Wachira v Republic (Criminal Appeal E176 of 2022)
[2024] KEHC 8103 (KLR) (1 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8103 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E176 OF 2022

LW GITARI, J

JULY 1, 2024

BETWEEN

ISAAC WACHIRA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act* No. 3/2006 before the Chief Magistrate's Court at Isiolo S.O No.E001/2021. The particulars are that on the 27th day of December 2020 in Isiolo County within Eastern Region jointly together with others not before court intentionally and unlawfully caused his penis to penetrate the vigina of CK a child aged thirteen (13) years without her consent.

2. In the alternative the appellant was charged with committing an indecent act with a child contrary to Section 11(i) of the *Sexual Offences Act*. It was alleged on the same date, place and time he intentionally and unlawfully touched the buttocks, breasts and vigina of CK a child aged 13 years with his hands and penis respectively.

3. The appellant denied the charges. A full trial was conducted and the learned trial magistrate found the appellant guilty on the charge of gang defilement contrary to Section 10 of the *Sexual Offences Act*. He was convicted and sentenced to serve thirty-five (35) years imprisonment.

4. The appellant was dissatisfied with both the conviction and sentence and filed this appeal based on five grounds which were later amended. The amended grounds of appeal are as follows: -

    1. That the learned trial court magistrate erred in matters of law and fact by failing to note that the sentence meted by the lower court is manifestly harsh and excessive.

2. That the trial court magistrate erred in both matters of law and also a fact where he failed to note that the birth certificate was not authentic.

3. That the learned trial magistrate erred in law and also a fact where the accused person was forced to cross examine the complainant hence he reported that he was sick thus violates his Constitution right of a fair trial.

4. That the trial magistrate erred in matters of law and fact when convicting and sentencing the appellant by expressing biasness in this instant matter.

5. That the learned trial court magistrate erred in both matters of law and also a fact where he convicted and at the same time sentenced the appellant herein hence failed to note that the vital and crucial witnesses were not called by prosecution side to testify.

6. That the learned trial magistrate erred in law and fact by misapplying the law and shifting the burden of proof to the appellant.

5. He prays that the appeal be allowed, the conviction be quashed, sentence be set aside and he be set at liberty.

6. The respondent opposed the appeal and prayed that it be dismissed.

The Prosecution Case

7. The prosecution called five witnesses.

8. CK (PW1) is the complainant a girl aged 13 years at the time of the incident. She testified that her date of birth is 26/3/2007 as shown on the birth notification which was produces as exhibit. On 27/12/2020 she met with her friends Christine, J and Macho. They went and met one Mama Glory who told them to go and pick mangoes from her farm. While they were picking mangoes, the appellant went there with another boy called Abalkar and other boys who she did not know. The appellant started abusing her and accusing her of destroying mangoes. He then took a stick and started beating her, telling her she would know he is king and that she should not be proud. The appellant held her hand and led her to the bush. A Turkana boy joined the appellant and threatened to cut her breasts into pieces with a wire. The appellant called further boys and two of them held her hands, each holding one hand. The 3rd boy held her legs with one hand and blocked her mouth with the other. The appellant tore her dress and removed her under pant. The appellant removed his trouser and defiled the complainant by inserting his penis in her vagina as he lay on top of her. She told the court that the ordeal was so painful and she screamed and asked him why he made her to bleed. The other boys who were holding her released her hands and legs and remained there watching as the appellant raped her.

9. The appellant threated to kill her if she dared to report the matter. She testified that she bled profusely as there was blood even on the ground where she was defiled. One of the boys chased her away. She went and she was escorted to hospital by one Muthoni. She reported the matter at Kulamawe Police Station and she was escorted to hospital by a police officer.

10. At the hospital the doctor told her that her vigina was torn and required stitching. She was stitched and given medication. Several tests were also done. A P3 form was filled at Isiolo General Hospital, Resorption form, MFI – 2b, outpatient attendance card, lab requests and treatment notes.

11. Daudi Dabaso (PW2) is the Clinical Officer who filled the P3 form. He testified that C.K from Kambi ya Juu aged 13 years was sent to the hospital on allegation that she was defiled. On examination he found that she had no torn clothes but her inner wear, dress and skirt were soiled with blood. She had

a history of being defiled by a person well known to her in the company of four others. She was in poor general condition because of the pain and she also had bruises on the back of the head where there was a cut wound which as bleeding, tender, swollen and painful. She was taken to the hospital within three hours of the defilement.

12. On the reproductive system, the hymen was newly broken, lacerations on the viginal walls. There was visible bleeding and blood clots in the genitalia.

13. Urinalysis revealed that there was blood. There was blood from high viginal swab. Pregnancy test was negative. There was blood from high viginal walls. Stitching and dressing was done. The conclusion was that defilement did occur due to the freshly broken hymen, lacerations of the viginal walls. The complainant was advised on how to manage the wounds on the genetalia to heal faster. He produced the P3 form the drug prescription form, outpatient card, lab requests form and treatment notes as exhibit 2a-e.

14. In cross examination PW2 stated that the injury in the genitalia was a 2° tear.

15. PW3, CK stated that on 27th December 2020 her friend CK went to their home from church and they had lunch together. The complainant then left with her cousin J to go and look for mangoes. That J was with his friend Mureithi. She remained at home. Later at around 1600 hours she followed them to the place where they had gone for the mangoes and she found them seated under a mango tree. One by called Abokor went and anted to beat the complainant. She asked him why and he told her that the complainant had plucked the mangoes without permission. Shortly thereafter, six other boys went to the scene and Abokor left. The Accused person was among the six boys. The accused person had a stick in his hand and wanted to beat the complainant. The complainant asked him why and the accused told her that she will know why she was proud and why she had declined his advances for a relationship. The accused person then pulled the complainant into a bush. The other five boys remained with her and the complainant's cousins. The boys wanted to defile her and they told her friend and the complainant's cousin to go away and leave her with them. One of the boys held her neck and asked why she had decline their proposal while the complainant had gone with the accused person. She started struggling with them as they tried to force her to fall to the ground. One of the boys told the others to let her go as there were people coming and they would be found. The boys then beat up J and his friend and chased them away. She asked them why they had released her and remained with the complainant and they told her that the complainant was with Chira, the accused person. As she was leaving the scene she met with three other boys and told them that her friend had been abducted by some boys and she was in the bush. The three boys went towards the bush. She went and sat at some junction and shortly, she saw her friend (complainant) going towards her. She was bleeding on her legs and she (complaint) told her to take her home. She took the complaint to her (witness') mother where they found another woman. Shortly her mother arrived and together they went to the police station. The complainant was taken to hospital and she was stitched. That the complainant was bleeding from her private parts and she could not sit. She also had injuries on the head.

16. On cross examination she stated that she found the complainant seated under a tree. That the accused person was the Chira she was talking about as that is the name he is known with. That she saw the accused person pulling the complainant into the bush and she could hear the conversation between them. That the accused person was forcing the complainant into the sexual act.

17. PW4 was Mary Kagendo a resident of Kambi ya Juu. She stated that on 27th December, 2020 a lady called Wairimu went to her house and told her that the daughter of B had been defiled. That the defiled girl was called CK. That her daughter is called CK (PW3). When she went out she found the complainant crying and bleeding from her private parts. She took her to the police station where the

complaint explained what had happened to her and they escorted her to Isiolo General Hospital. That she did not see any other injuries but the complaint had told her that she was assaulted as well. That her role was to help in taking the complainant to make a report to the police and escorting her to hospital.

18. On cross examination she stated that she saw the complaint bleeding. She did not witness the incident. She only helped the complainant.

19. PW 5 was No. 118782 PC Bonventure Bwire from Kulamawe police station and the investigations officer after taking over the file from PC Patrick Musila who had since been transferred to Ijara. He had perused the file and understood the matter. He stated that a girl called CK aged 13 years old had been taken to the station by a good Samaritan and reported that she had been defiled by a person well known to her and who was with others. The compliant was taken to hospital for examination and treatment as investigations commenced. A P3 form was filled which confirmed that the girl had been defiled. The complaint and her witnesses recorded their statements and a search for the accused person was mounted. The accused person was later arrested and an identification parade was conducted by the OCS in which the accused person was positively identified by the victim. The accused was later charged before court. Among the documents availed to them was the Birth Notification which showed that the complaint was born on 26th March, 2007 and so she was 13 years old at the time of the offence. He produced the Birth Notification as Pex-1. That there was evidence that the victim knew the suspect. The Identification Parade was conducted by IP Victor Otieno who was transferred to Turkana. He produced the ID parade form as Pex-3.

20. On cross examination he stated that the accused person was arrested later after the incident on 31st December 2020. That they first took the victim to hospital and had the P3 form filled, a recorded witness statements and the accused was arrested. That he did not threaten the accused person.

21. DW1 was Isaac Wachira, the accused person. In his unsworn testimony he stated that the denied the charges. He informed court that on 24th December, 2020 he went to Nanyuki after being invited by his Aunt for Christmas. He came back to Isiolo on 29th December 2020 and he was arrested on 31st December 2020. When he asked to know the reason for his arrest he was told that he will know while at the police station. While at the police station he was told that he had defiled the complainant. That the charges against him are as a result of a grudge between the complainant's father and his family due to grazing land. That he knew the complainant though their home is a bit far from theirs.

22. The appeal was canvassed by way of written submissions.

Appellant's Submissions

23. The appellant submits that the birth certificate was not authentic and it was not safe to rely on it. He submits that the age of the complaint remained unknown. He further submits that since the complainant had said she was seventeen years, there was material contradiction in the complainant's evidence and the birth notification.

24. The appellant further submits that the identification parade which was conducted was not necessary as the appellant was well known to the complainant. He submits that his identification was questionable and the same cannot be relied on to come to a safe conviction.

    He relied on Wamunga –vs- Republic (1989) KLR 424 and Njihia –vs- Republic (1986) KLR 422.

25. The appellant further submits the sentence imposed was harsh and excessive. While relying on the cases of Christopher Ochieng –vs- Republic (2018) EKL, Jared Koita Injiri –vs- R, Kisumu Criminal Appeal No. 93/2014 he submits that the mandatory sentence fails to conform to the tenets of fair trail

that accrues to the accused person under Article 25 of *the Constitution*. He urges the court to find that the sentence was harsh and excessive.

26. The appellant submits that his rights to fair trial were violated as he was forced to proceed with the witness when he was sick. He relies on Article 50 (2) (c) of *the Constitution*.

27. He further alleges that the trial magistrate was biased and meted out a harsh sentence.

28. The appellant submits that the prosecution failed to call vital witnesses who were mentioned on several occasions during trial. He cited Bukenya –vs-Uganda, peter Mutiiria Mitambo –vs- Republic (2015) eKLR.

29. The appellant submits that his defence was rejected and yet it contained some facts to support his acquittal. He submits that the charge was not proved beyond any reasonable doubts.

The Respondents' Submissions

30. It is there submission that the charge was proved beyond any reasonable doubts contrary to the submissions by the appellant. The respondent submits that all the elements of the charge of gang rape under Section 10 of the Sexual Offences were proved beyond any reasonable doubts and that considering the circumstances of this case the sentence was neither harsh nor excessive. The respondent urges the court to dismiss the appeal.

31. This is a 1st appeal. It is the duty of the first appellate court to carefully examine and evaluate the evidence which was presented before the trial court and come up with its own independent decision. It is now well settled that an appellant on a first appeal is entitled to expect the evidence as a whole to be subject to a fresh and exhaustive examination and consideration, and to the appellate's court own decision on the evidence. The leading authority on this subject is Okeno-v- Republic (1972) E.A 32 where this duty was discussed. This was buttressed in the case of Kiilu & Another-v- Republic (2005) 1 KLR 174 where the Court of Appeal stated:-

> " An Appellant on a first appeal 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 weight conflicting evidence and draw its own conclusions.
>
> It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must itself make its own finding. 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 advantage of hearing and seeing the witnesses."

Analysis and Determination

32. The issues which arise for determination are: -

    1. Whether the age of the complainant was proved.
    2. Whether the appellant was identified as the perpetrator.
    3. Whether the rights of appellant to fair trial were violated.
    4. Whether sentence was harsh and excessive.

33. The appellant was charged with the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act*. It provides as follows:

> " Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life."

34. The ingredients of the offence are:

a. Prove of penetration.

b. The offender is in association of another or others or any other with a common intention to commit the offence of rape or defilement.

c. Positive identification of the perpetrator

35. In Cosmos Koech –vs- Republic (2021) eKLR the court affirmed the ingredients of defilement as unlawful Sexual Act committed in association with another or others who form a common intention of committing the offence.

36. The three critical ingredients of defilement which are, age of the complainant, penetration and the identity of the perpetrator must be proved. On the age of the complainant, in the case of Francis Omuroni –v- Uganda, Court of Appeal, Criminal Appeal No.2 of 2000, the Court stated with regard to proof of age of a sexual offence victim.

> " 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 or by observation and common sense."

37. Thus, age may be proved through a birth certificate, age assessment by a medical practitioner or through other credible evidence such as baptism card, birth notification or evidence from the parent or guardian. The court has to determine whether the age has been proved beyond any reasonable doubts with credible evidence.

38. In this case the complainant stated that she was seventeen (17) years old but was quick to say that she did not know the date of her birth. The prosecution produced a birth notification showing that the complainant was born on 26/3/2007.

39. On the other hand clinical office who treated the complainant told the court that the complainant was thirteen years old at the time she was examined. The appellant has challenged the authenticity of the birth notification. To my mind, a birth notification is an official document which is issued to register the birth of the child and is used to obtain the birth certificate. It is not always the case that children are born in hospital. As such failure to indicate the hospital where a child was born does not invalidate the document, secondly as pointed out by the learned trial magistrate, the birth notification was issued long before this offence was committed. It cannot therefore be stated that it was issued for the purpose of this case. It was issued in Isiolo where the complainant was born and brought up. Finally the clinical officer confirmed the age of the complainant to be thirteen years. It is my view that the age of the complainant was proved to the required standards.

Penetration:

40. The term penetration is defined under Section 2 of the *Sexual Offences Act* to mean- "the partial or complete insertion of the genital organ of a person into the genital organ of another person."

41. Penetration is proved by the evidence of the victim and corroborated by the medical evidence. In this case the complainant adduced evidence on how the appellant found her with her friends and started to beat her with a stick alleging that they had stolen mangoes. The PW1 stated that the appellant then dragged her away from her friend and led her to the bush. The PW1 stated that the appellant told her she was proud and that he would show her he is king. The appellant was joined by other boys who forced her to lie down, they pinned her down with one holding her legs and the others her hands and blocking her mouth. The appellant undressed her and he also removed his trouser and inserted his penis into her genital organ and proceeded to defile her as his friends looked on. PW1 testified that she went through a very painful experience and bled profusely to the extent that there was blood in the ground where she was defiled. When she told the appellant that she would report, one of the boys chased her. She went home and she informed her grandmother. She then reported to the police at Kulamawe who in turn escorted her to Isiolo Hospital.

42. PW2 examined the complainant three hours after the ordeal and on examination she had an injury on the back of the heard. On the relevant findings, PW2 testified that the hymen was freshly broken, there were lacerations on the viginal walls. There was visible bleeding and blood clots on the genitalia. Urinalysis revealed there was blood. There was blood from High viginal walls. Stitching and dressing was done on the injury on the viginal wall which had a 2nd degree tear. He concluded that penetration did occur due to the freshly broken hymen and laceration of the viginal walls. He filed the P3 form and other medical records.

43. PW3 who was with the PW1 saw when she was dragged to the bush by the appellant and other boys. Thereafter the complainant went to where she was and she was bleeding.

44. I find that the prosecution proved that there was penetration in PW1's genital organ vigina with the testimony of PW1 and the medical evidence adduced by PW2.

45. The submission by the appellant on the testimony of PW5 that the genitalia was normal is misleading as there was such evidence on record.

46. On identity of the perpetrator. This offence was committed in broad day light. The PW1 and the appellant were well known to each other. There was no possibility of mistaken identity. The appellant submitted at length that he was well known to the PW1 and there was no need of an identification parade. The appellant admitted in his defence that he was well known to the complainant. PW3 corroborated the testimony of PW1 that the appellant was at the scene and he led her to the bush where he was joined by other boys. The appellant was identified as the perpetrator.

47. It was not necessary to conduct an identification parade as the appellant was well known to the victim. The identification parade form is there ignored as it has not probative value and the maker was not called why he saw it fit to conduct the parade. The appellant was prejudiced in anyway.

48. The prosecution proved that the appellant is the one who penetrated the complainant. He was with others who aided him to penetrate the complainant. The appellant had formed a common intention to penetrate the complainant. Common intention may be inferred from the presence of the accused person their actions and the omissions of any of them to disassociate himself from the assault.

49. On the other hand a person who aids, abets, Counsels, procures or conspires with another to commit an offence is said to commit the offence. Section 20(1) of the Penal Code provides as follows:-

> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence , and may be charged with actually committing
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids or abets another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence; and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission."

50. The appellant and the boys who were with him abetted and aided in the commission of the offence. Their common intention brings their actions within the ambit of Section 10 of the *Sexual offences Act*. There is no doubt that the appellant is the one who penetrated the complainant. The defence of the appellant was properly rejected as there was overwhelming evidence that he was at the scene and committed the offence. The defence of alibi given very late in the proceedings without giving the prosecution an opportunity to consider it and be able to cross-examine on it is at best rejected as an afterthought.

51. The appellant alleged violation of his right as the court refused to give adjourn the mater when he was sick. Article 50(2) (K) of *the Constitution* provides as follows:-

> "Every accused person has the right to a fair trial which includes the right-
>
> To adduce and challenge evidence."

52. A right under *the Constitution* is violated if it is denied, violated, infringed, threat to violation. See Article 23 of *the Constitution* and Article 165

53. The appellant was given the right to challenge evidence but he squandered it by feigning sickness and refusing to cross-examine. The right to challenge evidence was not denied nor violated.

54. Section 205(1) Criminal Procedure Code provides as follows:-

> 205.
>
> (1) The court may, before or during the hearing of a case, adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present, and in the meantime the court may allow the accused person to go at large, or may commit him to prison, or may release him upon his entering into a recognizance with or without sureties conditioned for his

appearance at the time and place to which the hearing or further hearing is adjourned:

> Provided that no such adjournment shall be for more than thirty clear days, or, if the accused person has been committed to prison, for more than fifteen clear days, the day following that on which the adjournment is made being counted as the first day."

55. The Court of Appeal has held that it is not all the time that a violation of Section 205(1) Criminal Procedure Code results in the breach of the right to fair hearing. A person alleging that breach must show that the violation is so flagrant or perverse that it hampered his ability to prepare or carry out his defence or has caused some other prejudice. The appellant did cross-examine the victim. The appellant did not apply to re-call the complainant for the purpose of further cross-examination. He has only come to raise the issue in this court. It is an afterthought. I see no prejudice suffered by the appellant. The ground must fail.

56. The appellant submits that a vital witness was not called. Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides as follows:-

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

57. This was a sexual offence where a minor was involved. Section 124 of the *Evidence Act* provides:-

> Notwithstanding the provisions of Section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

58. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

59. The trial court magistrate conducted a voire dire examination and the court found that she understands the impact of an Oath and gave sworn testimony. The complainant's testimony was well corroborated. The respondent had the discretion to call the witnesses who were sufficient to prove their case. The respondent did not withhold any vital witness. This ground is without merits.

60. The appellant has challenged the sentence as being harsh and excessive. Sentencing is an exercise of Judicial discretion by the trial magistrate. An appellate court will not normally interfere with the exercise of that discretion unless it is shown that the trial Judge took into account irrelevant mattes or failed to take into account relevant matter or acted on wrong principles.

61. In Ogola s/o Owuor –v. Republic (1954) E.A C.A 270

> The court does not alter the sentence unless the trial Judge has acted on wrong principals or overlooked some material factors."

62. See Shadrack Kipkoech Kogo-v- Republic C.A 253/2003 H.C Eldoret in Bernard Kimani Gacheru-v-Republic Court of Appeal (2002) eKLR it was stated-

> It is now settled law following several authorities by this court and by the High Court that sentence is a matter that lies 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 the sentence unless that sentence is manifestly excessive in the circumstances of the case or 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 to interfering with the discretion of the trial court on sentence unless any one of the matters is shown to exist."

63. The appellant was charged under Section 10 of the *Sexual Offences Act* which provides for a minimum sentence of 15 years and may be enhanced to life imprisonment. While sentencing the appellant the learned trial magistrate gave the appellant an opportunity to mitigate. He addressed the court and stated that he had a family. He prayed for leniency. He said he is an orphan with three daughters who he did not know where they were.

64. On the other hand, the respondent in his mitigation stated that they had no records of the accused in view of the mandatory minimum sentence he believes the appellant should suffer severe sentence as provided under Section 10 of the Act. He urged the court to consider the brutality in which the offence was committed and it relates to gender based violence. That there were aggravating factor to warrant the appellant to receive a severe sentence to serve as a deterrence. The victim was 13 years old who was overpowered by the appellant and others. The appellant is underserving of court mercy.

65. The learned trial magistrate noted he had considered the nature of the offence and the circumstances under which it was committed and the manner in which it was committed. He noted that the complainant had to be stitched in her genitalia to correct the tears occasioned by the appellant. The appellant was underserving to be in the society. He sentenced him to serve thirty five years imprisonment.

66. The Judiciary Sentencing Policy Guidelines at guideline No.7 19 states that in deciding whether to impose a custodial or noncustodial sentence the factors which should be taken into account are-

1) Gravity of the offence.

2) Criminal History of the offender.

67. It states that where there are aggravating circumstances, a custodial sentence should be imposed. In the case of Republic –v- Anthony Mwema Mutisya, Machakos High Court Criminal Case No.38/2011, Justice Ondunga as he then was stated as follows:

> .....whatever sentence the court decides to impose, it must be commensurate with the offence committed and must be one that is capable of sending a clear signal to the accused and the public particularly those who may be inclined to commit similar offence, that their actions will be met with appropriate penalty. Unless this is done the public might lose confidence in the justice system and result to self-help means in order to mete out what is in their view is the appropriate sentence."

68. The learned Judge cited Republic-v- Scott (2005) NSW CCA 152 Howie Grove where Barr JJ stated that the fundamental and immutable principle of sentencing is that the sentence imposed must reflect

the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed one of the purposes of punishment is to ensure that an offender is adequately punished and further to denounce the conduct of the offender. He also cited the New Zealand Case of Republic- AEM (2000) where it was stated that one of the main purposes of the punishment is to protect the public from commission of such crimes by making it clear to the offender that they will meet this punishment.

69. I associate myself with this holding. One of the considerations by the court when passing sentence is to punish the offender for the offence appropriately with a term sentence that takes into account the circumstances in which the offence was committed as well as the offence itself. Sentence should therefore send a message to would be offenders that that the offence will be punished with severe sentence. The Court of Appeal in Jared Koita Ivijiri –v- Republic (2019) eKLR stated in case where the appellant was ordered to serve a sentence of life imprisonment;

> The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a 1st offender. He pleaded for leniency. However it cannot be overlooked that the appellant committed a heinous crime and occasioned sever trauma and suffering to a young girl. His actions have demonstrated that around him young and vulnerable children like the complainant could be in jeopardy."

70. The learned trial magistrate considered the circumstances under which the offence was committed and the trauma that the offence committed had on her and the damage caused on her body. The trial magistrate took into consideration the correct principles while punishing the appellant. The sentence passed was not the bare minimum provided nor was it the maximum. The learned magistrate did not say his hands were tied or that he passed the sentence as the mandatory minimum. Instead he considered the sentence which was commensurate with the crime committed.

71. Having considered the circumstances under which the offence was committed the defence of the appellant and the mitigation. I find that no reason to interfere with the sentence meted out against the appellant. In the premises the entire appeal fails and is dismissed. It so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 1ST DAY OF JULY 2024.

L.W. GITARI

JUDGE