



**Nyongesa alias Reuben v Republic (Criminal Appeal 67 of 2019)
[2024] KEHC 10899 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10899 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 67 OF 2019
JRA WANANDA, J
SEPTEMBER 20, 2024**

BETWEEN

BERNARD NYONGESA ALIAS REUBEN APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The determination of this Appeal was delayed because the Appellant had filed an Application seeking bail pending Appeal which was successful and subsequently, he filed an Application seeking leave to adduce additional evidence on Appeal which second Application was however declined.
2. The background of the matter is that the Appellant and a co-accused (a minor) were charged in Eldoret Chief Magistrate’s Court Criminal Miscellaneous Case No. 193 of 2018 with the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that on 2/09/2018, at Eldoret West District, within Uasin Gishu County in association, alternatively, intentionally and unlawfully caused their genital organs, namely, penis to penetrate the genital organ, namely, vagina of JA, a child aged 16 years. They were also charged with an alternative charge of committing an indecent act with the same girl contrary to Section 11(1) of the same Act.
3. The Appellant and his co-accused pleaded not guilty to all the charges and the case then proceeded to full trial in which the prosecution called 4 witnesses. At the close of the prosecution’s case, the Court found that the Appellant and his co-accused had a case to answer and put them on their defence. They both gave sworn statements and called no other witness. By the Judgment delivered on 26/04/2019, they were both convicted on the main charge and the Appellant was sentenced to serve 20 years life imprisonment.



4. Dissatisfied with the said decision of the trial Court, the Appellant instituted this appeal in person on 7/05/2019, against the conviction and sentence. Messrs KWEW Advocates later came on record for the Appellant and filed an Amended Petition of Appeal citing 8 grounds reproduced verbatim as follows:
- i. That the learned trial Magistrate erred in law and in fact in failing to hold that the identity of the 2nd Appellant had not been ascertained by the prosecution beyond any shadow of doubt.
 - ii. That the learned trial Magistrate erred in law and in fact in believing the evidence of the complainant which evidence was tainted with glaring lies rendered her evidence unbelievable.
 - iii. That the learned trial Magistrate erred in law and in fact in failing to hold that the defence evidence had raised a doubt as to the version of the prosecution evidence and which should have given the 2nd Appellation a benefit of doubt.
 - iv. That the learned trial Magistrate erred both and in law and in fact in failing to make a finding that the burden and standard of proof beyond reasonable doubt that the defilement had been committed by the 2nd Appellant had not been discharged by the prosecution.
 - v. That the learned trial Magistrate erred both in law and in fact in failing to give due regard to the material contradictions, discrepancies and inconsistencies in the prosecution's case.
 - vi. That the learned trial Magistrate erred both in law and in fact by being selective as to which evidence by the prosecution she would rely upon in convicting the 2nd Appellant instead of considering both the prosecution's evidence and the defence evidence in totality.
 - vii. That the trial Magistrate erred in fact and in law by passing a very severe and harsh sentence.
 - viii. That the learned Magistrate erred in fact and in law by failing to find that the 2nd Appellant's rights as protected under Articles 49 and 50 of the Constitution of Kenya had been violated.

Prosecution evidence before the trial Court

5. PW1 was the minor-complainant (victim). She stated that she was 12 years old and because of that age, she was taken through a voire dire examination after which the learned Magistrate recorded that she understood the meaning and nature of taking an oath. She was then allowed to give sworn evidence which she then proceeded to do. She began by identifying the Appellant and his co-accused in the dock by their names. He referred to the Appellant as "Reuben". She then stated that she knew the Appellant as she had been seeing him to go to work at West Kenya and that the co-accused, too, used to arrange sugarcane at the same West Kenya on a tractor. She stated that on the fateful day, a Sunday in the evening, she was going to wash her uniform outside when the Appellant and his co-accused appeared from behind the house, that she thought they were passing and as she bent down to wash the clothes, the co-accused jumped on her from behind causing her to fall down and the Appellant then carried her up to the hill then to the bush about 290 metres away from her home. She testified further that the Appellant blocked her mouth and the co-accused raped her, that she tried to scream but the co-accused blocked her mouth while the Appellant held her hands, and that when the co-accused finished, the Appellant then also raped her. She testified that the Appellant was still raping her when her father appeared and the Appellant and his co-accused ran away. She stated that she told her father what happened and he took her to hospital where tests were conducted on her. In cross-examination, she stated that the Appellant was, at the time of the incident, wearing the same shirt that he was wearing in Court. In re-examination, she reiterated that it was in the evening, not at night, and that the moon had started to show.



6. PW2 was the complainant's father. He stated that on the fateful day, he had left church at around 7 pm and went home, that the complainant went outside behind the house to wash her clothes, that when his wife had finished cooking, he called out the complainant severally to come and eat but she did not respond and he got worried, that she then responded from behind the maize plantations which is behind a hill and screamed, and that it was about 50 metres away. He stated that when he rushed there, he saw 2 people running away up the hill, that when she inquired from the complainant, she told him that the 2 people running away had raped her and that she knew them, that he also recognized them, and that the minor told him that both of them had raped her. He added that the complainant could barely walk and it was evident that she was hurt and her clothes were muddy since it had rained. He then stated that the complainant recounted and described to him what had happened, and that he then reported the matter to the village elder and later the complainant was taken to hospital. He stated that the complainant was a student in class 5 and was 13 years old. He then identified the Appellant and his co-accused in the dock and testified that the 2 normally passed near his home on their way to work and that they used to exchange greetings. In cross-examination, he stated that the co-accused was wearing a red shirt, a blue short and a cap when he saw them running and that the Appellant was in front followed by the co-accused.
7. PW3 was one a Clinical Officer. She stated that she examined the complainant and filled the P3 Form, that the complainant was 11 years old and brought a skirt that was torn from behind and alleged that she had been defiled by people known to her. She testified further that the complainant had pain in her thighs and had been treated in a hospital, that there was redness showing that there was penetration, that the hymen was not intact and there was vaginal discharge, that HIV and venereal disease test were negative, and that there was epithelial swelling. She stated that her conclusion was that the complainant had been defiled and she then produced the P3 Form and treatment notes. She stated that the complainant reported that the defilement took place on 2/09/2018.
8. PW4 was one Sergeant Ruto. She stated that she was working at the Turbo Police Post, that on 4/09/2018 the complainant (PW1) and her father (PW2) came to the station and reported that the complainant had been defiled by 2 people at around 6.30-7.00pm while she was washing her uniform, and that she recounted to him how the attack took place. He stated that he then recorded their statements, issued P3 Form and escorted them to hospital where the complainant was examined. He testified further that since the complainant did not have any document to prove her age, he took her for age assessment and which estimated the same at 15-16 years. He stated further that it is the complainant who directed him to the Appellant and his co-accused for purposes of arrest since she knew them well, that the complainant told him that the two were their neighbours and used to pass at their home as they went to work at West Kenya Sugar, that she referred to the Appellant as "Reuben Koech" as that is the name that the Appellant is known by but that his real name is "Nyongesa". PW4 stated further that the co-accused, after arrest, told him that the Appellant was the complainant's boyfriend and the Appellant had asked him to call her, that they went and when they reached, they just decided to sleep with her, both of them.
9. At the close of the prosecution case, the Court found that a case been established against the Appellant and his co-accused and put them on their defence.

Defence evidence

10. DW1 was the co-accused and gave sworn statement. He stated that he was 15 years and for this reason, was taken through a voire dire examination after which the learned Magistrate recorded that DW1 understood the meaning and nature of taking an oath. In cross-examination, DW1 stated that on



2/10/2019, he met the Appellant on the road and who asked him to go and call the complainant. He stated that he used to pass the complainant's home and therefore knew where she lived.

11. DW2 was the Appellant. He, too, gave sworn statement and testified that he works as a sugarcane arranger on a tractor. He stated that on the material date, he had gone to church and returned with his wife's visitors who stayed at his home from 11 am to 2 pm, that he escorted them at around 3 pm and returned home at around 4 pm and that he never thereafter left the home as he was taking care of their baby. He stated that he was therefore shocked Administration Police officers accompanied by the sub-Chief came and arrested him on 27/09/2018 at his workplace. He claimed that the complainant identified "Koech" whom he does not know since his name is "Nyongesa". He claimed that he was framed.
12. DW3 was one JNK who stated that he is the Appellant's wife. He stated that he knew the Appellant as Rueben Nyongesa Mukhwana and that "Koech" was not his name. She stated that on 2/11/2018, they had visitors whom the Appellant came and found at home and denied that the Appellant came with the visitors. She claimed that on the material date, the Appellant was at work but conceded that she was not there with him at the workplace and that she could not ascertain where the Appellant was before he came home.

Judgment of the trial Court

13. After the trial, on 20/02/2023 the Court found the Appellant and his co-accused guilty of the offence of gang defilement and convicted both of them and on 26/2/2023, the Appellant was sentenced to serve 20 years imprisonment. In imposing the sentence, the learned trial Magistrate stated that "the offence has a minimal sentence".

Hearing of the Appeal

14. It was then agreed and directed that the Appeal be canvassed by way of written Submissions. The Respondent had already filed its Submissions on 16/01/2023 through Prosecution Counsel, Onkoba J.
15. On the part of the Appellant, although his Advocates forwarded a soft copy of an astonishing 51-page Submissions via email sent on 18/03/2024 as directed by the Court, there is no evidence that the same was formally filed in Court as required. No copy therefore even appears under Court CTS platform. Nevertheless, and in the interest of justice, I will still consider it. I will however first recite the Respondent's Submissions since it was filed almost 1 year earlier.

Respondent's Submissions

16. Prosecution Counsel submitted that although the Appellant has, as one of his grounds of Appeal, alleged violation of Article 49 (rights of an arrested person) and Article 50 (rights to a fair hearing) of *the Constitution*, the Appellant has not with specificity, clearly stated the particular rights that were violated and that in any case, there is nothing on the record that points to any such violation.
17. Counsel submitted further that the elements to be proven in defilement were all satisfied, that proof beyond reasonable doubt is not synonymous to proving a case with mathematical precision at 100%. He cited the case of *Miller vs Minister of Pensions (1947) 2 ALL ER* and submitted that to ask the prosecution to prove beyond a shadow of doubt becomes fanciful and wishful thinking.
18. Regarding the complainant's "age", he cited the case of *Evans Wamalwa Simiyu v R [2016] eKLR* and submitted that the complainant's apparent age on the P3 Form was abandoned as the investigating officer sought and obtained an age assessment Report which was produced. Regarding "penetration",



he submitted that under Section 2 of the *Sexual Offences Act*, and as affirmed in the case of *Erick Onyango Onden’g v Republic* [2014] eKLR, the slightest penetration is sufficient. He submitted that in this case, there was complete penetration which was confirmed by the doctor who examined the complainant and as well by the evidence of her father who told her Court that after seeing the Appellant and his accomplice running away, the complainant was walking with lots of difficulty which the complainant stated was as a result of the sexual assault by the two. He also observed that the findings of the P3 Form also proved penetration. Regarding “identification”, Counsel submitted that this was a case of recognition as the Appellant was a person well known to the complainant and her father and that even we were to rely on single witness evidence, the Court held in the case of *Ogeto v R* [2004] KLR 19 that a fact can be proved by a single witness except that such evidence must be admitted with care where the circumstances of identification are found to be difficult. Counsel submitted that in this case, the incident happened before night or darkness had set in and as such, the complainant was able to identify her aggressors, that further, the complainant and the Appellant spent a considerable time together while the Appellant was defiling her and as such, she was able to confirm his identity. He also observed that although it was contended that the Appellant’s name is not Reuben Koech, the witnesses who came from the area concerned area confirmed that it is the name that is known in the village and that even the Appellant’s co-accused (DW1) also confirmed this the Appellant was also known as “Reuben”.

19. On the issue of “corroboration”, Counsel cited the proviso to Section 124 of the *Evidence Act* which gives the exception that in sexual offence cases, where the only evidence is that of the alleged child the Court may proceed to convict on the basis of only that evidence, even without corroboration, if convinced that the child victim is telling the truth, a position which, he submitted, was affirmed in the case of *J.W.A v Republic* [2014] eKLR. He submitted further that in any case, in this case, the complainant’s evidence was corroborated by that of his father (PW2) and also by the doctor.
20. Regarding alleged “contradictions, discrepancies and inconsistencies” in the evidence of the prosecution witnesses, Counsel cited the case of *Twehangane Alfred vs Uganda*, Criminal Appeal No. 139 of 2001, the case of *John Nyaga Njuki & 4 Others* [2002] eKLR and the case of *Philip Nzaka Watu vs R* [2016] eKLR which he submitted to be authorities to the effect that the Court will ignore or overlook minor contradictions unless it thinks that they point to deliberate untruthfulness or if they do affect the main substance of the case. He submitted that, in this case, if there were inconsistencies in the evidence of the witnesses, then they were not material to dislodge the prosecution case or to cast any doubt at all.
21. On the allegation that the “sentence” meted out was harsh or severe, Counsel cited Section 382 of the Criminal Procedure Code and submitted that sentencing is a question of fact and it is always at the discretion of the trial Court, that in is Appeal, the Appellant does not contend that the sentence was illegal or unlawful. He cited the case of *Wanjema v Republic* (1971) EA 493, the case of *David Mwikwala Machugu v Republic* [2016] eKLR and also the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR and submitted that the Court having considered all the material circumstances during mitigation, the Court exercised its discretion and sentenced the Appellant.
22. Counsel also denied the allegation that the defence was not considered.

Appellant’s Submissions

23. As aforesaid, the Appellant’s Submissions runs up to 51 pages! I wish Counsels would appreciate that the Courts are swamped with an unmanageable number of cases to determine and that the best that they can do to assist the Courts is to be brief in their pleadings. I wish Counsels would realize that brevity is superior to verbosity and that it is all about quality and not quantity. Due to its length,



duplication and repetition of matters submitted upon, I will not recite the Submissions in detail but simply set out an abridged summary thereof.

24. Regarding the ground of violation of the Appellant's rights to fair hearing, Counsel submitted that the Appellant was never informed of his right to obtain legal representation. He cited Article 50(2)(g) of *the Constitution*, Article 25 thereof and also Section 43 of the *Legal Aid Act* No. 6 of 2016. As evidence that the Appellant did not comprehend the proceedings and should have been informed of the said right, he cited alleged errors and/or inaccurate references made by the Appellant in his home-made initial Petition of Appeal filed herein and he also quoted the trial Magistrate's observation that the Appellant did not raise any tangible questions during cross-examination and that his evidence was very weak. Counsel also submitted that there was no record that the Appellant was supplied with Witness Statements by the Prosecution considering that there was no pre-trial conducted and also the fact that the Appellant took plea on 15/10/2023 and the trial commenced on 23/10/2023. He submitted that because of these omissions, the Court should set the Appellant free and that considering the time that has lapsed since the trial was conducted, the Court should not order for a retrial.
25. Counsel also faulted the consolidation of the charge sheets for the two accused persons on the ground that no explanation was given for the consolidation and that no application to amend the charge sheet was made and yet the place where the incident occurred was changed from Ngenyelel location in the Eldoret West District within Uasin Gishu County to Chepkemei village in Eldoret West District within Uasin Gishu County.
26. Counsel also criticized the manner in which the issue of the complainant's age was handled and submitted that the age of the complainant was a moving target throughout the proceedings. He pointed out that, from the evidence, it was reported to the police that the complainant was aged 11 years old which is what was reflected in the P3 form and in the charge sheet dated 13/09/2018 and that the trial Court ordered for an age assessment on the complainant which placed her apparent age at 16 years and which was the age that was indicated in the charge sheet dated 15/10/2018. He submitted that the Court of Appeal has settled that *voire dire* examination is only to be conducted on minors below the age of 15 years and it is not clear why in this case, the Court conducted such *voire dire* examination which in any case revealed further inconsistencies because the complainant stated that his age was 12 years. He contended further that the age assessment Report should have been produced by the medical officer who prepared it, and not the Investigating Officer. Further, Counsel pointed out that there were contradictions in the evidence of the complainant and that of her father regarding the school where the complainant was alleged to be a student
27. Regarding identification of the assailants, Counsel submitted that the complainant gave contradictory evidence thereon since the medical treatment notes reveal that she did not state the identity of the assailants, and that it is only in the P3 Form that she disclosed the alleged names. He also submitted that while the complainant stated that the distance of the scene of crime from her home was 290 metres, her father stated that it was 50 metres. Counsel further pointed out the mix-up over the name of the Appellant between "Reuben Nyongesa", "Bernard Nyongesa" or "Bernard Koech". He also submitted that since the complainant's father (PW2) stated that he only saw the assailants running away, he could not have seen their faces. Regarding penetration, Counsel submitted that the skirt that the complainant alleged to have been wearing at the time of the incident and which was alleged to have been torn was not produced.
28. Regarding the sentence imposed, Counsel submitted that the same was harsh. He then faulted the Court for not calling for a pre-sentence Report and for not availing to the Appellant sufficient opportunity to mitigate because mitigation and sentencing were done on the same date that the



Appellant was convicted. He also criticized the trial Court for imposing a mandatory minimum sentence which has been declared to be unconstitutional.

Determination

29. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See *Ogeto versus Republic* [1972] E.A 32).
30. The issues for determination are evidently the following:
 - a. Whether there was a failure to inform the Appellant of his right to obtain legal representation and if so, the consequences thereof.
 - b. Whether consolidation of the charge sheets prejudiced the Appellant.
 - c. Whether there was failure to supply the Appellant with witness Statements.
 - d. Whether the gang defilement charge against the Appellant was proved beyond reasonable doubt.
 - e. Whether the sentence of 20 years imprisonment was proper.
31. I now proceed to analyze and determine the said issues

a. Failure to inform the Appellant of his right to obtain legal representation

32. Regarding the ground that the Appellant's rights to fair hearing were violated, Counsel submitted that the Appellant was never informed of his right to obtain legal representation and that therefore, the entire trial was a nullity. He cited Article 50(2)(g) of *the Constitution*, Article 25 thereof and also Section 43 of the *Legal Aid Act* No. 6 of 2016. Indeed, Article 50(2)(g) and (h) provides as follows:

“ 50(2). Every person has the right to a fair trial which includes the right
.....
(g) to choose and be represented by an advocate, and to be informed of this right promptly.
(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”
33. From the record of the trial Court, it is clear that the Appellant was not represented by an Advocate. The record is however silent on whether he was informed of his right to be represented by an Advocate to enable him elect whether to obtain such representation. In light of the cited provisions of law, it cannot be disputed that the duty to inform an accused person of his right to legal representation is a constitutional requirement and as such, I agree that failure to discharge this duty can, in appropriate circumstances, be deemed to be a violation of the accused person's fair trial rights and as amounting to an injustice to the extent that it can vitiate the entire trial. Indeed, I am aware of many decisions which have automatically nullified criminal trials on this sole ground.



34. I however also refer to the holding of my sister, Gitari J in the case of Joseph Muriuki Muthige v Republic [2017] eKLR, where she stated as follows:

- “ 25.
- The appellant was given enough time and facility to prepare his defence. He contends that he was not informed of his right to legal representation. The provision states that accused has the right to choose and to be represented by an advocate. The appellant never chose to be represented by an advocate. The appellant was not in any way hindered or prevented from enjoying the right to be represented by an advocate. The right was not denied.
26. In my view the wording of the article shows that the first step is for an accused person to choose to be represented where upon the Court would promptly inform him of the right to legal representation. The appellant never chose to be represented by a counsel. As such his right to legal representation was not violated. The appellant was charged with the offence of defilement. The appellant never brought to the attention of the Court that substantial injustice would occur. The Court had to be moved to order an advocate to be assigned
- ”

35. I also cite the decision of Musyoka J in the case of John Amugune v Republic [2021] eKLR in which he stated the following:

- “ 5. Let me start by first addressing the ground on the right to legal representation. The same is set out in Article 50(2) (g) (h) of *the Constitution* of Kenya 2010, under rights to a fair hearing. The constitutional provision states that:
-
6. *The Constitution* makes it mandatory for an accused person to be promptly informed of this right before the trial commences. The *Legal Aid Act*, 2016, at section 43, sets out the duties of the court when interacting with an unrepresented person, and states:
- “ A Court before which an unrepresented accused person is presented shall:
- a) Promptly inform the accused of his or her right to legal representation;
 - b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and
 - c) Inform the service to provide legal aid to the accused person”
-

10. In the instant case, at no time did the appellant raise the issue of legal representation or address his difficulties during the trial. The appellant carried out a proper cross-examination of the witnesses. It has also not been



demonstrated that his case involved complex issues of fact or law which made him unable to effectively conduct his own defence, owing to some disability or language difficulties or the nature of the offence. It is, therefore, my finding that the appellant has not demonstrated the violation alleged, and, therefore, this ground cannot stand.”

36. I associate myself with the above holdings and state that, in my humble view, each case must be determined on the basis of its own unique and/or peculiar facts. The Court must always retain its discretion to consider all relevant circumstances, case by case. I do not subscribe to the school of thought that it should always be automatic that a trial must be vitiated and declared a nullity wherever it is demonstrated that there was failure by the trial Court to inform an accused person of his right to obtain legal representation. Taking that route may mean that a very big number of convictions already determined in this country will have to collapse and convicts set free despite have committed crimes. This would be a serious injustice to victims of such crimes. In my view, there must be demonstration of the real injustice or prejudice that was caused by the omission. In this case, I cannot even conclusively determine that indeed the Appellant was not informed of the right to legal representation. The scenario is that the record is silent and therefore leaves room for speculation. I take judicial notice that not all that happens in Court finds its way in the records. It may very well be that the Court did inform the Appellant of his right to representation but simply inadvertently omitted to record the same. We may never know. Of course, this by no means excuses trial Courts from the failure to properly record proceedings. Such lethargy is unacceptable. However, having read the record in totality and having seriously agonized over this issue, I am not convinced that the Appellant has not demonstrated that substantial injustice was occasioned to him as a result of the fact that he was unrepresented or by the fact that he may, possibly, have not have been informed of his right to be represented. This ground therefore fails.

b. Whether consolidation of the charge sheet prejudiced the Appellant

37. Counsel also faulted the consolidation of the charge sheets for the two accused persons on the ground that no explanation was given for the consolidation and that no application to amend the charge sheet was made and yet the place where the incident occurred was changed from “Ngenyelel location” to “Chepkemei village”.
38. In regard to what should be contained in a Charge Sheet, Section 134 of the Criminal Procedure Code provides as follows:
- “Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”
39. In addition, it was held in *Sigilani vs Republic*, (2004) 2 KLR, 480 that:
- “The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”
40. Applying the test above and upon keenly perusing the charge sheet, I find that the particulars of the offence were clearly spelt out as were the date of the offence, the place of the offence, the act constituting the offence and the name of the victim. It has not been alleged that these ingredients were in any



way affected by consolidation of the charges facing the two accused persons. Even assuming that the consolidation was improperly done, I find the same to have been a minor issue that did not go to the root of the matter. Although I acknowledge that the Appellant is a layman and was unrepresented at the trial, I also note that he did not, at any time, raise any issue alluding to an objection before the trial Court to the effect that the consolidation was improper or prejudiced him in any way. After the consolidation, he fully participated in the trial in clear demonstration that he understood the charge. He cross-examined witnesses and was able to put up an appropriate defence. This is sufficient indication that the Appellant understood the particulars of the charge he faced. There is no demonstration that because of the consolidation of the charges, the Appellant was unable to plead to a specific charge that he could not understand or that he was unable to prepare his defence. In the circumstances, the Appellant cannot be said to have been prejudiced.

41. In any event, even assuming that there was any irregularity, the same would still be curable under Section 382 of the Criminal Procedure Code which provides as follows:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

42. Similarly, the Court of Appeal, in the case of *Fappyton Mutuku Ngui v Republic* [2014] eKLR, held as follows:

“

“30. We now turn to the issue of the defective charge sheet. The appellant argues that he was charged contrary to ‘section 8(1) (2)’ of the *Sexual Offences Act* when in fact there is no such section. We note that the appellant did not raise this issue in his first appeal. Despite this, the High Court addressed it in its judgement in light of any prejudice or miscarriage of justice that the appellant may have faced as a result. The High Court relied on Section 382 of the Criminal Procedure Code which provides that:

.....

31. The first appellate court was of the opinion that this defect was curable under section 382 cited above; the appellant had participated fully in his trial because he knew the charge that was facing him, and the trial process was fair. There was no prejudice that faced the appellant. We concur with the High Court and learned counsel for the respondent that the appellant was well aware of the charges he was facing, he had sufficient notice of the charges facing him and that he participated vigorously in the trial process. Furthermore, the charge sheet outlines the essential ingredients and particulars of the offence. We therefore find no merit in this ground of appeal and dismiss it.”



43. In light of the foregoing, I am not persuaded that consolidation of the charges resulted into any error, omission or irregularity that may be said to have occasioned a failure of justice or prejudiced the Appellant in any way. This ground therefore fails.

c. Whether there was failure to supply the Appellant with Witness Statements

44. Counsel for the Appellant also contended that there was no record that the Appellant was supplied with Witness Statements by the Prosecution considering that there was no pre-trial conducted and also the fact that the Appellant took plea on 15/10/2023 and the trial commenced only 8 days later on 23/10/2023. I however curiously note that Counsel is not conclusively urging that the Appellant was not supplied with witness statements but what he is alleging is that there is no evidence that the statements were supplied. This is clearly an evasive and opportunist submission which seems to be based on mere speculation.

45. I have also looked at the record and although it is not conclusively discernible whether the Appellant was supplied with the witness statements, upon considering the record in entirety, I am satisfied that the Appellant was so supplied. I say so because the record of the trial Court captures the following discourse in regard to the proceedings of 23/10/2023:

“Prosecution	I had indicated that I had 4 witnesses present, however I have just noted that I have supplied a statement for the father and another witness today, and the doctor had to leave on official duties and requested for another date after the complainant had testified
Accused 1	I want them to come
Accused 2	I want to say Reuben is not in the statement

46. From the above portion of the record, it is apparent that the accused persons had possession of the statements. This ground accordingly also fails.

d. Whether the charge was proved case beyond reasonable doubt

47. The Appellant and his co-accused were charged with the offence of gang defilement contrary to Section 10 of the Sexual Offences Act which 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 the fifteen years but which may be enhanced to imprisonment to life.”

48. From the above definition, it is evident that the elements of the offence are the following:

- i. Unlawful sexual act committed in association with another or others; or
- ii. Being in the company of another or others who commit the offence with common intention of committing the offence.



49. It is therefore also evident that although a person may not have himself engaged in the sexual act, he may still be guilty of gang rape or defilement if he was in the company of another or others who commit the offence “with common intention of committing the offence”.
50. It is also evident that apart from the above elements, in respect to the offence of gang defilement, the other 3 ingredients that must be proved are the “age” of the victim”, “penetration” and positive “identification” of the offender.
51. Regarding definition, Section 8(1) of the [Sexual Offences Act](#) provides as follows:
- “ 8. A person who commits an act which causes penetration with a child is guilty
(1) of an offence termed defilement.
52. The importance of proving age was underscored by the Court of Appeal in the case of Hadson Ali Mwachongo v Republic [2016] eKLR, as follows:
- “The importance of proving the age of the victim of defilement under the [Sexual Offences Act](#) by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In [Alfayo Gombe Okello v Republic Cr. App 203 of 2009](#) (Kisumu) this Court stated as follows: -
- “In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. This must be so because dire consequences flow from proof of the offence under section 8(1)”.
53. The manner of proving age was then explained in the case of Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, as follows:
- “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...”
54. Age may therefore be proved by way of Certificate of Birth or age assessment by a qualified doctor or through other credible evidence such as baptismal card, notification of birth or school records or even by the evidence of parents or guardian.
55. In instant case, the Charge Sheet states the age of the complainant (PW1) as 16 years as at the time that the offence was committed. The complainant herself testified that she was 12 years old and a class 5 pupil. Her father (PW2) stated that the complainant was 13 years old. On his part, the clinical officer (PW3) stated that the complainant told him that she was 11 years of age but since he had not been supplied with any document to demonstrate the exact age of the complainant, he sought and obtained an order permitting the carrying out of an age assessment test on the complainant. Indeed, such age test was conducted and a copy of the certificate was produced in evidence. The same placed the age of the complainant at 15-16 years of age. The validity of the certificate has not been challenged and neither has the process leading thereto. In light of this, and although contradictory accounts were given on the age of the complainant, it is clear that all the accounts placed the age of the complainant at below 18 years, thus within the age of minority which defilement is all about.



56. Counsel for the Appellant has urged that the age assessment Report or Certificate ought to have been produced by the maker thereof, the medical officer, and not by the Investigating Officer as was done in this case. Faced with a similar ground of Appeal in the case of *Smk v Republic* [2019] eKLR, R. Lagat-Korir J ruled as follows:

“ 39. It is trite that where there are is no documentary proof of age the court will rely on the medical evidence of a doctor as was held in *Thomas Mwambu Wenyi v Republic* (supra).

40. In the present case, the trial magistrate made an inquiry on the age of the Appellant on the 7th April, 2016 when the case came up for hearing. The Appellant informed the court that he was 17 years but the trial magistrate ordered that he be taken for age assessment. On the 14th April, 2016 the prosecution presented the age assessment dated 9th April 2016 which indicated that the Appellant was above 18 years old. The trial magistrate rejected the report on the basis that there was no medical proof to support the report and ordered a fresh age assessment to be carried out.

41. On 18/4/2016, the prosecution presented to court another age assessment report dated the 18/4/2016 indicating that the Appellant was 19 years old. There was no objection from the Appellant and the trial magistrate proceeded to set the matter for hearing. The Appellant has not provided any documentary evidence rebutting the age assessment report. He never challenged the production of the age assessment report in the lower court. In the premise, I find that the Appellant was an adult at the time of the offence.”

57. Like the Judge in the above case, I, too, find that the Appellant, having not given any indication that the age assessment was in any way inaccurate or erroneous, having not given any rebutting evidence against or controverting the age assessment Report or the age stated therein, and also having not challenged the production of the report before the trial Court, he cannot, at this stage, now turn around and purport to challenge the competency of the person who produced the Report. I do not therefore have any basis, at this appellate stage, to fault the trial Magistrate for admitting and relying on the age assessment certificate produced in evidence. This therefore dispenses with the issue of age which, I find, was adequately proven.

58. In regard to “penetration”, Section 2(1) of the *Sexual Offences Act* defines the same as:

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

59. In the case of *Mark Oiruri Mose v R* [2013] eKLR the Court of Appeal stated that:

“Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.”

60. In this case, the complainant (PW1) testified that the Appellant blocked her mouth and the co-accused raped her, that she tried to scream but the co-accused blocked her mouth while the Appellant held her hands, and that when the co-accused finished, the Appellant also then raped her. She testified that



the Appellant was still raping her when her father appeared, and that is when the Appellant and his co-accused ran away. This account is the same that the complainant gave to her father (PW2) who in fact testified that he saw the Appellant and the co-accused running away after he emerged. The complainant also gave the same detail to the clinical officer (PW3) and also to the Investigating Officer (PW4). Besides being consistent in her account, the complainant's testimony on penetration was also not shaken during cross-examination.

61. Further, medical evidence was provided by the clinical officer who produced the PW3 Form and also the treatment notes. She stated that she examined the complainant and filled the P3 Form, that the complainant brought a skirt that was torn from behind and alleged that she had been defiled by people known to her. She stated further that the complainant had pain in her thighs and had been treated in a hospital, that there was redness demonstrating that there was penetration, that the hymen was not intact, that there was vaginal discharge, and that there was epithelial swelling. Her conclusion was then that the complainant had been defiled.
62. In the circumstances, I find no grounds to fault the trial Magistrate for finding that "penetration" was proved.
63. On the issue of "identification", the Court of Appeal in the case of *Cleophas Wamunga v Republic [1989] eKLR* expressed itself as follows:

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".
64. In the instant case, the complainant (PW1) and her father (PW2) both stated that the Appellant and his co-accused resided in the same neighbourhood as they and that they also knew where both the Appellant and the co-accused used to work (West Kenya Sugar). The Appellant and the co-accused were therefore people well known to the complainant and her father. Indeed, the Appellant is said to have been arrested at the same place of work pointed out by the witnesses (West Kenya Sugar). I also note that the incident is said to have occurred in the evening at around 6.00-7.00 pm, thus before nightfall. According to PW1 and PW2, there was still sufficient daylight. PW2 even described the clothing that the co-accused was wearing. This testimony not having been controverted, I am satisfied that PW1 and PW2 had ample opportunity to identify the Appellant and as such, the element of mistaken identity as regards the people who defiled her would be too remote.
65. The most damning evidence on identification was however the testimony of the co-accused (DW1), a 15 years old boy, who readily admitted that on 2/10/2019, he met the Appellant on the road when the Appellant asked him to go and call the complainant. He stated that he used to pass the complainant's home and therefore knew where she lived. He also confirmed that the Appellant is known as "Reuben" in the neighbourhood. The Appellant's wife who testified as DW3 also confirmed that the Appellant (her husband) is also known as "Reuben". I therefore find that the Appellant's identification was by way of recognition.
66. Even assuming that the sole evidence of identification is that of the Appellant without corroboration, it is recognized that by their very nature, sexual assault acts especially those involving minors are



committed in exclusion of eye-witnesses. It is in recognition of this fact that the proviso to Section 124 of the *Evidence Act* provides as follows:

“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” (emphasis added).

67. This proviso allows a Court to convict an accused person in a sexual assault case where the victim is a child, solely on the victim’s evidence so long as the Court believes that the child is speaking the truth. In this instant case, the trial Court believed the child’s evidence. This Court, too, has no reason to doubt that the child told the truth.

68. Although it is true that the evidence of the prosecution witnesses contained some contradictions and inconsistencies as pointed out by Counsel for the Appellant, I do not find that the aspects contradicted upon to have been material or having affected the substance of the case. Indeed, this is what was stated in the case of *Twehangane Alfred vs Uganda*, Criminal Appeal No. 139 of 2001, [2003] UGCA where the Court stated as follows:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence 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.”

69. In his defence, the Appellant raised allegations amounting to a defence of alibi insofar as he claimed that he was not at the scene of crime at the time that the offence is said to have taken place. Although he claimed he was at home at that time, he was clearly at pains to do so. His wife whom he called as DW3 admitted that she could not confirm the Appellant’s whereabouts before he came home. Her testimony was also evidently contradictory and she also failed to give clear timelines. For instance, although the Appellant claimed that on the alleged date, he went to Church in the morning and came back home with visitors from the church, his wife contradicted him by testifying that the Appellant found the visitors at home.

70. Accordingly, I find that the trial Court had before it, sufficient material to support its finding that the prosecution proved its case beyond reasonable doubt. I cannot find any ground to rule that that the trial Court erred in convicting the Appellant. Although the Appellant claims that he was framed, I cannot find any motive for such framing and the Appellant did not offer any. The appeal on conviction therefore lacks merit and is hereby dismissed.

e. Whether the sentence of 20 years imprisonment was proper

71. The applicable principles when 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”.

72. In applying the above guidelines, regarding sentence, and as already stated, Section 10 of the [Sexual Offences Act](#) under which the Appellant was charged provides as follows:

“Any person who commits the offence of rape or defilement is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life.”

73. On its part, Section 8(2) of the [Sexual Offences Act](#) provides that:

“(2) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

74. In view of the above, it is clear that the sentence provided for the offence of gang defilement is between 15 years and life imprisonment. While therefore the Appellant could have been sentenced up to the maximum of life imprisonment, the learned trial Magistrate sentenced him to the much lesser sentence of 20 years imprisonment. The sentence was therefore within the law. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory minimum sentences should now be discouraged and that Courts should retain the discretion to depart therefrom. I will therefore still analyze this issue of mandatory minimum sentences.

75. In relation thereto, the Supreme Court in the case of Francis Karioko Muruatetu and Another vs Republic [2017] eKLR, while dealing with a case of murder, stated as follows:

“(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.”

76. The Supreme Court then directed the Attorney General, the Director of Public Prosecutions and other relevant agencies to prepare a detailed professional review in the context of the Muruatetu Judgment with a view to setting up a framework to deal with sentence re-hearing cases. The Attorney General was then given 12 months to submit a progress report.

77. On the strength of the Muruatetu decision and reasoning, the High Court and even the Court of Appeal routinely reviewed mandatory minimum sentences imposed on convicts for different offences other than murder, including for sexual offences and robbery with violence. Examples are the Court of Appeal decisions in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR, the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), and also the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR. I may also mention the oft-cited decision of Odunga J (as he then was), in the case of Maini & 5 others v [Director of Public Prosecutions & another \(Petition E017 of 2021\)](#) [2022] KEHC 13118 (KLR).



78. However, by the clarification made by the same Supreme Court in its subsequent directions given in *Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015)* [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Court made it clear that Muruatetu only applied to murder cases, and not to any other type of case, not even sexual offences. This is how the Supreme Court put it:

“7. In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to section 296(2) of the Penal Code, and others under the *Sexual Offences Act*, presumably assuming that the decision by this court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision.

.....

10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision’s expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;

.....

Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the “courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases”.

11.

We therefore reiterate that this court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.

.....

14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.

.....



18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:

- i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the Penal Code;

.....”

79. Recently, just about 3 months ago, the Supreme Court reiterated and restated the above directions when dealing with an Appeal emanating under the Sexual Offence Act. This was in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023)* [2024] KESC 34 (KLR) (12 July 2024) (Judgment). In setting aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside the mandatory minimum sentence of 20 years imprisonment imposed on an Appellant in a sexual offence case, the Supreme Court stated as follows:

“52. We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance.

.....

57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.

.....

61. Having so stated, we are aware that mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, USA, Australia, South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed.

.....

.....



62. Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below.

.....

68. Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.”

80. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will be acting ultra vires were it to set aside the sentence of 20 years imprisonment on the sole basis that 15 years imprisonment being a mandatory minimum sentence stipulated by statute is unconstitutional. As clearly spelt out by the Supreme Court, Muruatetu is not applicable to cases under the *Sexual Offences Act*.

81. My above observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh. In view thereof, I cite Majanja J, quoting the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR) in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, where 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.



82. 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.”

83. Applying the above principles to the facts of this case, I have considered that the offence of gang defilement is a serious one. The evidence given on how the incident took place demonstrates the harrowing and violent experience that the Appellant and his accomplice put the complainant through. It was no doubt a traumatizing experience that the complainant will have to live with. Although he may have been a first offender, the Appellant and his ilk cannot surely seek the Court’s sympathy after committing such a horrific offence. It was upon the trial Court to impose a sentence that is proportionate to the offence committed. For the said reasons, I agree that the Appellant merited a stiff punishment. The Appellant was given the opportunity to mitigate, which he did by pleading for a lenient sentence and the Court stated that in arriving at the sentence of 20 years imprisonment, it had considered such mitigation. I also note that the Appellant is not even remorseful or repentant. In my view, the sentence is commensurate and proportionate to the crime committed and the manner in which it was committed.

84. Taking into consideration all the relevant circumstances in this case, and while acutely aware of the intrinsic seriousness and gravity of the offence committed, my finding is that it has not been demonstrated that the sentence imposed was manifestly excessive nor harsh.

Final Order

85. In the circumstances, this Appeal fails on both limbs of conviction and sentence and the decision of the lower Court is upheld

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF SEPTEMBER 2024.

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Court Assistant: Brian Kimathi

