COJ v Republic (Criminal Appeal E024 of 2021) [2023] KEHC 18610 (KLR) (12 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18610 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E024 OF 2021

RE ABURILI, J

JUNE 12, 2023

BETWEEN

COJ .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal against the conviction & sentence by the Hon. F. Rashid, Principal Magistrate on the 10.6.2021 in the Senior Principal Magistrate's Court in Winam in Sexual Offence Case No. 21 of 2019)

JUDGMENT

Introduction

1. The appellant herein COJ was charged with two counts of the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. The particulars of the charge were that on the 21st day of May 2019 in Kisumu East sub-county within Kisumu County, being a male person, he caused his penis to penetrate the vagina of FA a female child aged 10 years who was to his knowledge, his daughter. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The complainant was the same in the main charge in this count one.

2. The appellant also faced another count of incest contrary to section 20 (1) of the *Sexual Offences Act*. The particulars of the charge were that on the 21st day of May 2019 in Kisumu East sub-county within Kisumu County, being a male person, he caused his penis to penetrate the vagina of AA a female child aged 5 years who was for his knowledge, his daughter. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*, with the same complainant in count two.

3. The appellant pleaded not guilty to all the charges and the case proceeded to full trial where the prosecution called four (4) witnesses. The appellant in his sworn testimony denied the charges against him.

4. In his judgement, the trial magistrate found that the prosecution proved its case beyond reasonable doubt and after considering the appellant's mitigation, sentenced the appellant to serve 25 years' imprisonment.

5. Aggrieved by the trial court's conviction and sentence, the appellant filed his petition of appeal on the June 17, 2021. The appellant however indicated that his petition was soley on the sentence passed and raised the following grounds of appeal which nonetheless, challenge both conviction and sentence:

   i. That the trial court failed to observe that the sentence imposed is/was manifestly harsh.

   ii. That the court failed to consider that the ingredients forming the offence were not proved to the required standards.

   iii. That the trial court did not consider that the investigation tendered was shoddy.

   iv. That the trial court failed to reconsider that there was/were animus of witnesses.

   v. That I wish to be present at the hearing of this appeal and to be supplied with the trial record.

6. The appellant filed written submissions and argued his appeal orally as well whereas the respondent made oral arguments through the Prosecution Counsel.

The Appellant's Submissions

7. The appellant submitted that he was only challenging the sentence passed by the trial court and not the conviction but retreated and submitted he was framed on the charge brought against him. He submitted that the complainant lied to court.

8. It was his submission that he and the complainant had had a quarrel over the bad movements and phone calls the complainant was making which he was not happy about. The appellant submitted that the minor's mother was just his girlfriend.

9. It was his submission that the trial magistrate's failure to cure the charge sheet as provided in Section 382 of the *Criminal Procedure Code* rendered the whole charge sheet defective and thus there was need to set aside his conviction and quash his sentence as the evidence presented was at variance with the charges as framed in the charge sheet. It was the appellant's submission that the P3 form indicated that the vagina was intact, meaning undamaged, and there that no explanation was given for how the complainant's hymen was broken. The appellant thus submitted that it was evident that the PRC form proved sodomy whereas the P3 form proved a contrary element.

10. The appellant submitted that there were inconsistencies and contradictions in the main medical exhibits which pointed towards the prosecution's failure in carrying out their investigations. Reliance was placed on the case of *Nzaka & 2 others v R* [2019] eKLR.

11. The appellant further submitted that the trial magistrate erred by failing to appreciate that convictions must not be found in a vacuum as he had misdirected himself by finding a conviction in Count 2 when no treatment notes, PRC form or P3 were produced to confirm that the complainant AA was treated anywhere.

The Respondent's Submissions

12. The respondent through the Prosecution Counsel opposed the appeal and submitted that the appellant was a stepfather to the complainant and was within the degree of relations as he had married the complainant's mother when she already had the complainant.

13. It was submitted that the mother to the minor caught the appellant in the act of defiling the minor. The respondent submitted that the age of the child, penetration and identity of the appellant were all proved beyond reasonable doubt.

14. On sentence, the respondent submitted that the court could only sentence on one of the charges, either the main or alternative count and not on both. Counsel for the respondent relied on the evidence on record and urged this court to uphold the conviction and sentence save for the error on the sentence which should be corrected to cover one count only.

The Role of the first appellate Court

15. This being a first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and arrive at its own independent conclusions bearing in mind that it neither saw nor saw the witnesses testify so as to observe their demeanor. The said duty was stated by the Court of Appeal in the case of *Mark Oiruri Mose –vs- Republic* [2013] eKLR, in the following words:

> " ...It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that..."

Evidence before the Trial Court

16. Revisiting the evidence adduced before the trial court, PW1 was taken through voire dire examination. She testified and recalled that she was 10 years old. She stated that she lived with her mother and the appellant. It was her testimony that on the 21.5.2019, she went to school and upon returning, she found her 'Baba', the appellant, 'sleeping' on her sister, AA. She testified that when the appellant saw PW1, he stopped 'sleeping' on her sister and started quarrelling PW1 saying that PW1 always spoilt things.

17. was her testimony that at night, the appellant defiled her too on the bed. The complainant testified that the appellant removed her clothes and his clothes and further that the appellant defiled her by taking his penis and inserting it into her vagina. She testified that it was very painful.

18. PW1 testified that her mum was in the house too and that she told her and her mother in turn escorted her to Russia Hospital. The complainant testified that the appellant 'slept' with her sister and with her-PW1, once each.

19. In cross-examination, PW1 stated that although she could not remember the date, it was on a Friday at lunch time. She stated that her mum was also on that bed and that she was taken to hospital after the incident. She testified that her sister was not crying when the appellant slept on her.

20. In re-examination, the complainant testified that the appellant defiled her at night. She testified that they had 2 beds, one which her mum and dad shared and the other which she shared with her sister. She reiterated that the appellant slept on AA at night.

21. PW2 IAO testified that she lived with the appellant her husband, having lived with him since the previous year. It was her testimony that her bed and the appellant's was in the sitting room while the children slept in the kitchen.

22. She testified that on the May 21, 2019, she cooked and they ate then she went to prepare the babies' sleeping place and slept. It was her testimony that while she slept at around 2 am, she woke up and found the appellant defiling PW1 but the appellant pretended to be asleep. She testified that the appellant had removed his trousers and the babies' panty had also been removed. She testified that the appellant ran back to the sitting room and that when she confronted him, the appellant stated that he had gone to wake her up.

23. PW2 testified that at around 3am the appellant left and she feared he'd hit her so she woke up a neighbour who went to her house. She testified that she saw the child had been defiled and they both saw a white discharge in her private parts. It was her testimony that in the morning, they took the child to Russia Hospital where she was treated. She further testified that she talked to the minor who told her that the appellant had defiled her and her sister.

24. PW2 testified that FA, the complainant was born on April 21, 2009 and AA was born on November 13, 2014. It was her testimony that she had known the appellant since 2017 and that they had never disagreed. In cross-examination, PW2 reiterated her testimony.

25. Phelista Afwamba, a clinical officer at JOOTRH testified and produced the PRC for the 1st complainant as PEx2 having examined the 1st complainant child on the May 21, 2019 at 5.07pm.

26. It was her testimony that on examination of her genitalia, the hymen was absent and there were bruises on the anus at the 12 o'clock angle. She testified that from her examination, there was anal penetration.

27. cross-examination, PW3 stated that generally, hard stool could cause bruises and sodomy could also cause bruises. She stated that she did not examine the appellant though it was necessary to examine the appellant. In re-examination, PW3 stated that DNA for the accused was necessary.

28. PW4 No 233298 PC Christabel Onyango from the Kondele Gender Desk testified that she took over the case from the initial investigating officer who had been transferred. She corroborated the testimonies of PW1 and PW2 and further stated that the appellant was found by PW2 zipping his trousers and that the appellant was taken to the chief and later he was arrested.

29. In cross-examination, she stated that the appellant was the father to the victim whom he defiled. She further stated that the clothes that the victim wore were not produced as exhibits in court. She stated that though the appellant was taken to hospital the following day after the incident, she was not aware whether he was examined.

30. In his defence the appellant denied committing the offence and stated that he normally worked at night but that on the date of the incident, he was at home with his wife and children. He testified that they ate at around 7.30pm when PW2, his wife received a call which she went to answer outside and on confronting her, he realized that it was a man who had called her.

31. The appellant testified that he had warned his wife about receiving calls from men and that she was annoyed. He testified that he left for work at 9pm and returned to the house after work on the May 22, 2019 at 7am when the children were being prepared to go to school.

32. It was his testimony that his wife framed him because he discovered that she had an affair and that on the May 23, 2019, she informed motorcyclists that he had defiled their children.

Analysis and Determination

33. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions and the applicable law in this appeal. The issues for determination are:

    a. Whether the charge sheet brought against the appellant was defective

    b. Whether the prosecution's case was proved beyond reasonable doubt and

    c. Whether the sentence imposed on the appellant was excessive and harsh.

Whether the charge sheet brought against the appellant was defective

34. The Appellant laments that the charge sheet relied on by the trial court to convict him was defective. It was his submission before this court that the particulars in the charge were at variance with the evidence adduced during trial by the prosecution.

35. In determining whether a charge sheet is defective or not, the Court of Appeal in Sigilani v Republic [2004] 2 KLR, 480 held as follows:

> "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".

36. On the other hand, Section 134 of the *Criminal Procedure Code* provides for what the components/ ingredients of the charge sheet constitute 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".

37. In the case of *Isaac Omambia v Republic*, [1995] eKLR, the Court of Appeal considered the ingredients necessary in a charge sheet and stated as follows:

> "In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the *Criminal Procedure Code* which makes particulars of a charge an integral part of the charge: 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."

38. Examining the amended charge sheet in question, it is clear that the Appellant was charged with two counts of "incest Contrary to Section 20(1) of the *Sexual Offences Act* No 3 of 2006." The charge sheet clearly spells out the statement of the offence that the Appellant was charged with.

39. The charge sheet also contained the particulars of the offence. In Count 1, the incest was alleged to have happened on the 21st day of May 2019 in Kisumu East sub-county within Kisumu County when he caused his penis to penetrate the vagina of FA a female minor aged 10 years who was to his knowledge his daughter.

40. In Count 2, the incest was on the 21st day of May 2019in Kisumu East sub-county within Kisumu County when he caused his penis to penetrate the anus of AA a female minor aged 5 years who was to his knowledge his daughter.

41. In both counts, the appellant also faced alternative charges of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No 3 of 2006.

42. The Court of Appeal in *Peter Ngure Mwangi v Republic* [2014] eKLR, cited the *Isaac Omambia* case with approval and further stated that:

> " A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in Yongo v R, [198] eKLR that:
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> "In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:
>
> (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
>
> (ii) when for such reason it does not accord with the evidence given at the trial."

43. The Court of Appeal in the *Peter Ngure's* case (*supra*) was further guided by the case of *Peter Sabem Leitu v R*, Cr. App No 482 of 2007 (UR) where the Court held that:

> " The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

44. The main defect pointed out by the Appellant is that the evidence adduced by the prosecution was at variance with the charges brought against him and that especially the medical evidence was at variance with the charge sheet as the PRC form proved sodomy whereas the P3 form proved a contrary element.

45. I have examined the evidence adduced by the prosecution and given a summary of the evidence adduced before the trial court hereinabove. The testimonies of PW1 and PW2 was that the appellant defiled her sister and herself, in their house. The evidence was corroborated by the medical evidence adduced by PW3. Furthermore, penetration through the anus is still penetration and defilement would still be proved by evidence of penetration through the anus.

46. To that extent I am persuaded that the evidence adduced was not at variance with the charge brought against the appellant. As to whether the evidence was enough to sustain the appellant's conviction, this court will shortly interrogate the same.

47. On whether the charge sheet was defective and if so whether the defect if any was fatally incurable, Section 382 of the *Criminal Procedure Code* provides that:

> "
>
> "382. 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."

48. In the instant case, I find no error, omission or irregularity in the charge sheets brought against the appellant. I further find that the evidence adduced by the prosecution was not at variance with the charges and their particulars. In my view, there was no ambiguity in the charges brought against the appellant and neither was there any defect that was prejudicial and therefore fatal to the conviction of the appellant.

49. This limb of the ground of appeal therefore lacks merit and is hereby dismissed.

Whether the prosecution proved its case against the appellant beyond reasonable doubt

50. Section 20 of the *Sexual Offences Act* deals with incest by males. It provides as follows:

> "incest by male persons
>
> 20.
>
> (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years: Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.
>
> (2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.
>
> (3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as "section 114 orders" under the Children's Act and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to

appoint any person or persons to be the guardian or guardians of any such female during her minority or less period."

51. To establish a case under the above Section, the prosecution must prove the elements of the offence which are:

    1. An indecent act or an act that causes penetration;

    2. The victim must be a female person who is related to the perpetrator in the degrees set out in Section 22 of the *Act*.

52. Section 22 states as follows:

    (1) In cases of the offence of incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.

    (2) ...

    (3) An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

    (4) In cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the court may give an order removing the accused person from the house until the matter is determined and the court may also give an order classifying such a child as a child in need of care and protection and may give further orders under the *Children Act* (No 8 of 2001)."

53. Indecent act is defined under Section 2 of the *Sexual Offences act* as:

    " indecent act" means an unlawful intentional act which causes-

    a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

    b. exposure or display of any pornographic material to any person against his or her will."

54. On the other hand, Penetration is defined under Section 2 of the *Sexual Offences Act*, to mean:

    'the partial or complete insertion of the genital organs of a person into the genital organs of another person."

55. There is overwhelming evidence on record that the 1st complainant was aged about 10 years old. Her sister AA was at the time of the offence 5 years old. The court observed that the 1st complainant was a child of tender age and she underwent a voire dire examination after which the court found her capable of giving a sworn testimony.

56. It was her testimony that the appellant defiled her and her sister AA She described graphically how the appellant put his penis in her vagina, even demonstrating to court the region of the vagina. She further testified that the appellant had prior to defiling her been defiling her younger sister.

57. The complainant's testimony was corroborated by that of PW2, her mother, who testified that she found the appellant defiling PW1 but the appellant pretended to be asleep and that the appellant had removed his trousers and the baby's panty had also been removed. PW3 further corroborated the complainant's testimony when she testified that on examination of her genitalia, the hymen was absent and there were bruises on the anus at the 12 o'clock angle and that from her examination, there was also anal penetration meaning, the victim was penetrated through both the vagina and the anus.

58. The P3 form produced as Exhibit 2 by PW4 also noted that there were lacerations on the labia minora and vaginal walls, the hymen was broken with remnants seen and that there was a white vaginal discharge.

59. There is no doubt that there was penetration of PW1's vagina and anus which caused injury to the genitals of PW1. Section 2 of the *Sexual Offences Act* defines genital organs to include female genital organs and the anus.

60. I have no doubt in any mind that PW1 identified the perpetrator as the father, as provided in section 22 (1) of the *Sexual Offences Act*, as the appellant herein. There is no evidence on record to suggest that PW1, a child of tender age could have framed the appellant with such a serious offence and given such candid details of the incident. PW1 gave her evidence on oath and was subjected to cross examination and her testimony was not shaken. Further, PW2 found the appellant had just defiled the child. he had removed his trousers and the child's panty too and when he saw her, he pretended to be asleep

61. Weighed against the appellant's defence that he was away at work on the night of the offence, or that the mother of the children framed him after he warned her of having an intimate love affair with another man, I find the evidence adduced by PW1 and her mother to be overwhelming. I thus agree with the trial court's finding that the appellant was the perpetrator of the offence that caused penetration of the genitals of PW1. In my view, the appellant's claim that he was framed by the child's mother was an afterthought as he never asked her any question to suggest that he had an issue with her and that she framed her with the offence.

62. The appellant further submitted that there were inconsistencies and contradictions in the main medical exhibits which pointed towards the prosecution's failure in carrying out their investigations.

63. I have examined the P3 form, Exhibit 2 and the PRC form, Exhibit 1, and I find that the two agree on the results of the 1st complainant's genital examination. There is no contradiction or inconsistency as alleged by the appellant herein.

64. I thus find that the prosecution proved their case against the appellant herein on count one beyond reasonable doubt.

65. On whether count two was proved to the required standard, I have perused the evidence on record and the judgment by the trial magistrate. Apart from the evidence of PW1 a minor and PW2 her mother who testified for the two complainant children, no other evidence was led to suggest that the child in the second count was defiled. No medical evidence was led, no evidence that she was taken for medical attention and treatment, no P3 form was produced and no evidence of her age whether by way of observation by the court or any other document proving her age. This court is unable to find that the second count and its elements were proved to the required standard. Furthermore, even in the analysis of the evidence by the trial court, only the evidence of PW1's defilement was assessed. The trial court found the appellant guilty on both counts but never analyzed any evidence that proved the elements of defilement against the second complainant. I therefore find no ground upon which the appellant was found guilty of defiling the second complainant in the second count. I find that the conviction of the

appellant on the second count was unsafe. I quash that conviction in count two and the concurrent sentence of 25 years imprisonment is set aside.

Whether the sentence imposed on the appellant was excessive and harsh

66. The offence of incest is provided for in Section 20(1) of the *sexual Offences Act* as follows:

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

67. From the above provision, it is clear that the sentence for incest is predicated upon the age of the complainant. If the complainant is an adult, that is over eighteen years old, the court has discretion to mete a sentence of imprisonment of any length not being less than ten years. If the complainant is under eighteen years of age the court has discretion to mete a sentence of up to life imprisonment.

68. The Court of Appeal interpreted Section 20(1) of the *Sexual Offences Act* in the case of *M. K v Republic* (Nrbi) Criminal Appeal No 248 of 2014 (C.A)[2015] eKLR. The court stated that:

> " 17. In the instant case, the appellant was charged with an offence under Section 20(1) of the *Sexual Offences Act*. This Section provides for a minimum term of 10 years' imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned Judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment".
>
> 18. The first observation to note is that the phrase "not less than" has not been used in the proviso to Section 20(1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.
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> 19. What does "shall be liable" mean in law". The court of Appeal for East Africa in the case of *Opoya v Uganda*(1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or imprisonment."

69. In the *Opoya* case (*supra*), the court interpreted the phrase "shall be liable to" as used in penal statutes by stating that:

> " It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it."

70. From the above interpretation of the phrase "shall be liable", it can be construed that the life imprisonment sentence under Section 20(1) of the *Sexual Offences Act* is not mandatory. It is also not the minimum sentence that can be imposed. What this means is that the accused can be sentenced to a period between 10 years up to life imprisonment where the victim is below 18 years old.

71. The appellant herein was sentenced to imprisonment for a period of 25 years on each of the counts and the trial magistrate stated that the prison terms were to run concurrently. In essence, the appellant was to serve 25 years in prison which was quite lenient as the maximum provided in the law is life imprisonment.

72. This court is therefore called upon to determine whether the trial court acted on the correct principles of law in meting out the sentence.

73. I note that in mitigation, the appellant sought leniency stating that he was an orphan with younger siblings and a younger wife who was taking care of.

74. I have considered the nature of the offence. In my view, this court cannot overlook the fact that the Appellant committed a heinous crime and occasioned trauma and suffering to two young girls. His actions clearly demonstrate that the young and vulnerable that are around him could be in jeopardy.

75. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of *Ogolla s/o Owuor v R*, (1954) EACA 270 wherein the Court of Appeal stated as follows:

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

76. In the case of *Wanjema v R* [1971] E.A. 493, 494, the court held that the appellate court is entitled to interfere with the sentencing discretion of the trial court in view of plain error of omnibus sentence and the illegality of the sentence. In this case, it is my view that the trial court considered the correct principles in imposing the sentence. She considered the mitigations by the appellant and the fact that he was a first offender, before sentencing him.

77. The upshot of the above is that the instant appeal against conviction and sentence in the first count is found to be devoid of merit and is hereby dismissed. The conviction and sentence imposed by the lower court in count one is upheld. However, the sentence imposed shall be calculated taking into account the period that the appellant spent in prison custody upon his arrest on May 24, 2019 until he was sentenced on June 10, 2021 as he did not raise the bond terms granted to him by the court for him to be released on bond. This is in line with the provisions of section 333(2) of the *Criminal Procedure Code*.

78. This file is closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF JUNE, 2023

R. E. ABURILI

JUDGE