# Wachira v Republic (Criminal Appeal 15 of 2019) [2023] KEHC 17581 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17581 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NANYUKI**

**CRIMINAL APPEAL 15 OF 2019**

**FR OLEL, J**

**MAY 18, 2023**

**BETWEEN**

**ALEX WACHIRA ........................................................................... APPELLANT**

**AND**

**REPUBLIC ............................................................................... RESPONDENT**

## JUDGMENT

1. This Appeal arises from the judgement conviction and sentence dated 29/3/2019 which was melted out as against the appellant in Nanyuki chief Magistrate Criminal Case ( S.O) No.20 of 2017, where the appellant was convicted and sentence both on the main charge of defilement contrary to section 8(1)(3) of the *sexual offence Act* and the alternative charge of committing and indecent act with a child contrary to section 11 of the *Sexual Offence Act*. The appellant was sentence to serve 20 years on the main count and 10 years in the alternative charge. The sentences were to run concurrently.
2. The appellant being dissatisfied by his conviction did his petition of appeal on 12/4/2019, which he later amended and filed an Amended Memorandum Grounds of appeal which raised the following grounds of Appeal namely;
    a. That the prosecution erred and failed to prove one of the key elements of defilement and which was misconstrued by the trial magistrate in convicting and sentencing the appellant occasioning a miscarriage of justice.
    b. That the learned trial magistrate erred in both facts and law in failing to appreciate that the appellant had a statutory defence as provided for under Section 8(1) as read with section 8(5) and (6) of the *Sexual Offence Act* No. 3 of 2006 as spelt out in evidence occasioning a prejudice.
    c. That the trial magistrate erred in law and facts by failing to appreciate the fact that the charge was incurably defective contrary to section 214,134 and 135 of the *Criminal Procedure Code*.

d. That the trial magistrate erred in failing to appreciate that it si bad judicial practice to convict on the main count and alternative count.

3. The appellant prayed that his appeal be allowed in its entity his conviction be quashed and sentence be set aside.

**Brief Facts**

4. PW1 SNW testified that she was a form 1 student at [Particulars Witheld] Secondary School and earlier had cleared primary school at [Particulars Witheld]Primary School. She stated that she was born on 19/9/2002 and was 15 years old. On 19.4/2017 she was at home in the evening when she had a confrontation with her mother because her school grades had dropped. She was angry and decided to leave home and go to her Dad's house at Riverside. She explained that her parents had separated and when she reached her dad's home she found her stepmom. She stayed there for about 30 minutes and decided to go to the appellant's home. She described him as her boyfriend and had met him while still in class six.

5. The appellant also resided within Riverside and he found him with his cousin and his aunty. She talked with the appellant who asked her why she had gone to his place. She told him that she had differed with her mother and the appellant allowed her to spend a night there. His house was a two roomed, a sitting room and a bedroom. PW1 testified that she stayed with the accused for one week and at night slept on one bed with the appellant. On the first night they did not have 'sex' but on the second night they did have sex with the appellant who had earlier bought chips for supper.

6. It was PW1 evidence that they kissed and cuddled in the sitting room, undressed before going to the bedroom and they had 'sex' on the bed. The appellant inserted his penis into her vagina and also touched her breasts using his hands. She also confirmed that the appellant had used protection. The following day the appellant went to work and did not come back. He came back after one day and told her that her mother was looking for her and later one of her cousins came and told her to go back home. Though still afraid she did go back to her mother's place. Her mother was still angry and decided to take her to hospital to confirm if she was pregnant or infected with HIV as she did not believe that she had not had sex. She was issued with the P3 form and PRC form. The accused was arrested and PW1 finalised her evidence by stating that that was her first time she visited the accused. The appellant did not ask PW1 any questions.

7. PW2 B W stated that she was a casual labour and was the mother of the complainant, who was her first born daughter. PW1 was 16 years old having been born in 19/2/2002. She produced the birth certificate which showed her birth date as 19/2/2001 but the correct date ought to have been 19/9/2002. On 19/4/2017 she differed with PW1 over her performance in school and when she came back from work she did not find her daughter at home. She though that she had gone to visit her father. She confirmed that they had separated with her husband.

8. After four days she called her husband who told her that PW1 as not at his house. She then stated to look for her daughter and informed her cousins to help her look for PW1. Later she was informed that her daughter was staying with the appellant who was a person well known to her. Later her daughter came back home and when she inquired where she was PW1 kept quiet and did not tell her anything. She threatened to take her to the police station which she did and PW1 informed the police that she had been staying at the appellant's home and they had engaged in sex. PW1 was taken to hospital and they were issued with the P3 and PRC forms. She produced the birth certificate as exhibit 3 and told the court she had not difference with the accused. The appellant did not ask any question in cross examination.

9. PW3 PC Dickson Mutembei testified that he was the investigating officer and that on 25/4/2017 at about 12 noon PW2 made a report that her daughter had disappeared. The case was assigned to him by the OCS and he made contact with PW2 who told him that the child had said she was going to see her father, but she later discovered that she did not go to the father's house. On 28/4/2017 PW2 came to the station accompanied by PW1 and reported that she had come back home. PW1 told him that she had been to her boyfriend's house. The boyfriend was known as 'Wachira'. They accompanied PW2 to Riverside area and arrested the appellant.

10. The following day he took both the appellant and PW1 to Nanyuki Teaching and Referral hospital where they were both tested and the doctor filled in P3 and PRC forms. He interrogated both parties and PW1 told him that the appellant was her boyfriend and the appellant also confirmed that PW1 had fled home and sought refuge at his house. He charged the appellant as PW1 had confessed to having 'sex' with him.

11. PW4 Dr. Betty Mbaya testified that she was attached to Nanyuki Teaching and Referral hospital and held a Bachelor of Medicine and Surgery degree from University of Nairobi. She graduated in 2015 and had worked at Nanyuki teaching and Referral hospital for 9 months. She had worked with one Dr. Mutathia, but she was on study lead for 3 ½ years. She was conversant with her handwriting and signature as she had worked with her for the nine months and prayer to be allowed to produce the P3 and PRC form filled by the said Dr. Mutathia. The appellant did not object.

12. The P3 and PRC form were with respect to PW1. She was reported to have been defiled. She was in fairly good condition. The external genitalia was normal and hymen was broken. She had a foul smelling discharge. A high vaginal swab revealed epittelial cells and no spermatozoa was seen. The epittelial cells were normal. The defilement was alleged to have occurred between 19 – 25th April 2017. The OB 10/25/4/2017 shows it occurred on 25/4/2017. The doctor produced both the P3 and PRC forms as exhibits.

13. The appellant was put on his defence and in his unsworn statement stated that he was a casual labourer and was not in company of the complainant and at the time she disappeared from home the complainant was not at his home. PW1 also had failed to explain where she was. The trial magistrate upon considering all the evidence tendered found the appellant guilty both on the main count and alternative count and sentenced him to serve 20 years for the main count and 10 years for the alternative count. The sentence were to run concurrently.

**Appellant submissions**

14. The appellant in his submissions preliminarily addressed the court on lack of equality. As *Sexual Offence Act* No.3 of 2016 was being used to punish young men and in other instances was being used to extort them for all sort of ill motive. There was thus need to protect the 'boy child' from these kinds of scenarios. Further, the court had to relook at the said act as it was unfair to young boys, where two minors decided to engage in sexual activity but it was only the 'boy child being jailed at the expense of the 'girl child'. In tricky situations like the present case where a girl runs away from home to the appellants place, without duress coercion, intimidation or use of force and offered herself freely out of her own volition. It was unfair for court to punish the appellant as he was not at fault.

15. The second issue the appellant addressed in his submissions was that penile penetration and age were not proved. He submitted that the real issue for determination which had to be canvassed and determined was not penetration but rather whether the minor had the legal capacity to wilfully engage in sex with the appellant, or was she forced as provided for under the *Sexual Offence Act*. PW1 admitted in court that the appellant was his boyfriend and she is the one who went to look for the appellant.

There was not force or coercion and despite the appellant pleading with her to go back she refused because she feared her parents. The appellant posed the question does this make him criminally capable?

16. The appellant submitted that PW1 behaved like an adult and therefore the magistrate erred to find that there was forced penis penetration which was a serious misdirection and wrongfully shut out the defence available to the appellant under section 8(5) and 8(6) of the *Sexual Offence Act* No.3 of 2006. The appellant relied on the case of Nyeri High Court Criminal Appeal No. 273 of 2010 *Duncun Mwai Gichuhi v Republic* [2015]eKLR, *Kavisa Katana Gona v Republic* [2015]eKLR and *Martin Charo v Republic* [2016]eKLR.

17. Further the appellant submitted that absence of the hymen did not prove penetration as hymen could be lost or broken through and myriad of factors unrelated to sexual intercourse see *Langat Dinyo Ouma Konyana v Republic* [2017].

18. The appellant also submitted that the charge sheet was defective as the particulars in the charge sheet varied from the evidence tendered. In particular there was variance regarding age of the child, there was no evidence of forceful penetration and the dates where the offence is alleged to have occurred differed. The evidence presented was thus totally at variance with particulars of the charge sheet and thus the threshold of burden of proof was not met.

19. The final issue the appellant submitted on was that the trial magistrate erred in applying the wrong sentencing principles by convicting him on the main charge and the alternative count. He relied on *David Wahome Wanyohi v Republic*[2015]eKLR & *Republic v Nasa Ginners Ltd* [1955] 22 EACA 434, the appellant prayed that the conviction be quashed and sentence set aside.

**Respondents Submissions**

20. The respondent filed their submission 23/1/2023 and supported that conviction on the ground that the prosecution proved its case beyond reasonable doubt and there was overwhelming evidence to secure a conviction against the appellant, the ingredient of defilement were met tot eh required standard.

21. On sentence the state conceded that it was excessive and that the trial magistrate was wrong to convict the appellant on the alternative charge.

**Analysis and Determination**

22. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See *Okeno v Republic* [1972]EA 32 & *Pandya v Republic* [1975] EA 366.

23. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala v R* [1975] EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported in doing so, it should make allowance for the fact that the trial Court has made the advantage of hearing and seeing the witnesses.

24. Also in *Peter's v Sunday Post*[1958] E.A. 424 it was held that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts

finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

25. The appellant raised four grounds of appeal which could be crystalized into the following issues;

a) Whether the prosecution case was proved beyond reasonable doubt and whether the trial magistrate failed to appreciate that appellant had a statutory defense pursuant to provision of section 8(1) as read with section 8(5)&(6) of the *sexual offences Act* No 3 of 2006 , which the trial court did not consider.

b) Whether the charge sheet was incurably defective.

c) Whether the trial magistrate erred in convicting the appellant both on the main count and the alternative count

**A. Whether the prosecution case was proved beyond reasonable doubt and whether the trial magistrate failed to appreciate that appellant had a statutory defense pursuant to provision of section 8(1) as read with section 8(5)&(6) of the *sexual offences Act* No 3 of 2006 , which the trial court did not consider.**

26. Section 8(1) of the *Sexual Offences Act* No 3 of 2006 provides as follows;

> (1)A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (3) A person who commits an offence of defilement with a child aged twelve years and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

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

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

b. penetration and

c. Proper identification of the perpetrator.

(see *Wamukoya Karani v Republic* Criminal Appeal No 72 of 2013 and *George Opondo Olunga vs. Republic* [2016] eKLR)

**Age of Minor**

28. This court will look at each element exclusively starting with the first element which is age. The Court of Appeal in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> “ ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.” (emphasis added).

29. In the case of *Francis omuroni v Uganda*, court of Appeal criminal Appeal No 2 of 2000, it was held thus

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in 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

30. PW1 stated that her names were SNW and was aged 15 years and was born on 19.09.2002 and was a student form 1 student at [Particulars Witheld] secondary school. PW2 who was the mother of the complainant also confirmed that she was born on 19.09.2002, though the birth certificate produced as exhibit 1 indicated that she was born on 19.09.2001. The age of the minor was thus proved by production of the birth certificate and as at April 2017 when the incident occurred in April 2017, she was 15 years old.

**Penetration**

31. The second element is penetration. Section 2 of the *sexual offences Act* defines penetration as;

> " Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

32. The complainant, PW1 did testify that she fell out with her mother and decided to go to the home of the appellant at Riverside. He asked her why she had come and she told him that she had differed with her mother and the appellant allowed to spend the night at his place. Her evidence was that

> " I stayed with the accused for 1 week. I spent the night in one bed with the accused. In the morning the accused left for work. I was left with the accused cousin. Accused came back around 7p. we then went to sleep. The second night I had sex with the accused. The accused bought me chips which I had for supper."
>
> "We had sex in the bed. while in the sitting room, accused kissed me. We undressed before getting to bed. The accused inserted his penis into my vagina. The accused touched my breasts using his hands. The following day the accused went to work. However he did not come back................ The accused used a condom when we had sex. Accused is the one who came with the condom."

33. PW4 DR Betty Mbaya produced the P3 form and PRC form, which found that the complainant's hymen was broken and she had epithelial cells, but those were normal urinary tract infection and was not necessarily an infection from a sexual Act.

34. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, 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."

35. The only evidence of penetration was that of PW1 as the medical evidence presented did not prove that the complainant's hymen was broken as a result of having sexual intercourse with the appellant. It is trite law that if the court is convinced and for reasons to be recorded the court can convict an accused person based on the evidence of a single witness. In this appeal the magistrate in her judgment noted that, "I saw the complainant testify and I am satisfied that she spoke the truth. Her evidence was clear and consistent and the accused did not challenge the same."

36. The appellant opted not to ask PW1 any question in cross examination and in his submissions alleged that penetration was not proved. There is no basis to support his line of submissions that there was no penetration as the evidence of PW1 was unchallenged and she was clear that they had protected sex with the appellant. The second element of penetration was thus proved by the prosecution.

**Identification of the perpetrator**

37. The final issue to be proved was that of identification. From the evidence adduced, the complainant freely admitted that the appellant was his boyfriend and she is the one who went to look for him at his house. She stayed there for one week and only went back home when she was being looked for by her parents. Given the above facts identification was by way of recognition and was free from the possibility of any error. See *Wamunga v Republic* [1989] KLR at 426.Having carefully examined the evidence adduced I do concur with the finding that PW1 knew the appellant as her boyfriend and a person well known to her. His identification was thus properly established. The trial court cannot be faulted for arriving at that conclusion.

38. The final issue raised by the appellant was that he ought to have benefitted from the defence offered under provisions of section 8(5) and (6) of the *sexual offences Act*. The said provisions provide;

    Section 8(5) of the *Sexual offences Act* provides that

    It is a defense to a charge under this section if;

    (a) It is proved that such a child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

    (b) The accused reasonably believed that the child was over eighteen years

39. Section 8(6) of the *sexual offences Act* provides that;

    > The belief referred to in the subsection (5) is to be determined having regard to all the circumstance's, including any steps the accused person took to ascertain the age of the complainant.

40. The appellant in his defence denied that he was not with the complainant at the time she disappeared from their home and further stated that she did not come to his home. This evidence directly contradicted the evidence of PW1 who testified that the appellant was her boyfriend and she sought refuge at his house having differed with her mother. The court believed the complainant and convicted the appellant.

41. The defence of having believed that PW1 was above 18years or deceived the appellant that she was above 18 years ought to have been put forward by the appellant at the trial stage, when given a chance to defend himself. He failed to do so and this line of defence has been brought forward as an afterthought at this stage.

**Whether the charge sheet was incurably defective**

42. The appellant submitted that the charge sheet was defective as he evidences adduced was in variance with the said charge sheet. There was no evidence of forceful penetration, the birth date was different and the dates when the offence is alleged to have occurred are also differed and thus it was clear from the evidence that the charges preferred could not be sustained

43. Section 134 of the *Criminal Procedure Code* provides that;

> " Every charge or information shall contain and shall be sufficient if it contains a statement of specific offence or offences with which the accused person is charged together with such particulars as maybe necessary for giving reasonable information as to the nature of the offence charged"

44. In determining whether a charge sheet is defective or not, the court of appeal in *Sigilani v Republic* [2004] 2KLR, 480 stated 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 is charges, together with such particulars as maybe necessary for giving reasonable information as to the nature of the offence charged."

45. The charge sheet dated 2nd May 2017, did contain all the relevant information and disclosed the offence and further gave out proper particulars as was necessary to give the appellant reasonable information as to the nature of the offence charged. Such a charge sheet cannot be said to be defective. See *Isaac Omambia v Republic* [1995] eKLR

46. There is therefore no basis for declaring the same to be defective. If the evidence presented is at variance with the charge sheet that would lead no failure of the prosecution case and acquittal of the appellant. But as already shown above the prosecution did amply prove their case beyond reasonable doubt based on the evidence adduced. This ground of appeal too fails.

The sentence meted out of life imprisonment was harsh and manifestly excessive and urge this court to review the same downward.

47. The appellant did submit that the trial magistrate erred law by convicting him of both counts and sentencing him to serve 20 years for the main count and 10 years for the alternative count. The sentences were to run concurrently. He further submitted that considering that he did not force or coarse PW1 into having sex with him and it was PW1 who came to their home, the sentence melted out was manifestly harsh and unjustified. He prayed that the same be reviewed downwards.

48. The Respondent admitted that it was an error and conceded the appellant was wrongly convicted on the main count and the alternative count. That should not have been the position, they also conceded that the sentence melted out was harsh considering the circumstances of this case.

49. As regards the sentence and whether it should be reduced, this Court is guided by the principles in the Court of Appeal case of *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with

sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

50. The Court of appeal also rendered itself as follows on sentences in sexual offences in the case of *Athanus Lijodi v Republic* [2021] eKLR

> "On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases, Muruatetu's case (supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for *instance Evans Wanjala Wanyonyi v Republic* [2019] eKLR). Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited."

51. The same court in the case of *Dismas Wafula Kilwake Vs. Republic* [2019] eKLR stated as follows;

> "Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

52. In *Maingi & 5 others Vs. Director of Public Prosecution & Another* (Petition No.E117 of 2021) (2022) KEHC 13118 (KLR) the Petitioners who were convicts serving offences under *Sexual Offences Act* No 3 of 2006 sued the Attorney General and sought for declaration that the mandatory nature of sentence under the *Sexual Offences Act* were unconstitutional as it fettered the discretion of Judges and Magistrates in meting out sentence. Justice G.V Odunga *vide* his considered judgment dated 17th May, 2022 did find that –

> "to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentence fall foul of Article 28 of the *Constitution*. However, the courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be mandatory minimum prescribed sentences."

53. Base on the above citations, this court does find that the provision of section 8(1) as read together with provisions of section 8(3) of the *Sexual Offences Act* No 3 2006 and legislation that was in force before commencement of the *Constitution* of Kenya 2010 must be considered with adaptation, qualification and exception when it comes to the mandatory minimum sentence and in particular when the said

sentences do not take into account the dignity of the individual as mandated under article 27 of the *Constitution* and as appreciated in the Francis Muruatetu case and applied by courts in several cases . See *Christopher Ochieng Vrs Republic* Kisumu CA Criminal Appeal No 202 of 2011 and *Jared Koita Injiri Vrs Republic* Kisumu CA Criminal Appeal No 92 0f 2104.

54. First and foremost it is conceded that the trial court erred in convicting the appellant on both the main charge and the alternative count. This was plainly erroneous and the conviction on the alternative count is quashed *exhibito justicea* and the sentence thereto also set aside.

55. As regard the sentence in the main count the state also conceded that it was excessive and manifestly harsh considering the circumstances of this case. The admitted fact is that PW1 was a girlfriend of the appellant and was not forced into having sex with him. She is the one who went and sort shelter in the appellant's house and was not lured to go there. But the appellant also ought to have exercised better judgment and known that PW1 was still a school going girl and thus was vulnerable and in need of care.

55. Be that as it may the aim of sentencing is to provide an appropriate punishment to the offender. In the case *R v Scott* [2005] NSWCCA 152 Howle J. Grove & Baar JJ then stated –

> " There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and then must be a reasonable proportionately between the sentence passed in the circumstance of the crime committed...one of the purpose of punishment is to ensure that the offender is adequately punished... a further purpose of punishment is to denounce the conduct of the offender."

**Disposition**

56. Having considered all evidence presented in this appeal I do find that the appellant partially succeed in his appeal and order as follows;

    a. The appeal against conviction on the main count (the charge of defilement) lacks merit and is dismissed. But this court finds merit and do issue an order quashing the sentence melted out of twenty 20 years and reduce the same to five (5) years to run from the date of conviction to wit 29.03.2019

    b. The conviction and sentence with respect to the alternative count is wholly quashed and the sentence of ten (10) years is set aside

    c. Judgement accordingly.

**JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF MAY 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 18TH DAY OF MAY 2023**

**In the presence of;**

**Appellant**

........................................For O.D.P.P

........................................Court Assistant