidence that the victim’s family wanted them out of the land and had offered to them the purchase price so as to vacate notwithstanding the fact that PW1 had stated her family had sold a piece of land to his family.
11. The appellant contended that he produced his birth certificate in support of his defence of mistaken identity to prove that he was not involved as the person who allegedly defiled the victim was called E yet his name as per the birth certificate is EK.
12. The appellant also submitted that PW1 was never taken to either the chief’s office or the police station to identify him and that he was never informed of his rights under article 49 of the Constitution.



13. The appellant also faulted the prosecution for failing to call the area chief, *nyumba kumi* member one Geoffrey Barno and Mr K as these persons were involved in his initial arrest. He contended that failure to call these crucial witnesses was fatal to the prosecution's case. He relied on the case *Bukenya and others v Uganda* [1972] EA where the court held as follows: -

“The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent;

Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.”

14. The appellant also submitted that the trial court erred by allowing PW4 to produce the black skirt without the accompanying certificate in accordance with section 78 of the *Evidence Act* and by making reference to exhibits that were neither marked for identification nor formally produced in court.

15. With regard to ground No 4 of the appeal, the appellant argued that the presentence report dated September 5, 2023 is an edited version of pre-bail report filed in court on March 7, 2023 since the only difference between the two reports is the title but the entire contents are the same. He argued that the same was hurriedly prepared, is defective and non-objective.

16. Regarding ground five of the appeal, the appellant submitted that the trial court erred in treating him as an adult for purposes of sentencing despite knowing that at the time of commission of the alleged offence he was 17 years old. He posited that the relevant mens rea that the court ought to punish at the sentencing stage was the state of mind of the appellant at the time of commission of the alleged offence and not the state of his mind at the time of sentencing.

17. He argued that the trial court ought to have applied the provisions of section 221(3) of the *Children Act, 2022* and not the provisions of section 191 of the repealed *Children Act 2001* while sentencing him.

18. With respect to the last ground of appeal, the appellant submitted that the sentence meted out against him by the trial magistrate was excessive, harsh, an abuse of the court's discretion in respect of sentencing, and failed to capture the recent jurisprudence on the same.

19. The appellant in support of his submissions, cited the case of *Simon Kipkurui Kimori v Republic* [2019]eKLR which the learned Odunga. J, while reiterating that the view of the Supreme Court with regard to mandatory sentence, held as follows:

“In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact supported by the Kenya *Judiciary Sentencing Policy Guidelines* where it is appreciated that: Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for Juvenile offenders.”

20. The appellant also cited the South African case of *S v Malgas* 2001(2) SA 1222 SCA 1235 where the court stated;

“What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences that have been supposed in some of the previously decided cases and it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip



service to the legislature view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.”

21. The appellant thus prayed that the appeal be allowed, the judgement and sentence of the lower court be set aside in its entirety and consequently he be acquitted of all charges.

Respondent’s Submissions

22. On identification of the perpetrator, the state counsel submitted that under section 124 of the [Evidence Act](#), the court can safely convict an accused person based on the evidence of a single identifying witness as long as it is convinced that the witness is saying the truth.
23. The respondent relied on the case of [Mobamed v Republic](#) (2006) 2 KLR 138, where the court asserted:

“It is now settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”
24. The respondent argued that considering the time of the alleged commission of the offence and the period it took, all conditions for positive identification were present and the fact that the witness knew the appellant proved this ingredient beyond any doubt.
25. On the issue of penetration, the respondent submitted that penetration was proved by the evidence of the victim and corroborated by a Medical Officer who produced the P3 Form and PRC form.
26. The respondent citing the case of [Erick Onyango Ondeng’ v Republic](#) [2014] eKLR posited that any slightest penetration is sufficient proof of defilement.
27. Regarding the age of the complainant, the prosecution counsel submitted that the birth certificate produced showed that the victim was 14 years old at the time of the offence. In buttressing their submissions, the respondent relied on the case of [Francis Omuroni v Uganda](#), Court of Appeal Criminal Appeal No 2 of 2000 where it was held thus:

“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...”
28. The Respondent also relied on the case of [Edwin Nyambogo Onsongo v Republic](#) (2016) eKLR where the court held that the age of a person can be proved by documentary, oral or by medical evidence.
29. On sentence, the prosecution counsel submitted that the same was in accordance with the law.
30. On whether the appellant ought to have been sentenced as a minor, the respondent argued that the appellant at the time of sentencing was beyond the age of 18 years, hence the trial court was right in sentencing him as an adult as he could not have been taken to a Borstal Institution which only admits minors.
31. The respondent further argued that the trial court was right in relying on the provisions of section 191 of the repealed [Children’s Act](#) as the same is replicated in the [Children Act 2022](#).
32. The respondent contended that the appellant ought to be punished by being granted a custodial sentence that will help him reform and grow up as a responsible person.



33. In view of judicial authorities discouraging mandatory sentence, the respondent proposed that the appellant should be sentenced to 15 years' imprisonment.

Analysis and Determination

34. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned judgment.
35. As a first appellate court, 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 demeanor of the witnesses. See *Okeno v Republic* [1972] EA 32.
36. The issues that arise for determination in this appeal are:
- a. Whether the prosecution proved the ingredients of the charges to the desired threshold.
 - b. Whether there were material and irreconcilable contradictions in the prosecution case.
 - c. Whether the prosecution failed to call crucial witnesses to testify.
 - d. Whether the trial court erred in sentencing the appellant as an adult.
 - e. Whether the sentence imposed against the appellant was excessive and harsh.

Whether the prosecution proved the ingredients of the charges to the desired threshold.

37. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* which provides:

“8

- (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (3) a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

38. In the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No 72 of 2013 the court stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

39. It is now well settled law that the specific elements of the offence defilement arising from section 8(1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:
- i. Age of the complainant;
 - ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
 - iii. Positive identification of the assailant.



40. The offence of defilement is thus rooted on the above ingredients as provided for under section 8(1) of the *Sexual Offences Act* and must be proven for a conviction to issue. (See *George Opondo Olunga v Republic* [2016] eKLR.) I will look at each ingredient.

Age of the Complainant

41. The court of Appeal in *Edwin Nyambogo Onsongo v Republic* (*Supra*) stated as follows in respect of proving the age of a victim in cases of defilement:

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

42. In *Fappyton Mutuku Ngui vs Republic* [2012] eKLR where it was held:

“... That “conclusive” proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.”

43. The importance of proving age was underscored by the Court of Appeal in the case of *Hadson Ali Mwachongo v Republic* [2016] eKLR, as follows: -

“The importance of proving the age of the victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In *Alfayo Gombe Okello v Republic* Cr App 203 of 2009 (Kisumu) this court stated as follows: -In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. This must be so because dire consequences flow from proof of the offence under section 8(1)”

44. A child is defined as a person under the age of eighteen years. PW1, the victim, testified that she was born on April 9, 2009. PW4 produced the birth certificate showing that the victim was born on the said date. Based on the said birth certificate, then it was shown the complainant was 14 years at the time of the commission of the offence.

45. The appellant has not challenged the evidence adduced to prove the age of the child and therefore I find the age of the victim was conclusively determined.

Penetration

46. Section 2(1) of the *Sexual Offences Act* defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”



47. The key evidence relied by the courts in defilement cases in order to prove penetration is the complainant's own testimony, which is usually corroborated by the report presented by the medical officer. See *Dominic Kibet Mwareng v Republic* [2013] eKLR.
48. In this case since the complainant was a minor, the evidence of the Clinical Officer is key so as to corroborate such testimonies.
49. I have critically analysed the evidence of PW3, the clinical officer who testified herein. It was her testimony that the victim was taken to the hospital with a history of defilement and on examination it was established her clothes were dusty ie stained and had small tear. She said her private parts had injuries on the vaginal wall, the hymen was broken and vaginal discharge was present. She stated that P3 indicated that hymen was broken due to penetration. She produced the P3 and PRC Forms.
50. The issue of penetration is not in dispute in this appeal. Therefore, in the circumstances, it is my finding that the second element of the offence, which is penetration, was proved beyond reasonable.
51. The third element of the offence was the identity of the perpetrator. There are clear guiding principles upon which the court must analyse evidence of identification. As a rule, the best evidence of identification is that of recognition. (See *Francis Muchiri Joseph v Republic* [2014] eKLR.)
52. In the instant case, both PW1 and PW2 stated that the appellant was their neighbour. In cross-examination during his defence case, the appellant confirmed this position. It is thus clear that the appellant was a person known to the victim.
53. PW1 testified that on the material date, she had gone to fetch firewood when the appellant came and covered her mouth using his hand and tore her dress and her blue underwear. She said she was alone and that she fought with the appellant but since he was stronger, she gave up. She said the appellant threw her on the ground and touched her vagina using his penis. She said the appellant was dressed in a trouser and he opened the zip and "*akanifanyia tabia mbaya*". It was her testimony that the incident happened at 12:30 pm and she saw the appellant well.
54. The complainant also confirmed that her parents sold land to the appellant's parents. However, she was not aware of any dispute between her parents and those of the appellant.
55. PW2 testified that she knew the appellant, who was well known at home as E and that even his parents call him E. She further stated that the land the appellant lives on was sold to them by her brother. She added that her family have no land dispute with that of the appellant and they even borrow hoes from each other.
56. The appellant, in his unsworn testimony denied committing the offence. He testified that on the material date, he was at the river in [Particulars Withheld] washing clothes when the member of nyumba kumi approached him in the company of 4 men. He said that they did not inform him anything but assaulted him, then they took him to an office in Kapkoi and later, to Kuresoi Police Station. He said his parents and the victim's parents had a dispute over a land whereby the victim's family wanted them to vacate the land in issue.
57. I have subjected all the evidence adduced to careful scrutiny. I have also carefully considered the issues raised by the appellant in this appeal.
58. It is also trite law under section 124 of the *Evidence Act* that a court can convict an accused person on the sole evidence of a victim as long as the court is convinced the victim is telling the truth and records



reasons for such belief. The Court of Appeal in *Arthur Mshila Manga vs Republic*, Criminal Appeal No 24 of 2014 [2016] eKLR held that: -

“It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See *Mohamed v Republic* [2008] KLR (g&f), 1175 And *Jacob Odhiambo Omuombo v Republic* (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.”

59. In this case, the trial magistrate in her judgement opined that there was no evidence advanced by the defence to prove the victim would benefit if at all the appellant was incarcerated. I have looked at the record. The complainant was clear in her testimony as to what exactly happened. She was also steadfast during cross-examination. There was no motive in telling lies and her credibility and that of her mother were beyond doubt. I find, as the trial court did, that the appellant committed the offence.

Whether there were material and irreconcilable contradictions in the prosecution case

60. It was the appellant’s case that the learned trial magistrate erred in both law and fact by convicting the appellant on account of insufficient evidence laden with glaring contradictions, gaps, inconsistencies, falsehood, uncorroborated evidence. I have considered the appellant’s submissions in this regard.

61. Indeed, the record reflects that the prosecution witnesses gave different evidence on the number of issues as pointed out by the appellant. However, it is my opinion that the contradictions pinpointed by the appellant were not material to the main issues in question.

62. In *Philip Nzaka Watu v Republic* [2016] eKLR the court stated as follows:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

63. The Court of Appeal of Kenya in addressed itself on the issues of contradictions in the case of *Erick Onyango Ondeng’ v Republic* [2014] eKLR held;

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

64. The Court of Appeal in the case of *Richard Munene v Republic* [2018] eKLR stated as follows:

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main



issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

65. Having examined all the evidence adduced, I find that the trial magistrate properly directed herself in reaching the conviction. The evidence of the prosecution was watertight. The victim and her mother knew the accused well so the defence raised by the appellant regarding his name was of no probative value.
66. Further the appellant’s insinuation that he may have been framed up because of a land dispute between his parents and those of the victim was uncorroborated and unproved.
67. For the above reason, I opine the first ground of appeal herein is baseless and is dismissed.

Whether the prosecution failed to call crucial witnesses to testify

68. It was the appellant’s case that crucial witnesses ie Nyumba Kumi one GB and Mr K who referred the matter to Olenguruone Police Station after it had been reported at Tinnet Police Post were not availed by the prosecution. He averred that it is curious that they neither recorded their statements nor attended court. According to the appellant, the failure to call them was fatal to the prosecution’s case.
69. In the case of *Sabali Omar v Republic* [2017] eKLR the Court of Appeal held that:

“The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turns out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see *Keter v Republic* [2007] 1 EA 135).
70. In the present case, the prosecution availed PW2 who had first reported the incident to *Mzee wa nyumba kumi* who in turn reported the incident at the police station. It is also my view that these said persons were not crucial since they did not witness the incident in question. In any case, the appellant himself admits that the Mzee wa nyumba kumi in company of others, did arrest him. I find that this ground of appeal as lacking in merit.

Whether the trial court erred in sentencing the appellant as an adult

71. This is perhaps the most crucial ground adduced by the appellant. I will address it as hereunder.
72. Throughout the trial and even in her judgment, the trial magistrate referred to the appellant as “the subject”. Even in her judgment that led to a finding of guilty, she still referred to the appellant as the subject.
73. The record of appeal contains a finding by the trial magistrate that the court made an enquiry as to the age of the appellant after it returned a verdict of guilty. The appellant, as per the certificate of birth tendered in court, was born on July 5, 2005. At the time of his finding of guilty and sentencing he had just crossed the age of majority, by around six to seven weeks.
74. Faced with the situation of an accused charged as a child but found guilty as an adult, the court had to make a determination on how to deal with the matter at hand.



75. The learned magistrate turned to the authority of *JKK v Republic* (2013) eKLR a matter dealt with under the *Children Act*, the predecessor to the *Children Act* 2022. In that case, the Court of Appeal held as follows:

“The dilemma we face in this appeal was the ascertainment of the age of the appellant. Going by the remarks by the Judge, he was about 17 years when he was first arraigned in court in March, 2009, it is now four years later, which means he is now over the age of 18 years, therefore, he is not suitable to be subjected to any of the sentences provided for under the *Children Act*. The purposes of the sentences provided for under the *Children Act* are meant to correct and rehabilitate a young offender, ie any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence.”

76. The court also relied on the decision in *Amos Kipchirchir Cheruiyot v Republic* [2020] eKLR where the court agonised over a similar situation as the present one. Justice T Matheka held as follows;

“It is an anxious moment finding the means to deal with these tricky situations the moment a child offender turns eighteen (18) years while still in the criminal justice system, or commits a serious offence. We simply push them onto the adult criminal justice system yet at the time of commission of the offence they were children as per the *Children Act*. We have children who commit serious offences, murder, defilement, robbery with violence. Obviously, they require a different treatment regimen than those who are delinquent or commit minor offences. The serious offenders require to be held in separate facilities from the delinquents or petty offenders again for obvious reasons. When they turn into adults while still being tried for offences they committed as children, it is my understanding that the Act does not have clear legal provisions on what to do with them without jeopardizing the fact that they committed the offence while below the age of eighteen (18) years. This is so evident in that there is no infrastructure in place to deal with the said offenders.

This issue has been dealt with by other Judges.

For instance in the judgment of the learned judge in *SCN v Republic* [2018] eKLR who dealt with a similar case where the appellant was seventeen (17) when he committed the offence and was sentenced to imprisonment for life. In that case just as this the trial court did not address the age of the appellant. The learned judge made an analysis of this court’s and the Court of Appeal’s approach to these situations. He reduced the appellant’s sentence to ten (10) years’ imprisonment.

In *Daniel Langat Kiprotich v State* [2018] eKLR where the Judge noted the lacuna in the law and the need for reform. The learned judge interpreted the provisions of section 191(l) as giving the court the discretion to deal with a child in any other lawful manner other than the manner provided at (a) to (k). This, he was of the view meant that a court could convict



and sentence a child offender to a term of imprisonment, in an adult facility now that the child had committed a serious offence and could not be held in a children facility. He stated:

“Since the statutory scheme provides that such a child cannot be sent to prison and since the law further provides that such a child can only be sent to a borstal institution for no more than three years, the options are limited to trial courts even where on analysis and evidence such a court might be persuaded that the almost-adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or her errors.

A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where the offence committed was a particularly vicious or serious one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn.

While these dilemmas call for a reform to our juvenile justice system to provide a more nuanced statutory scheme, I am persuaded, in following the Court of Appeal in the *Dennis Cheruiyot* case and the *JKK* case, that when faced with the situation such as the one we have in this case, the solution lies in section 191(1)(l) of the Children’s Act: to deal with the offender in question in any other lawful manner.

77. A similar issue arose in the case of *JKM v Republic* [2017] eKLR where the court held as follows: -

“On sentence, the appellant submitted that he was a minor aged below 14 years at the time of commission of the offence; that he should not have been subjected to the sentence prescribed for adults under the *Sexual Offences Act*. A scrutiny of the record reveals that the age of the appellant was ascertained during the trial through an age assessment report dated July 14, 2010 which was filed in court. The report confirms that as of July 14, 2010, the appellant was 14 years old. According to the charge sheet, the offence was committed on July 9, 2010 about three days earlier. There is therefore no doubt that at the time the appellant committed the offence, he was a child within the meaning of section 2 of the *Children’s Act* which defines a child as any person below the age of 18 years.

It is also evident from the record that though the appellant’s trial commenced on July 20, 2011, it was concluded on December 1, 2014 when the appellant was convicted and sentenced. This was over three years since the trial began. The appellant had by then attained the age of majority. He was a few months past his eighteenth birthday.

The question that this court must now grapple with is whether an offender who finds himself in the situation that faced the appellant should have been sentenced as a child or as an adult. My take is that the appellant ought to have been sentenced as a child and not as an adult. I say so because the appellant committed the offence as a child not as an adult and consequently, he should have been punished as a child.....

Having found that the appellant ought to have been sentenced as a child, the law that should have guided the trial court to inform its decision in sentencing the appellant is section 8(7) of the *Sexual Offences Act*. This provision provides that a person below the age of eighteen



years who is convicted of a sexual offence under the Act should be sentenced in accordance with the *Borstal Institutions Act* and the *Children's Act*.

78. As can be seen, the dilemma that the trial court faced, and this court faces, is not a novel one. The only distinction is that the decisions cited above were made under the *Children Act, 2001*, which has since been repealed by the *Children Act 2022*. The former section 191 of the repealed *Act* was replaced by section 221 of the latter *Act*. It provides as follows:

Criminal liability of a child.

- (1) A person under the age of twelve years shall not be criminally responsible for any act or omission.
 - (2) A child who commits an offence while under the age of fourteen years shall be presumed not to be capable of differentiating between right and wrong, unless the court is satisfied on evidence to the contrary.
 - (3) The provisions of this part shall apply to a person who reaches the age eighteen years before proceedings instituted against them pursuant to the provisions of this Act have been concluded.
79. From the wording of section 221(2), it is to be presumed that a child over the age of 14 is capable of differentiating between right and wrong, unlike a child under that age for whom a presumption to the contrary arises.
80. Sections 238 and 239 then provide the methods of dealing with a child in conflict with the law. They state as follows;

238. Restriction on punishment.

- (1) No court shall order the imprisonment of a child.
- (2) Notwithstanding the nature of any offence punishable by death, no court shall impose the death penalty on a child on a finding of guilty for such an offence.
- (3) A Children's Court shall not make any order to send a child under the age of twelve years to a rehabilitation school.
- (4) The performance of community service under an order of the court shall be in accordance with the *Community Service Orders Act, 1998*.

239. Methods of dealing with children in conflict with the law.

- (1) Where a child is tried for an offence, and the court is satisfied as to their guilt, the court may deal with the case in one or more of the following ways—
 - (a) discharge the child under section 35(1) of the Penal Code;
 - (b) discharge the child on his or her entering into a recognisance, with or without sureties;
 - (c) make a probation order against the offender under the provisions of the *Probation of Offenders Act*;
 - (d) commit the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake the care of the offender;



- (e) if the child is between twelve years and fifteen years of age, order that the child be sent to a rehabilitation institution suitable to the child's needs and circumstances;
- (f) order the child to pay a fine, compensation or costs, or any or all of them, having regard to the means of the child's parents or guardian;
- (g) in the case of a child who has attained the age of sixteen years, deal with the child in accordance with the *Borstal Institutions Act*;
- (h) place the child under the care of a qualified counsellor or psychologist;
- (i) order that the child be placed in an educational institution or vocational training programme;
- (j) order that the child be placed in a probation hostel under the provisions of the *Probation of Offenders Act*;
- (k) make a community service order;
- (l) make a restorative justice order;
- (m) make a supervision order;
- (n) make any other orders of diversion provided for in this part; or
- (o) deal with the child in any other lawful manner as may be provided under any written law.

81. In the instant case, there is no dispute that at the time the appellant was charged with the offence, he was still a child and at the time of the finding of guilty he had attained the age of 18 years.
82. At this juncture, I will pose a question. Assuming the Appellant had pleaded guilty on March 7, 2023, or found guilty on July 4, 2023 on the eve of his 18th birthday, how would he have been treated even considering the gravity of the offence? Did the age difference of a few weeks radically change who he was?
83. The answers to the above questions cannot be easy to find. The complexity of the situation ought to have been addressed with the enactment of the *Children Act, 2022*.
84. While it is acknowledged as a milestone in further securing the rights of children, the Act failed to address the issue of treatment of a certain category of children in conflict with the law, such as the one the appellant is in. The Act, just like its predecessor, seems to throw such children to the vagaries and uncertainty of the law.
85. As can be seen, the law has taken care of the children in conflict with the law up to the age of fourteen. They are to be treated as children even if they attain the age of majority in the course of the trial. The same protection is not provided to children above 14 years of age. The question is, aren't they also children deserving of some form of protection? Why call them children and then abandon them at the most crucial moment, just when the court is determining their fate. Is there so much difference between a child who is 14 years and one who is, say, 15 years old that they will be treated so differently by the law?
86. These are some of the other questions that I kept asking myself as I wrote this judgment.



87. I am of the view that the law ought to have provided some form of protection as well, even if not identical to the one under section 221 of the Act. If the Act intended them to be treated differently, it ought to have expressly stated so. Why call them children and then deal with them like adults?
88. I would easily find that the children in this age bracket (over 14 years) have not been adequately protected, so there is an element of discrimination.
89. There is no explanation why the lacuna in the law continues to exist, despite several decisions of the superior court addressing the issue.
90. So how are courts supposed to deal with such ‘children’?
91. Credit to the trial magistrate, as she made a well-reasoned ruling on the sentence. The authorities she cited supported her position that as per the law, the Appellant was to be dealt with in any other lawful manner.
92. In the absence of the law providing expressly for former children such as the appellant, then the courts have to be guided by the existing legal provisions and the precedents of the superior courts, some of which I have referred to hereinabove.
93. Just like Justices J Ngugi (as he then was) and T Matheka have held, I also find that the ball is squarely on the Legislature to come up with a proper regimen to handle these type of cases.
94. I will now deal with the last issue at hand, how to deal with the appellant.

Whether the sentence imposed against the appellant was excessive and harsh.

95. The trial court, in sentencing the appellant to 20 years’ imprisonment, stated that in accordance with section 8(3) of the Sexual Offences Act, that was the minimum sentence and she had no discretion. But is that really the position? I will answer this question as hereunder.
96. The issue of mandatory minimum sentences in the Sexual Offence Act has been the subject of various decisions by superior courts, following the Supreme Court’s decision in Francis Karioko Muruatetu & another v Republic [2017] eKLR (See for instance, Christopher Ochieng v R [2018] eKLR and Jared Koita Injiri v R [2019] eKLR).
97. In Dismas Wafula Kilwake v Republic [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Sexual Offences Act as follow:

“[We] hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand.

On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”



98. Also in *Jared Koita Injiri v Republic* [2019] eKLR the Appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(1)(2) of the *Sexual Offences Act*. The Court of Appeal opined that;
- “if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis
99. The above decisions were reached after *Francis Muruatetu and others v Republic* (*supra*) (Muruatetu 1). Subsequently, and owing to uncertainties created by it, the Supreme Court in *Francis Muruatetu and others v Republic* (2021) eKLR (*Muruatetu 2*), clarified that its decision in only applied to murder cases, it left open to other persons serving sentences that were mandatory in nature to petition for similar orders.
100. Subsequently, Odunga J (as he then was), in *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) held as follows;
- “Taking cue from the decision in *Francis Karioko Muruatetu* directed that those who were convicted of sexual offences and whose sentences were passed on the basis that the trial courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.”
101. The above decision has not been set aside. The superior courts have found it to be in consonance with the principles set out in *Muruatetu* cases (*supra*).
102. From the above, it is now settled law that any provision for a mandatory minimum sentence is unconstitutional and a court dealing with such a sentence has discretion over the matter. Needless to state, that discretion ought to be exercised judiciously, taking account all the circumstances of the case, the aggravating and mitigating factors.
103. Having said this, the court must not forget that offences of defilement are serious in nature and merit stiff sentences and there has to be a good reason to depart from the indicative sentence prescribed by law. The court would not be wrong if it found that a convicted person would deserve a sentence equivalent to the minimum sentence or more, provided that the reasons are stated.
104. Thus, and in answer to the question I posed earlier, I find that the trial magistrate erred when said that she had no discretion in the matter. She did have discretion, stemming from the principles enunciated hereinabove.
105. The appellate court must not lose sight of the fact that in sentencing, if the trial court exercised its discretion and such discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with any orders so issued.
106. In this case, I have found that the learned magistrate was wrong to hold that she had no discretion at all. I find that this court is entitled to examine the sentence imposed and make a determination thereon.
107. With a discretion in sentencing, the court ought not to have lost sight of the age of the accused when the offence was committed. The delay in the conclusion of a case, which ultimately led to his attaining the age of majority, should have been a factor to be considered in favour of, and not to the prejudice of the appellant.
108. Having said so, then it is the duty of this court, if it is to find that the sentence was manifestly excessive, to mete one that it deems appropriate in the circumstances.



109. The *Sentencing Policy Guidelines* require the court, in sentencing an offender, to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender.
110. In my opinion, the trial magistrate should have considered the peculiar situation of the appellant. Meting out a 20-year prison sentence to the appellant was in my opinion excessive by all accounts. The appellant was not to blame for the delay in the case, so why would he have to suffer such a lengthy prison term arising out a problem not of his own making?
111. Of course the above sentiments should not be taken to mean that the Court loses sight of the nature of the offence and the manner it was committed.
112. The appellant ambushed the complainant and had sex with her in a violent manner. She did not consent to it and tried to fight off the appellant, who was too strong for her. The appellant ought to answer for his indiscretion. At the same time, the victim ought to have some sense of justice being done to her. These are the aggravating circumstances.
113. The mitigating circumstances are, as I have stated, the age of the appellant at the material time. I have also considered the pre-sentence report. Although castigated by the appellant, I find that it contains the necessary information on him. That information would not have been any different from that contained in the pre-bail report. After all they were in reference to the same person.
114. As stated, I find that in the circumstances of the case the sentence meted by the trial court was excessive. I therefore set aside the 20 years' imprisonment and I substitute it with a sentence of five (5) years imprisonment.
115. The record shows that the appellant was in custody throughout the trial. Therefore, under section 333(2) of the *Criminal Procedure Code* the five (5) year sentence will commence from March 7, 2023, when he was first remanded into lawful custody.
116. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 6TH DAY OF FEBRUARY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Wanjiku for State

Mr. Bore for Appellant

