



**Chesang v Republic (Criminal Appeal E004 of 2023)
[2024] KEHC 3717 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3717 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E004 OF 2023
RB NGETICH, J
APRIL 4, 2024**

BETWEEN

THOMAS KANGOR CHESANG APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal against both conviction and sentence arising from the
Judgement by Hon. Caroline Ateya (CM) delivered on the 20th December
2022 in Kabarnet Chief Magistrate's Court S/O No. 74 of 2021)*

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual offences Act* No.3 of 2006. The particulars of the offence were that on diverse dates in the months of February and August 2021 the 23rd August, 2021 at unknown time in Kelyo Mosop location within Baringo North Subcounty, the accused intentionally and unlawfully caused his penis to penetrate the vagina of V.J.L a child aged 13 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual offences Act* No.3 of 2006. The particulars of the offence being that the Appellant on diverse dates in the months of February and August 2021 the 23rd August, 2021 at unknown time in kelyo mosop location within Baringo North Subcounty, the accused intentionally and unlawfully touched the breasts and vagina of V.J.L a child aged 13 years.
3. When called upon to plead to the charge, the Appellant denied the charge and the hearing proceeded with the prosecution calling 5 witnesses. In his defence, the appellant gave sworn statement and called 3 witnesses. After trial, the appellant was and sentenced to 40 years imprisonment. The appellant Thomas Kangor Chesang being dissatisfied and aggrieved by the decision by the learned Senior Resident Magistrate Hon C.R.T. Ateya (SRM) on the 27th January 2023 sitting at Kabarnet Law



Courts, filed this petition against the said judgment, conviction and sentence on the following grounds:

- i. The prosecution was done by Mr. Abwajo who is an ordinary man not gazetted by the Director of Public Prosecutions to prosecute criminal proceedings in the Republic of Kenya.
- ii. The learned trial magistrate erred in law by ignoring a cardinal principle in criminal procedure that the burden of proof lies on the prosecution and that they must prove every ingredient of the charge beyond and reasonable doubt.
- iii. The learned magistrate erred in law and fact by holding that the respondent had proved beyond any reasonable doubt the penetration and participation of the appellant.
- iv. The learned magistrate erred in law and fact in holding that the prosecution had proved the case beyond reasonable doubt against the appellant while deciding the case against the weight of the evidence.
- v. The learned trial magistrate misdirected herself in law and fact in relying on discredited evidence of the prosecution thereby causing a miscarriage of justice.
- vi. The learned trial magistrate was biased in her judgment, which misstated the evidence on record and thereby wrongly convicting the appellant.
- vii. The learned trial magistrate failed to make a finding that there existed considerable doubts in the prosecution's case and further failed to make a finding thereof that the benefit aforesaid was to be given to the appellant and erred in law by failing to acquit the appellant as a result thereof.
- viii. The learned trial magistrate gravely misdirected herself in basing the appellant's conviction on mere speculation and conjecture by making a farfetched inference on the guilt of the appellant.
- ix. The learned trial magistrate erred in fact and law in failing to give due regard to the material contradiction, discrepancies and inconsistencies in the prosecution's case thereby reaching a wrong decision and resulting in a miscarriage of justice.
- x. The learned trial magistrate erred in law by failing to consider the defence case adequately and failed therefore to make a finding in favor of the appellant.
- xi. The learned trial magistrate erred in law and fact in failing to believe the appellant's defense and further found no reason for not believing the appellant and failed in giving proper or any reasonable grounds for rejecting the appellant's defence from the evidence adduced which defense covered facts which were weighty and cogent.
- xii. The learned trial magistrate erred in law by failing to consider pertinent medical findings made by the doctor called by the appellant.
- xiii. The learned Magistrate wrongly approached the principle on failure to produce certain evidence inclusive production of witnesses stated by Pw1 thereby wrongly failing to make the presumption that the withholding of the evidence would have been unfavourable to the appellant's case.
- xiv. That the sentence imposed on the appellant is harsh in the circumstances given that the Probation Officer's report favored the appellant.
- xv. The learned magistrate erred in her appreciation of the law applicable and the evidence adduced against the appellant in the circumstances of the case.



- xvi. The learned magistrate erred in her general approach to the whole case.
 - xvii. The conclusion of the trial magistrate on evidence was improper and therefore raises a need to be interfered with by this court.
4. The appellant prays that this honorable court finds his appeal merited and allow it, and quash the conviction, set aside the sentence and let him free and any other favourable relief is likewise prayed for.
 5. The appeal proceeded by way of written submissions. Both the appellant and the state filed written submissions.

Submissions By The Appellant

6. In submissions dated 16th July 2023 and supplementary affidavit dated 21st November 2023, the appellant listed the following as issues which I have combined from the two sets of submissions for determination: -
 - a. Whether the prosecution proved its case beyond reasonable doubt.
 - b. Whether the appellant's defence was adequately considered.
 - c. Whether the sentence imposed on the appellant is excessive in life of life expectancy.
 - d. Whether Joseck Akengo Abwajo was mandated to undertake prosecutorial duties in the Kenyan courts
 - e. Whether medical evidence of DW2 was taken into consideration.
 - f. Whether *voire dire* was properly conducted.
7. The appellant started by submitting on the duty of first appellate court being to re-evaluate the trial court's evidence and urged this court to reevaluate evidence adduced by the trial court.
8. On the first issue listed above, the appellant's counsel submitted that there were contradictions in evidence adduced before the trial court and cited the case of *Woolmington v DPP*[1935]UKL1 where the court held that the onus is on prosecution to prove the offence beyond reasonable doubt which mean the prosecution's case need to be consistent and each inconsistency must be explained and resolve by the prosecution; and it also mean prosecution's witnesses must be truthful and consistent. Counsel submitted that the complainant Pw1 gave two accounts in her testimony being that in the first account, she was defiled in the months of June and July and in the second account, she did not make any reference to any day and time when she was defiled. He further submitted that on the 1st sexual encounter, Pw1 said the appellant defiled her when she went to tether a cow at his home and later said her mother sent her to tether 5 cows at the chief's home and counsel argue that she contradicted herself on the number of cows by saying a cow and later saying 5 cows and argued that the inconsistency should be resolved in favour of the appellant.
9. Counsel further submitted that the complainant said the appellant invited her to his house then they watched TV before he defiled her and in the second account, she does not mention watching of Television. Further that the complainant said she was given medicine to swallow after intercourse but in the first instance she said she was given kshs 100 but she did not mention being given medicine to swallow.
10. In respect to 2nd sexual encounter in the month of July 2021, counsel submitted that Pw1 did not mention the actual date she was allegedly defiled. He submitted that the complainant initially said she



had gone to collect mangoes from the appellant farm and as she was leaving, the appellant met her at the door and defiled her but her narration later changed when she said she had gone to pick pain killers but does not talk about mangoes.

11. Counsel further submit that Pw3 said the complainant was defiled when she went to wash utensils an indication that she narrated different circumstances at the time of the alleged defilement which is indication of lies and untruthfulness of a witness. He cited the case of [Absolom Ambaka Okila V Republic](#) [2020] eKLR where the court stated that it is trite that defilement is proved by evidence direct or circumstantial.
12. He submitted that the evidence of Pw1 and the surrounding circumstances were not truthful and involved a substitution and mixture of facts which ended up contradicting and the contradiction is also evident in the testimony of Pw3 and relied on the case of [PMG V Republic](#)[2022]eKLR where the court held that the critical question is whether the complainant was indeed truthful and submitted that if the trial court took into account Pw1's contradictory evidence, it would have arrived at a different conclusion. Counsel urged this court to find that contradictions in evidence injured credibility of Pw1 as the sole eye witness.
13. The appellant further submitted that the time and date of defilement were not established and proven. He submitted that the complainant's statements recorded with police, contained several allegations of defilements without reference to specific time and date of the month; that when she gave unsworn evidence, she only talked of defilement without any specific date and submitted that time is a relevant factor because it helps a person to know where he was on that particular date and time and give his defence. He concluded that failure to prove relevant factors ,the prosecution cannot claim that it proved the case beyond reasonable doubt and cited the case of [Absolom Ambaka Okila V Republic](#) where the court held that identification was doubtful and allegation of repeated acts of appellant were not established.
14. On the issue of uncorroborated evidence of Pw1, the appellant's counsel restates that Pw1 is not a truthful witness and since the trial court relied on her unsworn evidence, her evidence required corroboration as she was the only witness of the incident. Further the court did not record why it relied on her unsworn evidence as required under section 124 of the [evidence Act](#) and section 19 of [Oaths and Statutory Declaration Act](#)(cap15) despite finding that the complainant did not understand the meaning of taking oath;and relied on the case of [Stephano Ngigi Maigwa V Republic](#)[2002]eKLR Where the court stated that the trial court must set out the reasons for believing the accused and further that the court must take all circumstances into account and objectively weigh all evidence even if it tends to believe the uncorroborated witness.
15. Counsel argued that the trial court state that the witness was truthful but the believe that she was truthful was not based on evidence. Further that the trial court relied on Pw3 and Pw4 who examined Pw1 and found her to be pregnant to corroborate Pw1's evidence. He submitted that evidence of Pw3 cannot be relied on because her evidence say Pw1 was defiled in August 2021 while Pw1 says she was defiled in the month of June and July; and if Pw1 conceived in August as Pw3 say, then the pregnancy was not for the appellant; and in view of contradictions, the trial magistrate could not therefore rely on pregnancy to prove defilement.
16. Further that the trial court relied on broken hymen but PRC form filled on 15th November 2021 describe it as old broken hymen and a lapse of 6 months is too long to attribute the broken hymen to the appellant and cited the case of [Mercy Chelangat V Republic](#). He submitted that since the incident was reported over 6 months after the happening, the old broken hymen cannot be attributed to the appellant.



17. On whether appellant's defence was considered, counsel submitted that the trial court made a finding that the appellant has two homes one in Kasaka and the other in Nakuru and she held that the appellant was within Kasaka without any evidence from the prosecution to support the finding. He further submitted that the appellant in his defence said between February and August 2021 he was at his home in Kasaka and Nakuru and in August, he was in Nakuru because he was quarantined having been infected with Covid 19 and he produced documents to confirm he was infected with Covid 19 and DW4 confirmed that his father fell sick in July 2021 and went to Nakuru and although prosecution complained that defence of alibi ought to have been raised early in time, they ought to have investigated defence of alibi under section 212 of the criminal procedure code. Counsel submitted that failure to bring a sick sheet or letter as rightfully put by the trial magistrate to disprove that the appellant was not in Nakuru but in Kasaka was an apprehension of evidence as there was enough evidence to show that the appellant was sick and got treated in Nakuru; that this being a criminal case, it was for the prosecution to disprove the defence of alibi but not the appellant but prosecution failed to do so and the appellant's view is the failure casts doubt on prosecution's case and relied on the case of Republic v SSM [2020]eKLR where the court held that the prosecution lost opportunity to rebut the appellant's alibi defence; and that the investigators must act impartially and independently on receipt of a complaint; and failure to take necessary steps to secure evidence may amount to failure to prove guilt. Counsel submitted that in this case, prosecution failed to investigate and adduce evidence to challenge defence of alibi which was corroborated by the DW3 and DW4.
18. In respect to sentence imposed, the appellant's counsel submitted that the appellant was sentenced to 40 years imprisonment while section 8(3) of *sexual offences Act* which provide for defilement of a child aged between 12 and 15 years provide for a minimum of 20 years imprisonment. He submitted that the court took into account the gravity of the offence and the responsibility of the appellant to third parties and vulnerable people in the society and also took into consideration the fact that Pw1 was exposed to abortion and guided by aggravating circumstances in the sentencing guidelines, the trial court-imposed sentence of 40 years imprisonment. He however submitted that no material evidence was placed before court to show that the appellant was the mastermind of the abortion.
19. He submitted that the sentence of 40 years though deterrent is excessive and unwarranted in view of the minimum sentence of 20 years provided by the Act and at the time of sentencing, the appellant was 48 years old and assuming he would be alive, he will leave prison aged 88 years old, would have lived beyond the life expectancy in Kenya of 67 years and will leave prison while dependant at a very old age and will have lost trace of his family. He submits that the sentence imposed supersedes the life expectancy in Kenya and therefore excessive and cite the case of Ali Abdalla Mwanza V Republic [2018] eKLR where the court of appeal held that life expectancy in Kenya as per World Health Organization is 66.7 years and if the appellant was to serve 40 years imprisonment, it would go beyond life expectancy of about 67 years and in that case would appear manifestly excessive and substituted sentence of 40 years to 20 years imprisonment.
20. In respect to the last issue as to whether Joseck Akengoo Abwajo was mandated to undertake prosecutorial duties in Kenyan courts, he submitted that gazette notice number 12186 attached to the appellant's affidavit has a list of prosecutors with delegated duties from director of public prosecution and a letter from secretary of public prosecutions Dorcas Oduor who confirmed that Mr. Abwajo was not Gazetted to conduct prosecutorial duties but was allocated other duties. He submits that Article 157(6) confer state powers of prosecution to DPP and section 88 of *CPC* empowers DPP to delegate prosecutorial powers to other persons such as solicitor general, the deputy DPP, the Assistant DPP or state counsel and section 22 of *Director of Public Prosecutions Act* (ODPP Act) empowers DPP to delegate powers in writing as provided by section 22(1) of ODPP Act.



21. Counsel submitted that the said Abawajo has attached documents showing donation of prosecutorial powers to him by the DPP and submitted that he was not mandated to prosecute in Kenya and did so without mandate of DPP and urged this court to find that the proceedings before the trial court were a nullity and the proceedings to start denovo.
22. Counsel in conclusion urged this court to find that the evidence on record was not safe to sustain a conviction, urged this court to allow this appeal, set aside conviction and sentence and if conviction is sustained revise the sentence to 20 years imprisonment.

Respondent's Submissions

23. In submissions dated 16th October 2023, the respondent identified the following as issues for determination: -
 - i. Whether it is a legal requirement for prosecution counsel to be able to conduct general prosecution.
 - ii. Whether the prosecution discharged its burden of proof.
 - iii. Whether evidence was corroborated.
 - iv. Whether there was penetration.
 - v. Whether the appellant was positively identified.
 - vi. Whether the trial magistrate considered accused's defence.
 - vii. Whether the sentence is harsh and illegal.
24. On gazettement of prosecution counsel, the respondent cited provisions of Article 157 of *the constitution* and section 13 of *ODPP Act* which provide for composition of office of DPP and submitted that prosecution counsel is a member of staff for the office of DPP and prosecution counsel as a member of the office of DPP is appointed to undertake any prosecution and under section 19, there is no mention of Gazettement for the officer to exercise prosecutorial powers. The respondent further submits that section 20 of *ODPP Act* provide for appointment of prosecution Assistants who are people not qualified to be prosecution counsel but with relevant experience and expertise and currently serving in National police service and exercising prosecutorial powers and section 2 provide that such an officer in the national police service may be Gazetted as prosecutor.
25. He further submitted that the person who prosecuted in the trial court had qualification as provided under section 34 of the *ODPP Act* as he was duly appointed as prosecution counsel on the 1st of October 2018 and has been doing prosecutorial work since his appointment to date and just alike all the other prosecution counsels in the office of DPP, none of them was appointed via gazette notice since the year 2013 when the *ODPP Act* came into force. He added that no letter from the DPP has been tendered indicating the prosecution counsel was not authorized. That the Kenya gazette did not serve as gazettement of the prosecution counsel neither did it state that those listed were the only one allowed to prosecute; further that prosecution in lower court was concluded on 3rd October 2023 and gazette notice was published on 7th October 2020; therefore, the case had been concluded at the time of Gazettement. In conclusion he submitted that there is no legal requirement for persons engaged by DPP as prosecution counsels to be Gazetted and in any event, this is technicality which cannot be used to set aside a conviction.



26. On whether the case was proved beyond reasonable doubt, the respondent submitted that in respect to penetration, the respondent submitted that the complainant Pw1 adduced evidence on events that led to defilement and further stated that she was given tablets to swallow after the act and the act of defilement happened more than once and on one incident she did not swallow the medicine and she became pregnant and the victim was led to procure abortion to conceal defilement; and her evidence was corroborated by evidence of Pw3 who confirmed that the minor was pregnant at the time of examination.
27. On age of victim, the respondent submitted that age assessment was done on 15th August 2022 and the complainant was found to be approximately 15 years old and having been defiled between March 2021 and August 2021 she was approximately 13 years old.
28. On identification, the state counsel submitted that the appellant was well known to the victim and during cross examination, she referred to the appellant as chief and the evidence of identification was not disputed.
29. On defence of alibi, the state counsel submitted that no notice of alibi was given as required by law and cited the case of *Republic v GNK* [2017] eKLR where the court held that the accused is required to raise defence of alibi at the earliest opportunity possible to enable the prosecution and investigating officer to check it out to determine its veracity or lack thereof. Counsel further said that when prosecution raised the issue during cross examination of Pw1 as seen at page 43 of the proceedings, counsel for the appellant respondent that the issue of alibi would be raised at the tail end clearly not giving prosecution opportunity to investigate the truth of the alibi raised. The respondent submitted that the court however weighed evidence of prosecution and defence and found the complainant credible and truthful.
30. In respect to sentence, the state counsel submitted that the minimum sentence is 20 years imprisonment and submitted that the aggravating circumstances outweighed the mitigating ones in view of the fact that a 13-year-old child was forced to go through an abortion; that she suffered psychological torture which will remain the rest of her life.

Analysis and Determination

31. 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 demeanor. The principles that apply in the first appellate court are set out in the case of *Okeno v 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.)”

32. In view of the above, I have considered evidence adduced before the trial court, grounds of appeal and submissions filed by parties herein. I note from the court record that the court conducted voir dire examination and in response to questions asked by the court, the minor did not understand the nature of the oath she was required to take and the court directed that she give an unsworn statement. In my view, the court having found that the minor did not understand the meaning or importance



of taking oath, the next step would have been followed to establish whether the child is intelligent and understand the importance of telling the truth. That is not recorded but I am of the view that whether the child was saying truth can be ascertained from analyzing her evidence alongside other corroborative evidence. Having perused and considered evidence adduced before the trial court, I wish to consider the following as issues for determination: -

- i. Whether the officer who prosecuted the matter in the trial court was mandated to prosecute
- ii. Whether ingredients for the offence of defilement were proved beyond reasonable doubt
- iii. Whether the sentence imposed against the appellant was harsh and excessive.

(i) Whether the officer who prosecuted the matter in the trial court was mandated to prosecute

33. I have perused replying affidavit filed by Josek Akengo Abwajo dated 27th April 2023. He attached a letter of appointment dated 20th September 2018. The letter indicates that he is appointed as Prosecution counsel II and deployed to ODPP Baringo county and was allocated duty vide letter dated 8th April 2022.
34. Section 19 of the ODPP Act provides that there shall be appointed by the office of DPP such number of prosecution counsels as may be necessary for the proper and efficient provision of prosecution services. Section 20 of the said Act provides for appointment of prosecution Assistants who the director by notice in Kenya Gazette delegate powers and functions conferred upon the office to prosecution Assistant and shall exercise delegated authority as shall be determined by the direction in the notice of appointment.
35. Looking at the above provisions, Gazettement is provided for assistant prosecution Assistants. There is no provision for Gazettement of prosecution counsel and in my view having been appointed as prosecution counsel as provided by section of the ODPP Act Joseck Akengo Abwajo had the mandate to prosecute the matter herein before the trial court and the proceedings before the trial court are therefore not a nullity.

(ii) Whether the ingredients for the offence of defilement were proved beyond reasonable doubt

36. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See *C.W.K v Republic* [2015] eKLR). I wish to consider whether the three ingredients were proved beyond reasonable doubt.

(a) Penetration

37. Penetration is defined under Section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.
38. The appellant argued that the complainant's evidence was not consistent and cited incidents of inconsistencies. I have relooked at evidence adduced before the trial court. Record shows that the complainant went to the appellant's house on dates she could not recall and the dates she went to appellant's house, she explained how the appellant took her to his room and defiled her. She explained that the appellant removed his trouser and shirt, then removed her pant and had carnal knowledge



of her and after the act he would give her medicine to take and when she failed to take is when she conceived. On the second time he said after giving her medicine to swallow, he gave her kshs 100. She explained she felt pain in her vagina after the incident but she never informed her mother as the appellant threatened to kill her if she told anyone what he did to her.

39. Pw1 said she told her brother's wife that she did not get periods in the months of August, September, October and November and that the appellant held her. Her sister in law informed the complainant's brother who reported at Kabartonjo police station. Pw3 a clinical officer confirmed that she examined the complainant on 15th December 2020 and found that she was pregnant.
40. The complainant stated how she was taken by accused's father and complainant's brother Silvester to a doctor who without any explanation being given to her, abortion was carried out. She explained that when they heard that police were going to her home she was taken to her grandmother's house and that is where the baby came out of her womb and the baby was taken by her mother; that she did not know where her mother took the baby. She said she was taken to Kipkaren together with her mother. She said they later went home and they met accused's brother who asked her mother to take her to Barwasa. She was later taken to Kapenguria to the house of appellant's relative where she stayed for 3 weeks before the OCS went for her. She was taken to hospital again after coming back from Kapenguria and then she was taken to the children's home.
41. From the above narration by the complainant, there is no doubt that she had good recollection of what happen to her from the date of defilement up to the time the family of the appellant and the complainant's family colluded to procure abortion for the complainant. Pregnancy was confirmed by Pw3 who examined complainant on 15th December 2021 and said the pregnancy was about 5 months. There is no doubt that penetration was proved beyond reasonable doubt.

(b) Proof of age

42. The complainant's age was assessed on 15th August 2022 and the report confirmed that she was 15 years old. Pw5 produced age assessment report as exhibit. There is therefore no doubt that she was 13 years old at the time of the offence.

(c) Identification of assailant

43. From evidence adduced, it is not disputed that the appellant and complainant's family were neighbors. The defilement incidents occurred during the day and in the appellant's house. There is therefore no doubt that the complainant knew the person who defiled her. She even further stated that the appellant's family members and her own father, brother and mother colluded in organizing to procure abortion for the complainant which they did and took the complainant to various places and finally to Kapenguria to hid her after procuring abortion.
44. On whether accused's defence was considered, I have perused the record and note that the appellant said he was in Nakuru having contracted covid 19 and he was in quarantine. He however did not produce any document to confirm his allegation. The appellant argued that the prosecution should have investigated but, in my view, having raised defence of alibi, he ought to prove it by adducing evidence to confirm that indeed he was not in Kasaka when the minor is alleged to have been defiled. Further, he did not raise the defence of alibi at the earliest opportune time to enable the prosecution to investigate and rebut the said evidence.
45. I have considered evidence adduced by the appellant together with his 3 witnesses and weighed against evidence adduced by the prosecution and there is no doubt that prosecution evidence outweighs the



appellant's evidence of defence. From the foregoing, I find that the prosecution proved the charge against the appellant beyond reasonable doubt.

(iii) Whether sentence imposed was harsh and excessive

46. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. In the case of *Shadrack Kipchoge Kogo v Republic* Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows;

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

47. The appellant herein was sentenced to 40 years imprisonment. It is not disputed that for defilement of a girl between 12 and 15 years the accused is liable to 20 years imprisonment. The magistrate considered the aggravating circumstances herein and imposed 40 years. I do agree that if the appellant was 48 years old at the time of sentence, at time of completion of sentence if he lives to such time, he will be 88 years old. If the life expectancy rate is 67 years as per WHO, then the 40 years sentence in this case amount to life imprisonment. However, life imprisonment was declared unconstitutional by court of appeal in Malindi Malindi Court of Appeal Criminal Appeal No. 12 of 2021, Julius Kitsao Manyeso Versus Republic.

48. In view of the above I find that sentence of 40 years imprisonment as harsh and excessive and I am inclined to set aside and impose 20 years imprisonment.

49. Final Orders: -

1. Appeal on conviction is hereby dismissed.
2. Sentence of 40 years is hereby set aside.
3. The appellant is sentenced to 20 years imprisonment.
4. Period served in remand to be computed in the sentence.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 4TH DAY OF APRIL 2024.

.....
RACHEL NGETICH

JUDGE

In the presence of:

CA Sitienei.

Ms.Ratemo for state.

Mr. Matoke H/B for Mr. Nyagaka for the Appellant.

