Mutie v Republic (Criminal Appeal E001 of 2023)
[2024] KEHC 8604 (KLR) (17 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8604 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL E001 OF 2023

FROO OLEL, J

JULY 17, 2024

BETWEEN

MUNYOKI MUTIE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being An Appeal From The Conviction And Sentence Delivered On 22Nd December 2022 By Hon J.aringo (srm) In Kyuso Sexual Offence No E003 Of 2022)

JUDGMENT

A. Introduction

1. 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* of 2006. The particulars were that on 1st day of February 2022 at about 1300hrs in Kyuso Sub county of Kitui county, the Appellant intentionally caused his penis to penetrate the vagina of JMM a child aged 15 years.

2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* of 2006. The particulars were that on 1st day of February 2022 at about 1300hrs in Kyuso Sub County of Kitui County intentionally caused his penis to penetrate the vagina of JMM a child aged 15 years.

3. During trial the prosecution called five witnesses who testified in support of their case. The appellant was placed on his defence and gave sworn evidence. The trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of defilement and proceeded to sentence him to 20 years imprisonment.

B. Facts at Trial

4. PW1 JMM, testified that she does not go to school, and was 17 years old. She presented her birth certificate (MFI 1), which indicated her date of birth was on 5.10.2006. she recalled that on 01.02.2022, she was at the shamba chasing birds and also harvesting green grams. The Appellant, who was well known to her came to the shamba, and started to help her in harvesting the green grams. After a short while, the Appellant fell her down, tore her biker, removed his penis and started doing bad things to her. It was her evidence that the Appellant raped her for about one hour, and did not use a condom, during this process.

5. It was her further testimony, that her grandmother came to the shamba and stumbled upon the Appellant raping her, and this forced the Appellant to stop what he was doing. As a result, they went and reported this incident to Kyuso Police Station with her uncle and grandmother. She was interrogated and thereafter taken to Kyuso Hospital where she was medically examined and treated. She identified the PRC form, P3 form, treatment notes, her panty and torn biker. She also identified the Appellant as her assailant. Upon cross examination. She stated that she knew the Appellant as her grandfather, being that he was an uncle to her mother. The incident had occurred at about 1.00pm during the day and when her grandmother stumbled upon them, she did not scream.

6. PW2, MM, the mother to the victim PW1 confirmed that PW1 was born in 14.10.2006. On 01.02.2022 she was at Masyungwa, when at about 1.00pm, she was called by her Aunty Muyathi, who informed her that she had left PW1 at the shamba and on coming back had found the appellant having sex with her daughter (PW1). Her daughter was a slow learner, and attended special needs school, but was otherwise a normal child. The Appellant on being found in the act, got up and left. Her Aunty also did not take action and/or scream because the Appellant was armed with a panga. She immediately went back home, and while accompanied by her Aunty Muyathi and her brother, they took PW1 to the police station and later to hospital.

7. Upon cross examination she stated that her Aunty had told her, that the Appellant was armed with a panga and thus feared to take any immediate action. When she arrived at home, she had taken her time, to physically examined PW1 and indeed confirmed that she had been defiled. PW1 had no physical injuries but had some fluids on her inner cloths. Both of them, were well conversant with the Appellant and related well and therefore had no reason to frame him.

8. PW3, JMM, testified that PW1 was her granddaughter. On 01.02.2022, she was at home and PW1 was at the shamba watching over the birds, not to eat Sorghum. At about 1.00pm she went to look for PW1 at the shamba and on getting closer, she heard a man's voice and saw the Appellant on top of PW1. She was about 50m away, and indeed confirmed that the assailant was the Appellant, who did not notice her presence and continued with the act for about five minutes before her got up and left. She then asked PW1, why they were engaged in sex, and she stated that she had been forced into it. They went back home and as they took lunch, she called PW2, who came and they later went to the police station to report the incident. PW1 was thereafter taken to hospital, examined and was given medication. PW3 reaffirmed that she found the Appellant red handed defiling PW1 and he was a person well known to her.

9. Upon cross examination, PW3 confirmed that she heard the voice of the accused first before seeing him. She did not know his intentions since he had a panga and she did not inform anybody other than PW2, who was the mother of the complainant. She reaffirmed that she found the appellant red handed defiling PW1.

10. PW4 DR Kioli Munyoki testified that he was a medical officer at Kyuso Sub County Hospital and that on 02.02.2022, PW1 was brought by the police to the hospital allegedly having been sexually assaulted by a person known to her. On examination, he found that PW1, had low intelligence, but otherwise was well oriented in person, time and place. She would laugh at being examined and failed to appreciate the gravity of the situation. Her inner clothes were torn, but she no bruises. On examining her genitalia, thee hymen was broken and from HVS there was spermatozoa. Hepatitis B and Pregnancy were negative. Urinalysis was normal. His professional medical opinion was that PW1 had been forcefully defiled, as Spermatozoa had been noted. PW4 proceeded to produce the PRC form, P3 form and treatment notes into evidence.

11. PW5 PC Beatrice Mungai testified that on 01.02.2022 they got a report that PW1 had been defiled. She interviewed PW1 who stated that at 1300 hours of the same day while at her grandmother's shamba guarding crops from being destroyed by birds and preparing cowpeas, she was joined by the Appellant who greeted her and had a panga. He helped her with the cowpeas and then forced her to lie down, lift her skirt up and tore her biker and panty and defiled her. PW3 confirmed this incident and told her that she left the minor at the shamba and went home which was a distance and on coming back, she found the Appellant defiling the minor. PW3 informed PW2 and they reported the matter to the police. They later escorted the minor to hospital where she was examined and treated.

12. PW5 confirmed visiting the scene of the incident and took the biker and panty, which she kept to be used as exhibits. On 04.02.2022, the Appellant was arrested by PW1 uncles at Ndatani and the police went and re arrested him. On cross examination she confirmed that she visited the scene of the incident and saw that the shamba where the incident is alleged to have occurred, was adjacent to the home. She further was not aware if the parties had any other dispute nor was, she told of the existence of any grudge between the parties.

C. Defence Case

13. The appellant gave sworn evidence and stated that on 04.02.2022 he was going to work when he met two (2) people who held him and tied him up. The police vehicle then came and he was arrested and taken to the police station, where he was told he had defiled a girl. PW3 had told him that she would teach him a lesson and that PW1 was Coached on what to say. She had initially stated that she does not know him yet she had known him from childhood.

14. Upon cross examination, he testified that on the material day, he had gone to cut trees and at around 1.00pm had passed by PW3's shamba. He found PW1 preparing Mbaazi, while watching over the birds to prevent them from eating sorghum. He offered to he assisted her and had hardly sat down for five minutes, when PW3 came and sat at a distance. He stood up, went and greet her. They made small talk before he left. He denied defiling PW1 at any point during this interaction.

15. The trial court considered the evidence adduced and found the Appellant guilt of the offence of defilement. The Appellant was allowed to mitigate and was thereafter sentenced to serve twenty (20) years imprisonment. The Appellant being dissatisfied by the conviction and sentence filed this petition of Appeal on 04.01.23 The grounds raised were that;

    a. The learned Trial Magistrate erred in matters of the law and fact by failing to consider that there was no cogent and credible evidence to connect him to the commission of the alleged offence and also failing to consider sharp contradictions contrary to section 163 of the *evidence act*.

    b. That the learned trial magistrate erred in both law and fact in failing to consider that the sentences imposed to the appellant was manifestly harsh and excessive in the circumstances.

c. That the learned trial magistrate erred in both law and facts by failing to adequately consider the appellant defence.

d. The learned Trial Magistrate grossly erred in both law and facts by basing the conviction on evidence that was below the standard of proof.

e. That the learned trial magistrate erred in both law and facts in finding that the prosecution had proved its case beyond reasonable doubt.

f. That the learned trial magistrate grossly erred in both law and fact by disregarding the appellant evidence and relying heavily on medical evidence prepared relating to the missing hymen and penetrating to secure conviction of the appellant.

g. That the learned trial magistrate failed in law and fact by disregarding the appellant's submission and arguments therein.

h. That the learned trial magistrate erred in both law and facts by failing to appreciate that the medical evidence tendered before court did not create nexus between him and the alleged offence.

i. That the learned trial magistrate erred in law and in fact by relying on insufficient evidence.

j. That the learned trial magistrate erred in both law and fact by dismissing the appellant's plausible defence which was not rebutted without offering any cogent reasons thereof.

k. That the trial court failed to consider that the appellant fundamental constitutional rights were violated and thus no ample time was given to defend himself.

l. That the honorable trial magistrate erred in law and in fact by failing to consider that the subject was based on fabrication and after thought in the circumstances of evidence tendered on record.

D. The Appeal

16. The merits of this Appeal was canvassed by way of written submissions. The Appellant submitted that he had a right to be promptly informed of his rights as an accused person and further that since he was a layman, ought to have been assigned legal aid/ representation before trial. This was not done and it prejudiced his position during trial. He relied on Articles 50(2) (h) , 10, 27 and 159 of *the Constitution* of Kenya 2010 and the case of Legal aid South Africa v Van Der Merwe and others (A409/2010) & Rattiram Vs State of M.P. 202 4SCC 516 Where it was emphasized that the trial court should identify in advance any act or omission that could constitute a violation of the accused person fundamental rights to fair trial and remedy the same before trial.

17. Secondly, the Appellant submitted that the voire dire examination on PW1, was not properly conducted. The examination ought to have endeavored to ascertain whether the witness understands the meaning, nature and purpose of oath, if yes, he/she would be allowed to give sworn evidence, and if not, the witness would give unsworn evidence, which had to be corroborated by other material evidence before being used to implicate the accused. Reliance was placed on the case of Patrick Wamuyu Wanjiru v Republic, Joseph Opondo vs Republic, R vrs Lal Khan, Johnson Muiruri Vs Republic, & Gamaldene Abdi Abdirahman & Another Vs Republic where the said principles were espoused. PW1 evidence was un-procedurally received without proper voire dire being conducted and the trial court was faulted for relying on the said evidence to convict him.

18. The evidence presented by the prosecution witnesses had inconsistencies and did not tally as to the time of the incident, PW1 had not disclose the truth as there was no struggle at all and generally it was problematic to reconcile the doubtful versions given by the prosecution witnesses. This confirmed that they were not credible witnesses and were persons whose evidence could not be relied upon. Reliance was placed on the case of John Mutua Munyoki v Republic, Erick Cheruiyot Bii v R, Cr. App. No 71 0f 2009 Burunya vs Uganda Cr Appeal No.223 of 1968, Francis Muniu kariuki v R [2017] eKLR &Geoffrey Kip'ngeno v R {2008}.

19. Further, the Appellant faulted the prosecution for failing to provide cogent and direct evidence, which could implicate him for defiling the minor and unfortunately the trial court erred by importing extraneous evidence, which it considered and wrongly convicted him. The trial Magistrate had further erred by shifting the burden of proof to him, thereby rendering his conviction unsafe. Reliance was placed on the case of Victor Mwendwa Mulinge vs Republic[2014] eKLR, B vrs Merton LBC, Case No 881/2003 London WC2A 2LL, Kiplimo Chereno Vrs Republic (2014) eklr and section 169(1) of the Criminal Procedure Code.

20. Lastly, on the issue of sentence, the Appellant urged this court to find that this was a borderline case, where the minors age had attracted disparity. It was important for the court to exercise caution and evade emotional presentations bought before it. It was the Appellants humble submissions that the sentence of 20 years was harsh and the same ought to be reviewed, while considering the current jurisprudence on sentencing.

21. The Respondent on the other hand submitted that the duty of the 1st appellate court was to look into the evidence afresh and determine whether the conviction was proper. On age of the victim it was submitted that the evidence on record confirmed that the age of the victim was 16 years when the offence was committed and that the prosecution relied on evidence of PW1 PW2 and PW4, who comfirmed that PW1 was born on 5.10.2006 as affirmed by the birth certificate produced into evidence. Though there was a disparity between the age as indicated in the charge sheet and as proved, the same was not fatal, since the victims age was only applicable for sentencing purposes under section 8(4) of the *sexual offences Act*.

22. On penetration, it was submitted that from the evidence on record it was apparent that the victim was defiled by the appellant who tore her biker and panty, removed his penis and inserted in PW1 vagina. PW3 found him red handed defiling the minor and proceeded to report the incident to PW2. The medical evidence produced by PW4 also corroborated this fact and found that the hymen of the victim was broken and there was also presence of spermatozoa seen. The parties were neighbours, who knew each other and the incident occurred during daytime. Identification was therefore, based on recognition.

23. The appellant's defence did not controvert the prosecution's evidence as he placed himself on the scene of the crime. Finally, on sentencing, it was submitted that the appellant was sentenced to what was considered as the minimum statutory sentence of 20 years imprisonment. The prosecution conceded that Appellant court could take cognizance of the emerging jurisprudence regarding the court's discretion on sentencing and reconsider the same. The court was therefore urged to find the conviction proper, but review the sentence passed as it deems fit.

D. Analysis & Determination

24. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This

court is guided by The Court of Appeal case of Okeno – VS – Republic (1972) EA 32 where it was stated as follows: -

> " An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

25. In the case of Republic Vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

26. Having considered the lower court record, the grounds of appeal and the submissions of the parties, I find the following as issues for determination;

    a. Whether the prosecution proved the case beyond reasonable doubt

    b. Whether the sentence should be reviewed

27. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

28. The ingredients for the offence of defilement can be summarized as follows;

    a. Age of the victim (must be a minor),

    b. penetration and

    c. Proper identification of the perpetrator.

29. On the age of the victim, The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR 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." (emphasis added).

30. Similarly, in in Hadson Ali Mwachongo vs. Republic [2016] eKLR;

> " The importance of proving the age of a 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 victim. In *Alfayo Gombe Okello vs. Republic Cr. App. No. 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 the 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. That must be so because dire consequences flow from proof of the offence under section 8(1)."

31. Also, in the case of Joseph Kieti Seet v Republic [2014] Eklr the court held that;

> " It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No 2 of 2000, 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..."

32. Rule 4 of the Sexual Offences Rules, 2014 also provides that:-

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents."

33. In this case, PW1 JMM stated that she does not go to school, but was 17 years old, a fact, confirmed by her mother PW2, who stated that her daughter was born on 14.10.2006. They both identified her birth certificate, which was later produced into evidence by PW5, the investigating officer. The age of the minor was thus sufficiently proved by evidence presented.

34. On the issue of penetration, the same is defined in section 2 of the *Sexual Offences Act* as;

> "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

35. The victim stated that on 1.2.2022, she was at the shamba chasing birds and also harvesting green grams. The Appellant, who was well known to her came to the shamba, and started to help her in harvesting the green grams/cow peas. He proceeded to fell her down, removed his penis, tore her biker/ panty and proceeded to rape her. The Appellant was found red handed defiling the minor by PW3, who succinctly confirmed as much in her testimony. The medical evidence produced by PW4 Dr Kioli Munyoki also confirmed that indeed PW1 had been defiled. From the evidence of the victim and her grandmother, it is clear that the appellant had penetrated the vagina of the victim. The medical report and testimony of the doctor also corroborated the same. It is therefore a safe conclusion, based on evidence presented that the ingredient of penetration was proved.

36. On the issue of identification, the Court of Appeal in the case of Peter Musau Mwanzia Vs The Republic 2008 eKLR expressed itself as follows:-

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness , in seeing that the suspect at the time of the offence can recall very well having seen him earlier on before the incident"

37. Both PW1, PW2 and PW3 were persons who knew the Appellant, and the Appellant too confirmed in his evidence that they were neighbour's and he also knew PW1 well. Though the evidence in place shows that PW1 is a mentally challenged child, PW4 stated that she was well aware and oriented in person, time and place. She knew the Appellant and also knew that they were related. PW3 also confirmed finding the Appellant red handed while he was defiling the minor and this incident happened at 1.00pm. The Appellant in his defence also confirmed being at PW3 farm, though he denied defiling the minor. From the evidence adduced, there cannot be any doubt whatsoever as to the identity of the perpetrator who defiled the minor and it was indeed confirmed to be the Appellant.

38. The Appellant raised two primary issues in his submission's, that his rights were violated by not being promptly informed of his right to counsel and secondly that the court wrongly accepted the evidence of PW1, without her undergoing proper voire dire examination. Further that the court was faulted for wrongly convicting the appellant based on inconsistent and contradictory evidence.

39. At no point during determination of the primary matter, did the Appellant raise any objection as to not understanding the charge, its particulars, and/or the evidence presented. He got an opportunity to cross examine all witnesses and on being placed on his defence gave sworn evidence, exculpating himself from this incident. It is therefore too late in the day for the Appellant to allege that his rights were violated, yet when he had the opportunity, he did not raise any complaint. None of the Appellants rights under Article 50(2)(a) to (q) of *the Constitution* were therefore violated and specifically if indeed he felt that he needed to have a pro bono advocate, engaged to assist him, he should have asked the trial magistrate during the primary proceedings. It cannot be raised as a fresh matter on Appeal.

40. The Appellant also faulted the trial court for relying on the evidence of PW1 without undertaking a proper voire dire examination.Section 19 of the *Oaths and Statutory Declarations Act* (hereafter section 19 of Cap 15 of the Laws of Kenya) provides that:

> 19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

41. Under section 19 of Cap 15 of the Laws of Kenya, where a child of tender age is called as a witness in a proceeding, there are two things the trial court must be satisfied about, namely; 1) whether the child understands the nature of an oath; or 2)if the child, in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. The inquiry should graduate to the second level if the child does not understand the nature of the oath; then the trial court should determine if he possesses sufficient intelligence to justify the reception of the evidence, and he understands the duty of telling the truth. It is only after the said inquiry has been conducted that the testimony of a child of tender age is received in evidence either under oath or as unsworn statement. But in both instances, the child is liable to cross-examination. See BGM HCCRA NO 141 OF 2011 [2013] eKLR.

42. It should be noted that PW1 was not a child under the age of 12 years as recognized under law, who then, mandatorily require voire dire examination. She was 17 years olds and though intellectually slow, she did ably communicate and presented her evidence.

43. The Appellant also did allege that PW1 to PW3 did give contradictory and inconsistent evidence relating to the timing of the incident and age of PW1, which evidence in totality when considered made the witnesses unreliable and whose evidence, the court ought not have relied upon to convict him. .As was noted in Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:

> "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."

44. Also in *Joseph Maina Mwangi vs. Republic CA No. 73 of 1992* (Nairobi) the Court of Appeal held that: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

45. The evidence of the prosecution was cogent and direct. The appellant was caught red handed defiling the minor, and the contractions noted were minor and did not point to deliberate untruthfulness of

the prosecution witnesses. The appellant also undesirably picked out singular sentences and considered them in isolation from the rest of the statements and wrongly analyzed the same, yet the flowing narrative reveal otherwise.

46. As regards the sentence, This Court is guided by the principles set out in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR where it was stated as follows:

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

47. Sentencing is a discretion of the court of law but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in Thomas Mwamba Wanyi Vs Republic (2017)eKLR cited the decision of the Supreme Court of India in Alister Antony Pereira Vs The state of Maharastra at paragraph 70 – 71 where the court held;

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

48. Under the current sentencing jurisprudence, the provision of section 8(1) as read together with provisions of section 8(3) of the *Sexual Offences Act* No 3 2006 and legislation that was in force before commencement of *the Constitution* of Kenya 2010 must be considered with adaptation, qualification and exception when it comes to the mandatory minimum sentence and in particular when the said sentences do not take into account the dignity of the individual as mandated under Article 27 of *the Constitution* and as appreciated in the Francis Muruatetu case and applied by courts in several cases. See *Christopher Ochieng Vrs Republic Kisumu CA Criminal Appeal No 202 of 2011* and Jared Koita Injiri Vrs Republic Kisumu CA Criminal Appeal No 92 0f 2104.

49. The Appellant was charged under provision of section 8(1) and 8(3) of the sexual offence *Act No 3 of 2002*6 of defiling PW1. As at February 2022, the minor was already 16 years old, and therefore the Appellant ought to have been sentenced under provisions Section 8(4) of the *sexual offences Act* No 3 of 2006, which provides for minimum sentence of fifteen years. The state also conceded that the

sentence melted out was harsh and submitted that the court could reconsider the same in light of new jurisprudence on sentencing.

50. While the Appellant was sentenced to serve a term of twenty years, the court has to consider the gravity of the offence, both mitigating and extenuating circumstances. In this instance, the Appellant took advantage of his mentally challenged relative and defiled her in broad daylight. He must be handed down a punitive and deterrent sentence.

E. Disposition

51. The upshot, having considered the entire record of Appeal and submissions made, I do find that the Appeal as against the trial courts finding on conviction lacks merit and the same is dismissed.

52. The Appeal as against sentence is hereby upheld. The sentence of HON J ARINGO (SRM) issued in KYUSO PMCR (S.O) NO E003 OF 2022 sentencing the Appellant to twenty (20) years is set aside and the same is replaced with a sentence of fifteen (15) years. The same will run from 4th February 2022, when he was arrested in line with provisions of Section 333(2) of the Criminal Procedure Code.

53. Right of Appeal 14 days

54. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 17th day of July, 2024.

In the presence of;

Appellant present from Kamiti maximum prison

Mangare/Otulo for O.D.P.P

Susan/Sam Court Assistant