



**AKK v Republic (Criminal Appeal E074 of 2022)
[2024] KEHC 7462 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E074 OF 2022
JRA WANANDA, J
JUNE 21, 2024**

BETWEEN

AKK APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This Appeal arises from the conviction and sentencing of the Appellant in Eldoret Chief Magistrates Criminal Case (Sexual Offence) No. 58 of 2019.
2. The Appellant was charged with the offence of incest contrary to Section 20(1) of the [Sexual Offences Act](#). The particulars were that on diverse dates between October 2018 and 19th February 2019 at Keiyo South Sub County within Elgeyo Marakwet county, he unlawfully and intentionally caused his male genital organ (penis) to penetrate the genital organ (vagina) of S.J.R, a child of 10 years whom to his knowledge was his daughter. There was also the alternative charge for the offence of committing an indecent act with the same child contrary to Section 11(1) of the [Sexual Offences Act](#).
3. The Appellant pleaded not guilty and the matter proceeded to full trial wherein the prosecution called 3 witnesses. After close of the prosecution case, the trial Court found that the Appellant had a case to answer and placed him to his defence. The Appellant testified and also called 1 witness in his defence.
4. Upon considering the testimonies and the evidence presented, the trial Court convicted the Appellant of the main charge and sentenced him to life imprisonment. Aggrieved with the sentence and conviction, the Appellant instituted the present appeal vide the Petition of Appeal filed on 9/06/2022 premised on the following grounds;
 - i. That (I) am aggrieved the trial court erred in law and fact as it failed to hold that the charge sheet was fatally defective.



- ii. That the trial court erred in law and in facts as it failed to observe that the witness evidence was inconsistent and uncorroborated.
- iii. That the trial court erred in law and facts by failing to hold that this court was not proved beyond reasonable doubt.
- iv. That the trial court erred in law and in facts by convicting on manifestly insufficient prosecution evidence.
- v. That the trial court erred in law and facts by failing to consider the defence evidence.
- vi. That (I) am aggrieved the trial court erred in law and in facts as it failed to hold that the evidence of identification and recognition was not conclusive.
- vii. That the learned trial magistrate erred in law and in facts by shifting the burden of proof from the prosecution backyard to the Appellant when the evidence failed to link him to the offence.
- viii. That the other grounds will be raised during the hearing.

Prosecution evidence before the trial Court

5. PW1 was the complainant. Being a minor, a voire dire examination was conducted and upon which the Court determined that the minor understood the importance of giving evidence on oath. She therefore gave a sworn testimony. She testified that from the month of October until 19/02/2019, her father (Appellant) did to her “tabia mbaya” (bad manners). She pointed to her private parts and stated in the Kiswahili language that the Appellant inserted his “thing which has in the front” (aliiningisha kitu yake ilea ko nayo pale” private part into hers and that he did it on the bed while her mother was away. She stated further that the Appellant committed the act on several occasions and that he told Aunt, Mama [name withheld] who then took her to hospital. In cross-examination, she stated that they used to share a bed with the Appellant and her sister [name withheld], that however, her said sister went away and that her mother had also gone to PW1’s grandmother. She reiterated that the Appellant (her father) defiled her.
6. PW2 was Police Constable (P.C.) Sophia Ramadhan of Kaptagat police station gender desk. It was her testimony that on 19/02/2019 at around 7.25 pm, Administration Police from Kamwosor brought in the Appellant and the children who were defiled, that he learnt that one was 10 years old and one was 8, that she took the children to the interrogation desk and also discovered that that they could not walk as they had vaginal bruises. She stated further that she then placed them as children in need of care and protection and took them to the Moi Teaching & Referral Hospital on the following day. She testified further that she recorded the children’s statements and learnt that the Appellant had separated with his wife 1 year ago and that he took the girls from the mother, that she also learnt that the Appellant usually slept with the girls on one bed. She also stated that PW1 told her that the Appellant always chased her mother away and then defiled her. PW2 then stated that she charged the Appellant. She then produced PW1’s panty as an exhibit and stated that she took the child for age assessment which placed her age at less than 12 years. She produced the assessment Report and also stated that the mother inspected PW1 and noticed a whitish discharge and that the uncle also suspected that the Appellant had been defiling the girls. In cross-examination, PW2 stated that she learnt that while the Appellant used to share a bed with the girls, his other children, (boys) used to sleep in the kitchen, that the Appellant had been defiling the girls since the year 2018, and that other witnesses had refused to testify. She added that the Appellant had 5 children in total (2 girls and 3 boys) and that the uncle had refused to record a statement.



7. PW3 was Dr. Lilian Taban from Moi Teaching and Referral Hospital and who testified that she examined PW3. She stated that PW1 told her that her father had been defiling her since December 2018 while her mother was away. The doctor stated that she examined PW1 on 20/02/2019 and determined that her left hand and thighs had scratch marks which PW1 stated had been inflicted by her father, that her vaginal outface (hole) was very widened to the extent that one could see the vaginal walls and healed hymen that had ruptured and that her vagina had reddened at the urinal tract. She stated further that she could not determine exactly when PW1 was defiled. She produced the P3 and concluded that it was a case of defilement because of the widened vagina hole. In cross-examination, she conceded that she did not test the Appellant and that there was no spermatozoa. She then reiterated that PW1 insisted that it is the Appellant who had defiled her on several occasions and that from her opinion, the defiling was by an adult.

Defence Evidence

8. The Appellant testified as DW1 and confirmed that PW1 is his daughter aged 12 years old. He stated that he had been living with all his children, that on 14/10/2018, the children were taken by his wife's sisters, that upon his insistence and intervention and after he reported the matter to the Chief, the children were brought back on 12/01/2019. He claimed that the in-laws again demanded to take the children back and when he refused, problems with the in-laws began and that is how he came to be arrested and charged in Court for the present offence and that he also had another case in another Court. He claimed that the Chief and the village elder should have been called to testify. He claimed that the doctor from the dispensary and his wife were related but conceded that he did know the doctor's name. He also claimed that the children were coached. In cross-examination, the Appellant claimed that PW1 was coerced to make the claims of defilement and was coached by the mother.
9. DW2 was Ismael Kotol, the area chief who stated that he heard that the Appellant had assaulted the wife and that she escaped leaving the children behind, and that he later heard that the Appellant was defiling the children. He stated that he did not know the children and neither did he know whether the Appellant was defiling them. In cross-examination, he stated that he heard the reports of defilement from the village elder.

Judgment of the trial Court

10. As aforesaid, upon considering the testimonies and the evidence presented, the trial Court convicted the Appellant of the charge of incest and sentenced him to life imprisonment.

Hearing of the Appeal

11. The Appeal was canvassed by way of written submissions. The Appellant filed his Submissions on 24/01/2023 in person while the State filed on 1/02/2024 through Senior Prosecution Counsel Ms. Emma Okok.

Appellants' Submissions

12. In his Submissions, the Appellant urged that his constitutional rights were contravened as the investigating officer could not explain why he was held in custody beyond the stipulated time which was a violation of his rights under Article 49 of [the Constitution](#). He cited the case of Emoni Chelakani v Republic.
13. He submitted further that the reception of the evidence of the complainant was improperly done as the mandatory provisions of Section 19(1) of the [Oaths and Statutory Declarations Act](#) and Section



125(2) of the Evidence Act were contravened. He cited the case of John Muiruri vs Republic and other cases. Further, he faulted the voire dire examination and submitted that it was conducted improperly. He also faulted the application of Section 124 of the Evidence Act in the trial Court and submitted that it was unsafe for the Magistrate to convict the Appellant on the evidence of PW1.

14. The Appellant submitted that the investigations were shoddy as the investigating officer failed to avail crucial witnesses who were mentioned during the trial, such as the neighbour who took the child (PW1) to hospital, her mother, and her brothers. He urged that it was the responsibility of the prosecution to ensure all crucial witnesses testified and submitted that since the investigating officer made no effort to avail the witnesses, the case was not proved to the required standard. He cited Section 144, 145 and 150 of the Criminal Procedure Code. He also faulted the prosecution for failing to produce crucial documents such as the treatment chits. According to him, the witnesses were not credible and were untrustworthy. He pointed out the difference in the reference numbers used by the witnesses in reference to the P3 form. Further, he claimed that what was conducted was an unfair trial in contravention of Article 50 of the Constitution because although the Court allowed for a recall of the child, the prosecution failed to avail her. In conclusion, he submitted that he was framed by his estranged wife the case was instituted because of a grudge.

Respondents' Submissions

15. In her Submissions made on behalf the State, Ms. Emma Okok submitted that the Appellant alleges that his right to a fair trial was violated as he was arraigned in Court 3 days after his arrest but that he did not raise this issue during the trial and therefore the investigating officer was not given a chance to explain if and why this was the case. She urged that this was not fatal to the prosecution case and the conviction. She submitted that if the Appellant feels aggrieved by the continued detention, then he can file a Constitutional Petition alleging violation of his rights and pray for remedies.
16. Regarding the voire dire examination of the child (PW1), Counsel submitted that it is evident from the record that the same was properly conducted and urged that the child understood the importance of giving evidence on oath and the Court therefore properly directed that she gives sworn evidence. She submitted further that the Appellant was not prejudiced in any way and was able to properly cross-examine the child.
17. Regarding proof of incest, Counsel urged that the offence is provided for under Section 20(1) of the Sexual Offences Act and that to prove the offence the following ingredients must be met demonstrated; penetration, proof that the offender is a relative of the victim, identification of the perpetrator and age of the victim.
18. On proof of "penetration", Counsel submitted that PW1's evidence was that the Appellant defiled her and her sister on several occasions and on diverse dates between October 2018 and 19th February 2019, that the Appellant inserted his penis into her vagina and that he did this at home on the bed, that she reported the incident to her aunt, Mama [name withheld] who took her to hospital. Counsel submitted that the child's evidence on penetration was corroborated by the evidence of PW3 (the doctor who examined her), that PW3 noted that the child's vaginal outface (hole) was very widened and there was healed hymen that had ruptured, that the vagina had reddened at the urinal tract, that she concluded that the offence of incest had been committed because of the vaginal hole and that she produced the P3 form as an exhibit. According to Counsel therefore, the evidence on penetration was therefore solid.
19. On proof that the offender is a relative of the victim, Counsel urged that the child was categorical that the Appellant is her father and she even referred to him by name.



20. On identification of the perpetrator, Counsel submitted that the child knew the Appellant as her father, that she was clear that it was the Appellant who defiled her, that she stated that "baba alinifanyia tabia mbaya.". According to Counsel therefore, identification was by way of recognition which is the best form of identification and that the evidence thereon was therefore solid.
21. On the victim's age, Counsel submitted that the child told the Court that she was 10 years old, that PW2 (the investigating officer) produced the child's age assessment report as an exhibit and in which the child was found to be less than 12 years old. According to Counsel therefore, it was conclusively proved that PW1 was a minor.
22. Regarding the Appellant's defence, Counsel urged that the Appellant alleged that he had been framed and that the case arose out of a grudge that he had with the child's mother. Counsel submitted that this was an afterthought as the Appellant did not raise the issue during his cross-examination of the witnesses. Counsel submitted further that it is worth noting that the Appellant did not deny being the child's father and also added that the defence was not strong enough to rebut the prosecution case and that the trial Court was therefore right in disregarding the same.
23. On the Appellant's contention that crucial witnesses were not called to testify, Counsel submitted that the same was not fatal to the prosecution case, that during cross-examination, PW2 (the investigating officer) stated that other witnesses completely refused to testify, that there is no law compelling the prosecution to avail a certain number of witnesses in order to prove its case and that the prosecution is at liberty to avail the number of witnesses they believe will be crucial in proving its case. She cited Sections 124 and 143 of the *Evidence Act*. She urged that in this particular case, the trial Magistrate was convinced that the child was telling the truth in addition to the corroborative evidence that was availed by the prosecution. She reiterated that the prosecution discharged its burden of proof and that the Appellant was properly convicted, that the prosecution evidence and witnesses were credible, consistent, reliable and well corroborated and that all ingredients of the offence were established beyond reasonable doubt.
24. On sentencing, Counsel submitted that the Appellant was sentenced to life imprisonment after he was given a chance to mitigate which he did, that the prosecution also informed the Court that he was a first offender and that Section 20(1) of the *Sexual Offences Act* provides for a minimum sentence of life imprisonment, that the child was 10 years old at the time of the incident and evident that the Appellant abused the trust that was bestowed upon him by the society. Counsel added that the Appellant took advantage of a child of tender years and committed a heinous crime which occasioned severe trauma and suffering to child. Counsel submitted that looking at the circumstances of the case, the life imprisonment imposed was a sufficient and deterrent sentence.

Determination

25. As a first appellate Court, I am obligated to revisit and re-evaluate the evidence afresh, assess the same and make my own conclusions bearing in mind that, unlike myself, the trial Court had the advantage of hearing and observing the demeanour of the witnesses (see *Okeno vs Republic (1972) E.A 32*).
26. The issues that arise for determination in this appeal are the following;
 - i. Whether the prosecution proved the charge of incest to the required standard.
 - ii. Whether the sentence was lawful and/or excessive.
27. I now proceed to analyze and determine the said issues.
 - i. Whether the offence of incest was proved



28. The offence of incest is provided for under Section 20(1) of the *Sexual Offences Act* as follows:

“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years, provided that if it is alleged in the information or charge that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

29. To prove the offence of incest therefore, the following ingredients must be met: penetration, proof that the offender is a relative of the victim, identification of the perpetrator and age of the victim.
30. Regarding “penetration”, I am convinced that this was proved by the clear testimony of the child and which was sufficiently corroborated by the medical evidence. The doctor who examined the child produced the P3 Report and clearly described the injuries that she observed when examining the child. The P3 confirmed that the child’s vaginal outface (hole) was very widened to the extent that one could see the vaginal walls, there was also a healed hymen that had ruptured and the her vagina had reddened at the urinal tract. It was the doctor’s conclusion that the nature of the injuries was evidence of defilement. There was no rebuttal of this evidence by the defence.
31. Regarding whether the Appellant was a “relative”, the child testified that the Appellant was her father and who also by himself confirmed that indeed the child was his daughter.
32. Regarding the “age” of the victim, in the charge sheet, it was stated to be 10 years. The age assessment test tendered by the prosecution showed that the child was less than 12 years old. The child also confirmed this same range of age. More importantly, the Appellant himself also confirmed that the child was 12 years old. It was therefore proved that the child was below 18 years of age.
33. On “identification”, it is not in dispute that the child knew the Appellant very well as he was her father. She was emphatic that it was the Appellant (her own father) who had been defiling her for a long time. She described how the father had chased away her mother after a disagreement, how the Appellant then made the child and her sister to be sharing his bed with them and how he separated them from the boys by sending the boys to be sleeping in the kitchen. The identification was therefore one of “recognition” and which is the best form of identification.
34. The Appellant submitted that the prosecution failed to call crucial witnesses whose names featured during the trial. He mentioned for instance, the neighbour who took the child to hospital, the child’s mother, and her brothers. He also faulted the prosecution for failing to produce crucial documents such as the treatment charts. On this allegation, first, I note that PW2 (the investigating officer) stated that the other witnesses potential refused to testify. Secondly, I agree with Ms. Okok that there is no law compelling the prosecution to avail a certain number of witnesses in order to prove its case. The prosecution is at liberty to avail the number of witnesses it believes will prove its case. In any case, like the trial Magistrate, I too, am satisfied that the witnesses who testified sufficiently proved the case against the Appellant and corroborated each other.
35. Regarding the Appellant’s complaint that his right to a fair trial was violated because he was arraigned in Court 3 days after his arrest, I agree with Ms. Okok that it will not be proper for this Court to canvass that issue same at this stage since the Appellant did not raise it before the trial Court and that therefore the investigating officer will not have a chance to respond to the allegation. In any case, and even if it were true that the Appellant was arraigned 3 days after arrest, I do not accept that that action would



vitiating the trial and conviction. The Appellant still has the remedy of filing a Constitutional Petition to seek the appropriate relief.

36. Regarding the *voire dire* examination of the child (PW1), the Appellant has not demonstrated how the same fell short of the requirements. In any event, upon perusing the record, I cannot find any evidence that the *voire dire* examination was not properly conducted.

37. Further, the Appellant claimed that what was conducted was an unfair trial because although the Court allowed for recall of the child for further cross-examination, the prosecution failed to avail her. Again, the Appellant did not raise this issue with the trial Court and proceeded with the defence case. The presumption is that he abandoned the quest to recall the child. His revisiting that issue at this stage is clearly an afterthought.

38. In the circumstances, I find no reason to interfere with the conviction of the Appellant as all the elements of the offence of incest were proved beyond reasonable doubt. I am convinced that the testimony of the child that the Appellant defiled her was sufficiently corroborated by other testimony and evidence.

ii. Whether the sentence was lawful or excessive

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

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

40. As already stated above, under the *Sexual Offences Act*, the punishment prescribed for the offence of incest where the victim is less than 18 years old is life imprisonment. This was the sentence imposed by the trial Court.

41. In view of the above, it is clear that the sentence imposed was within the law. Nevertheless, I take judicial notice of the emerging jurisprudence that strict adherence to mandatory minimum or maximum sentences is now being discouraged and the majority view now prevailing is that Courts retain the discretion to depart from such mandatory sentences. In connection to this issue, the Supreme Court in the case of *Francis Karioko Muruatetu and Another vs Republic* [2017] eKLR, while dealing with a case of murder, declared the mandatory death sentence unconstitutional. This is how the Supreme Court put it:

“(66) It is not in dispute that article 26(3) of *the Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of *the Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account



due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.”

42. Prior to the subsequent directions of the Supreme Court given in the same Muruatetu case on 6/07/2021, which clarified that Muruatetu only applied to murder cases, Courts, deeming themselves bound by the authority, had been routinely re-sentencing convicts for different offences, including for sexual offences. Since the giving of the directions, the Courts now exercise their discretion in re-sentencing convicts in sexual offences on the basis of the unique circumstances of each case.
43. A notable case in which the Court of Appeal applied similar logic to Muruatetu and set aside a mandatory sentence in a case of defilement is *Dismas Wafula Kilwake vs Republic* [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the Court in sentencing offences.
44. Another case is *GK v Republic (Criminal Appeal 134 of 2016)* [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.
45. There is also the case of *Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021)* [2022] KEHC 13118 (KLR), where Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial Court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of *the Constitution*. He however clarified that his view was that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.
46. I may also mention the case of *Joshua Gichuki Mwangi vs Republic* [2022] eKLR, where the Court of Appeal reiterated that it was impermissible for the legislature to take away the discretion of Courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
47. Further, the constitutionality of the life sentence has also now been questioned. In dealing with a matter where the Appellant had been sentenced to life imprisonment under the *Sexual Offences Act*, the Court of Appeal, in the case of *Manyeso vs Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment), stated as follows:-

“...an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.... we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence... We therefore in the circumstances, uphold the appellant’s conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.”



48. Regarding sentence, Majanja J, quoting Muruatetu, in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, stated as follows:

“The Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;

- (a) age of the offender;
 - (b) being a first offender;
 - (c) whether the offender pleaded guilty;
 - (d) character and record of the offender;
 - (e) commission of the offence in response to gender-based violence;
 - (f) remorsefulness of the offender;
 - (g) the possibility of reform and social re-adaptation of the offender;
 - (h) any other factor that the Court considers relevant.
49. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

“With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment.”

50. In view of the legal guidelines set out in the various authorities cited above, and considering the Appellant’s mitigation before the trial Court, I find that the sentence of life imprisonment should be reduced a determinate period of imprisonment. I also deem it necessary to give the Appellant the opportunity to reform while in prison and thereafter be released to achieve social re-adaptation. I believe that after a reasonable prison term, the Appellant will have suffered sufficient retribution for his actions and will be ready for rehabilitation into the society.

51. I however also consider that the Appellant was the child victim’s father and who was therefore the same person expected to protect the child and provide her with a sense of security. He instead betrayed that trust and committed a heinous act on the child, her very own, and which he committed over a long period of time and from which the child will forever bear the scars of and is unlikely to fully



recover from. The worse fact is that the Appellant is not even remorseful and despite the overwhelming evidence, still continues to claim that he was framed.

52. What is disturbing is that there is evidence that the “rumours” of the Appellant defiling her daughters were apparent in the neighbourhood. The child’s teachers, the village elder and even the Chief who testified as DW2 seem to have been aware. Sadly, none of these people who by their positions in society had the ability to intervene and save the child, all steered away and made no effort to come to the aid of the child. An uncle is said to have even refused to testify. This is clear proof of the shocking level of degeneration that our society has fallen.
53. Taking into account all the recounted circumstances, and the impact of the offence on the victim and also the Appellants’ mitigation, I trust that a sentence of 35 years imprisonment shall suffice.
54. I note from the charge sheet on record that the Appellant was arrested on 20/02/2019 and was arraigned on 25/02/2019. After conclusion of the trial and upon his conviction, the sentence was eventually read out on 27/05/2022. From the record, I am convinced that the Appellant was not granted bond or bail and therefore remained in remand custody throughout the trial. In view of the proviso to Section 333(2) of the Criminal Procedure Code, which requires that the period that a convict has spent in remand custody be “taken into account” while determining sentence, I will apply this proviso.

Final Order

55. In the circumstances, I make the following Orders:
- i. The Appeal against conviction fails.
 - ii. The sentence of life imprisonment imposed by the trial Court against the Appellant is however set aside and substituted with a sentence of 35 years imprisonment to be computed from the date of arrest, namely, 20/02/2019.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF JUNE 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Mr. Mugun for the State
Petitioner in person

Eldoret High Court Criminal Appeal No. E074 of 2022

