



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**RW v Republic (Criminal Appeal E058 of 2021)
[2023] KEHC 18996 (KLR) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18996 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E058 OF 2021
RE ABURILI, J
JUNE 12, 2023**

BETWEEN

RW APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the conviction & sentence by the Hon. S.O.
Temu on the 24.8.2021 & 10.12.2021 in the Senior Principal
Magistrate's Court in Nyando in Sexual Offence Case No. 50 of 2018)*

JUDGMENT

Introduction

1. The appellant herein RW was charged with the offence of defilement contrary to section 8 (1) as read with section 8(3) of the *Sexual Offences Act* 2006. The particulars of the offence being that on the October 19, 2018 in Nyando sub-county within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of DNA a child aged 13 years old.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.
3. The appellant pleaded not guilty to both the substantive and alternative charges and a full trial ensued whereupon the trial Court found him guilty of the main charge a, convicted him and sentenced him to serve twenty years imprisonment.
4. Aggrieved by the conviction and sentence, the appellant filed his petition of appeal in person on the December 17, 2021 raising the following grounds of appeal:
 - i. That the trial court failed to observe that the sentence imposed is/was manifestly harsh and disproportionate.



- ii. That the trial court failed to consider that my fundamental constitutional rights was/ were violated and thus no ample time was the appellant given to defend herself.
 - iii. That the trial court did consider that the investigation tendered was shoddy.
 - iv. That the trial court failed to consider that the subject was based on fabrication and afterthought.
 - v. That the appellant hereby beseeches the superior court to indulge into the same and or be pleased to reduce the sentence proportionately as enshrined in the article 50 (2) (p) of the [Constitution](#).
 - vi. That I wish to be present at the hearing of this appeal and or be supplied with trial record to enable me erect more grounds.
5. The appellant subsequently filed supplementary grounds of appeal dated November 18, 2022 raising the following additional grounds of appeal:
- i. That the learned trial magistrate's conviction and sentence complained of violated the principle of fair hearing and fair trial.
 - ii. That the learned trial magistrate misdirected himself by convicting the appellant on medical evidence adduced by untrustworthy, unreliable and a misrepresenting witness.
 - iii. That the decision of the learned trial magistrate whereby he allowed the witness whose testimony had been objected to produce a document he never ordered without even canceling or lifting the said objection raised against the said witness amount to an affront to the rules of procedure and violates the principle of fairness.
 - iv. Failure by the Hon. Trial magistrate to count as part of the sentence imposed the duration of trial violates the requirement of section 333 (2) of the [Criminal Procedure Code](#) hence the appellant's prayer to be accorded such period by the instant superior court.
 - v. That the learned trial magistrate erred in both law and facts by convicting the appellant on evidence which was contradicting in nature and without realizing that the material evidence presented and or adduced amount to a mere fabrication for enrichment and witch-hunt.
 - vi. That the learned trial magistrate failed to appraise himself to the facts that it was not safe for him to find a conviction on the evidence riddled with grave inconsistency and contradictions.
 - vii. The learned trial magistrate's decision complains of whereby he subjected the appellant to a mandatory minimum sentence of 20 years imprisonment in line with section 8 (1) as read with 8 (3) of the [Sexual Offences Act](#) is illegal, null and void amount to a violation of section 216 of the CPC and is an infringement of an appellant's rights on mitigation and fair hearing.
 - viii. Failure by the learned trial court to count the period already spent in custody while under trial violated the appellant's right to equal protection and benefit of the law as stipulated by the [Constitution](#).
 - ix. The learned trial magistrate failed in his duties to enlighten the sovereignty of the offence at the time of plea and the consequences of each and every stage of trial thereby occasioning grievous infringement on the part of the appellant.
6. The appeal was canvassed by way of written submissions.



The Appellant's Submissions

7. The appellant submitted that glaring contradictions and inconsistencies in PW1's testimony made it unsafe to properly convict him. Reliance was placed on the case of *Nzoka W & 3 Others v R [2020] eKLR*. It was submitted that the medical evidence adduced by PW4 amounted to mere fiction and was irrelevant as PW4 stated that he assessed the injuries as grievous harm whereas in the P3 form produced, the said injuries were categorized as harm. The appellant further submitted that PW1 failed to explain how and when the hymen was broken as there are more than one factor that can lead to breaking of the hymen.
8. The appellant further faulted the testimony of PW5 Dorcas Okeyo on the ground that she was not the investigating officer and thus this made the entire prosecution case unbelievable.
9. It was the appellant's case that the court failed its role by forcing him to undertake the trial on the day of plea taking thus limiting his right to fair hearing and further that the court on various occasions failed to educate him on the effect of proceedings.
10. It was submitted that the prosecution's failure to call the witness who saw the incident was calculated to mislead the court into believing the prosecution's story.
11. On the twenty years' imprisonment imposed, the appellant submitted that the mandatory minimum sentence imposed limited his right to mitigation thereby infringing on his right to a fair hearing. Reliance was placed on the case of *Philip Mueke Maingi & Others v Republic Machakos Petition E017 of 2021*.

The Respondent's Submissions

12. On behalf of the respondent, it was submitted that the ingredients necessary to prove the offence of defilement were proved beyond reasonable doubt. On the age of the victim, it was submitted that evidence adduced by PW1, PW3 and PW5 showed that the victim was aged between 11-13 years old.
13. On recognition of the perpetrator, it was submitted that the appellant was recognized by PW1 as the appellant was well known to the victim and her mother PW2 and thus there was no mistaken identity.
14. On penetration, the respondent submitted that the testimony of PW1 was that she was defiled while standing near the pit latrine which testimony was corroborated by PW4, the clinical officer at Ahero County Hospital and thus this ingredient was also proved beyond reasonable doubt.
15. The respondent submitted that the appellant's defence was an afterthought which ought not to be considered and that the appellant tendered his mitigation before sentencing. Further it was submitted that the appellant's sentence was in line with the provisions of the law especially noting the circumstances of the case like the age of the victim and as such, the sentence was proper and ought to be affirmed.
16. On contradictions, it was submitted that the appellant had not highlighted any contradictions in the proceedings and further that no irregularities were occasioned during the hearing as the appellant would always state when he was ready or not ready to proceed with the hearing.
17. It was further submitted that the appellant confirmed to court in the proceedings that he had been supplied with witness statements. The respondent submitted that the evidence on record was clear, consistent and uncontroverted and thus this appeal ought to be dismissed.



Role of the first appellate Court

18. I have considered the Appellant's grounds of appeal, the submissions, and the evidence adduced before the trial court. Before I frame issues for determination, this being a first appellate court, I must subject the entire evidence adduced before the trial court to a fresh evaluation and analysis, bearing in mind that I had no opportunity to see and hear the witnesses as they testified hence I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the Court of Appeal decision in the often cited case of *Okeno v R (1972) EA 32* where the Court of Appeal for Eastern Africa set out the duties of a first appellate court as follows:

' An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya Vs Republic (1957) EA (336)* and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's 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 had the advantage of hearing and seeing the witnesses, See *Peters V Sunday Post, (1958) EA 434*)'

Evidence before the Trial Court

19. PW1, DNA, a minor and the complainant herein gave sworn testimony after being taken through a *voire dire* examination and recalled that she was 13 years old. It was her testimony that on the October 19, 2018 at 5.30 am on her way to the latrine before leaving for school, she met the appellant whom she referred to as 'Baba Mummy' who led her hand and told her that all he wanted was a kiss which the complainant refused. That the appellant held her hand by the latrine, removed his belt and trousers then inserted his penis into her vagina as she stood and after he finished, he told her to go and that he would give her the same thing the following day. She testified that she went back home but did not tell her mother then he proceeded to school. PW1 testified that there was a lady who had witnessed the incident and that she was the one who informed her mother who after confirming the same with PW1, escorted PW1 to Nyangoma Sub-County Hospital.
20. PW1 testified that she later reported the matter to Awasi Police Station where she was issued with a P3 form which she took to Nyangoma Sub-County Hospital and had it filled. It was her testimony that the incident occurred when the area was well lit with security lights and that she was able to recognize the appellant who was her neighbour and was well known to her.
21. PW2, the complainant's mother testified that on the material day, PW1 returned home from school at lunch time and informed her that the appellant had defiled her. She testified that she took the complainant to hospital and later in the evening told the landlord who referred her to the police station. It was her testimony that her family had never had any disagreement with the appellant and that the appellant's 2nd wife was her friend.
22. PW3 Nelson Mandela, a clinical officer at Ahero County hospital testified that he carried out the complainant's age assessment and established that her age as at October 24, 2018 was between 11 – 13 years of age. He produced the age assessment report as PEx 1.
23. PW3 also testified as PW4, Nelson Mandela from Nyando Hospital produced the P3 form on behalf of Caren Arani who she had worked with but was unavailable. It was his testimony that on examination of the complainant's private parts, she had lacerations on the vagina and the part was also tender. He



stated that the P3 form was filled 5 days after the incident and that the injuries were classified as grievous harm.

24. PW5 No xxxx PC (W) Dorcas Okeyo testified that on the October 20, 2018, she received a defilement report from the complainant who was from hospital and that she issued her with a P3 form that was filled at Nyangoma Hospital and that she subsequently recorded witness statements and arrested the appellant on the October 23, 2018.
25. In cross-examination, PW5 denied knowing the appellant prior to arresting him and stated that during the arrest, the appellant had hid under the bed from where she fished him out. She further stated that the toilet where the offence was committed was near the appellant's house.
26. Placed on his defence, the appellant denied committing the offence and stated that he had gone out with the appellant's mother on the October 20, 2018 and that in the evening, the complainant's mother asked him for money but he did not give her. He testified that the following Monday, police officers arrested him while he was in the house and locked him up.

Analysis and Determination

27. I have considered the appeal herein as a whole and the evidence adduced in the lower court as well as the submissions and the applicable statutory provisions and the judicial pronouncements. The main issues for determination in this appeal, from the grounds of appeal is whether the prosecution proved the appellant's guilt beyond reasonable doubt and whether sentence imposed was appropriate in the circumstances.
28. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the [Sexual Offences Act](#) and an alternative charge of committing and indecent Act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
29. This ingredients of an offence of defilement are as stipulated in section 2 of the [Sexual Offences Act](#) which are: identification or recognition of the offender, penetration and the age of the victim. These ingredients must be proved beyond reasonable doubt to sustain a conviction of an accused person.
30. Commencing with the age of the minor, PW1 testified that she was 13 years old. PW3, the Clinical Officer, testified that he carried out an age assessment on the complainant and found that she was between 11 – 13 years of age. In the case of [Fappyton Mutuku Ngui v Republic \[2012\] eKLR](#) it was held that:

' That 'conclusive' proof of age in cases under [Sexual Offences Act](#) does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.'
31. Further, there was no contrary evidence on the age of the victim. In the case of [Joseph Kieti Seet v Republic \[2014\] eKLR](#), HC at Machakos, Criminal Appeal No 91 of 2011, the court stated as follows and I concur that:

' It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni -versus- Uganda, Court of Appeal Criminal Appeal No 2 of 2000. It was held thus:

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



the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.'

The foregoing holdings are applicable in the instant case in various ways. At the trial, PW 2, the complainant herein stated that she was 12 years old. Both PW 3 and PW 4 who were the complainant's biological parents stated that the complainant was aged 12. On the other hand, the charge sheet indicated that the complainant was aged 12 as well the P3 form that was produced in court as P Exhibit 1.

Furthermore, the trial court which had the opportunity of seeing PW 2 did not doubt her age. PW2's age was also not set on a borderline. I would have no reason to doubt that that was her age.'

32. I am thus satisfied that the age of the complainant was proved to be between 11 - 13 years old at the time of the incident.
33. On penetration, Section 2(1) of the [Sexual Offences Act](#) defines penetration as:

' The partial or complete insertion of the genital organs of a person into the genital organ of another person.' See the case of Mark Oiruri Mose v R [2013] eKLR.
34. The complainant testified how the appellant followed her to the toilet, held her hand and initially wanted to kiss her but she declined then he inserted his penis into her vagina and on finishing, he told her that he would come back for the same the following day.
35. Her testimony was corroborated by that of PW4, Nelson Mandela who testified on behalf of her colleague and adduced the P3 Form showing that the hymen was broken, ragged and tender and further that there were lacerations on the vagina.
36. In his defence, the appellant denied committing the offence and seemed to suggest that he was being set up by the complainant's mother who had asked him for money but he declined to give to her.
37. I have considered the evidence for the prosecution and the defence proffered by the appellant. On corroboration, Section 124 of the [Evidence Act](#) Laws of Kenya provides that:

' Notwithstanding the provisions of section 19 of the [Oaths and Statutory Declarations Act](#), where evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence, where 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 reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.'
38. Despite the provisions of section 124 of the [Evidence Act](#), the complainant's testimony remained unchallenged and was corroborated by PW4 Nelson Mandela who testified on behalf of his colleague who had examined the complainant and filled the P3 form.
39. The appellant found issue with the testimony of PW4 stating that he was not the original maker of the P3 document and thus the evidence was fiction and irrelevant.



40. Whether the P3 medical form was admissible depends on whether it was produced by the maker thereof or under section 77 of the Evidence Act (Chapter 80 of the Laws of Kenya). The doctor who examined PW 1 and prepared the P3 form was not called. Section 77 of the Evidence Act allows a person other than the one who prepared a report such as the P3 forms in issue to produce it provided the presumption of authenticity is met. The section provides as follows:

' 77.(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.'

41. Once the presumption of authenticity under section 77(2) aforesaid is met, the document is admissible but the trial court may, suo moto or upon request by the accused person, call for the maker of such document to appear in court for cross-examination on the form and content of the report. In Joshua Otieno Oguga v Republic KSM CA Criminal Appeal No 183 of 2009 [2009] eKLR the Court of Appeal considered the same issue and held that:

' That in short means that if the appellant wanted the medical report to be produced by a doctor, he had to apply to the court to summon the doctor who prepared the report, otherwise there was nothing wrong in law in the P3 form being produced by PC. Ann Wambui as she did.'

42. In this case, the prosecution lay a basis for the admission of the P3 form by the witness, PW4 who testified that the doctor was unavailable and vouched for her qualifications further confirming that he was familiar with her handwriting and signature. The medical evidence was therefore admissible. Further, I observe that from the trial court record, the appellant did not raise any objection when PW4 testified and the appellant cross-examined him. I thus find that penetration was proved beyond reasonable doubt.

43. As to whether it was the appellant who committed the offence as charged and therefore whether his conviction was sound and safe, the evidence adduced is that the appellant, the complainant and PW2 were neighbours who knew one another very well. According to PW1, the complainant, the place where the appellant defiled her from was well lit from the flurry of security lights that dotted the plot, a fact that was corroborated by her mother PW2. The complainant further testified that the appellant was a neighbour and that she had known him for some time.

44. In the circumstances, I find nothing to suggest that the complainant was mistaken as to the identity of the appellant and that the appellant was positively identified and recognized as the perpetrator who committed the offence. This limb of defilement was thus proven beyond reasonable ground.

45. The appellant also pleaded in his petition of appeal that he was denied a fair hearing as he was forced to proceed with the trial on the same day he took plea and also on the August 5, 2020 and on the May 26, 2021



46. I have perused the trial court record and note that when the case came up for plea taking on the October 24, 2018, the prosecution informed the court that they had supplied the appellant with all the statements and that they were ready to proceed. On being asked by the court, the appellant confirmed the same and indicated that he did not object to the hearing commencing.

47. The appellant cannot thus allege that he was denied a fair trial on this basis. The hearing that proceeded on the October 24, 2018 was by the appellant's own affirmation and he cross examined witnesses who testified on that date. The appellant has not demonstrated what prejudice he suffered by the trial proceeding and on the contrary, the record reveals that the appellant was able to undertake his defence and carried out a strong cross-examination of PW1.

48. Regarding proceedings, on the August 5, 2020 when a new magistrate took over the matter. Section 200 of the Criminal Procedure Code was complied with. The section provides that:

' 200. Subject to sub-section (3), where a magistrate, after having heard and recorded
(1) the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a) Deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) Where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.

(2) .

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.

(4) .'

49. Indeed, as much as it is practically possible, it is highly desirable that the trial magistrate or judge who commences hearing a case should hear the case to its conclusion and ultimately render judgment. This is important for the final arbiter to be in a position to weigh the evidence taken together with his or her observation of the demeanour of witnesses. This was succinctly explained by the High Court in the case of *Ndegwa v R (1985) KLR 535* where Madan, (as he then was), Kneller and Nyarangi, JJA stated that:

' It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully 'observed' the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case in our opinion for these reasons we have stated, in our view the trial was unsatisfactory.'



50. In other words, Section 200, as was emphasized in the case of Ndegwa (*supra*) will be resorted to sparingly and only in cases where the exigencies of the case dictates. Even where the trial magistrate has been transferred, arrangements ought to be made for him or her to return to the former station to complete the trial, unless in cases where only a few witnesses had testified. In such a case, the succeeding magistrate may continue with the trial from the stage it had reached. The provision can also be used where the evidence already recorded is more or less formal or largely uncontroverted. Section 200 therefore entrenches the accused person's rights to a fair trial as provided for in this time under Article 50(2) of the Constitution. In the instant case, the record is clear that Section 200 was explained to the appellant who stated that he wished to proceed with the case from where it had reached. I thus find that this ground of appeal has no merit. It is dismissed.
51. The appellant further raised the issue with the prosecution's failure to call a witness who is said to have reported the incident to the complainant's mother. In the case of Donald Majiwa Achilwa and 2 other v R [2009] eKLR, the Court stated as follows:
- ' The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See *Bukenya & Others v Uganda [1972] EA 549*). That is, however, not the position here. We find no basis for raising such an adverse inference.'
52. Under Section 143 of Evidence Act (Cap 80) Laws of Kenya:
- ' 143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact'
- In the case of *Bukenya v R (UGC 1952)*, the court addressed itself thus: -
- (i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
- (ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
- (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.'
53. In the case of *Keter v Republic [2007] 1 EA 135* the court held inter alia that:
- ' The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.'
54. In the instant case, the prosecution was at liberty to call the witnesses they deemed necessary to establish and prove their case beyond reasonable doubt. The trial court was in my view not at liberty to determine which witnesses are sufficient to prove the prosecution case. Further, the person who was informed by the minor that she had been defiled was not an eye witness to the incident and unless there is evidence that the minor was lying, I find that the complainant by the appellant is lacking in merit and substance. The ground of appeal fails.



55. The appellant further alleged that the prosecution evidence contradicted each other. I have perused the record and find no inconsistency or contradiction. Even if there was any contradiction which I find none disclosed, the Court of Appeal addressed itself on the issues of contradictions in the case of [*Richard Munene v Republic \[2018\] eKLR*](#) stated as follows:

' It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.'

56. My finding is that there was no contradiction in the testimonies of the 5 prosecution witnesses as to vitiate the conviction of the appellant. Consequently, this ground fails.

57. The upshot of the above is that I find and hold that the prosecution proved their case against the appellant beyond reasonable doubt. I dismiss this appeal against conviction and uphold the trial magistrate's findings and holding.

Whether the sentence imposed on the appellant was excessive

58. The appellant lamented that the minimum mandatory sentence of twenty years imposed on him was illegal and unconstitutional and that the trial court did not take into account the period that the appellant spent in custody prior to sentencing, which is in violation of section 333(2) of the Criminal Procedure Code.

59. The punishment prescribed for the offence of defilement where the victim is aged between 12 and 15 years old is a prison term of 20 years or more. The evidence in this case discloses that the victim was in that age bracket of 11 – 13 as is evident from PEx 1, the age assessment report.

60. In his mitigation, the appellant pleaded for leniency on the grounds that he had school going children who depended on him. In considering the same, the trial magistrate sentenced the appellant to 20 years' imprisonment as prescribed by law.

61. It is trite that sentencing is an exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See [*Shadrack Kipkoech Kogo v R and Wilson Waitegei v Republic \[2021\] eKLR*](#)).

62. In this case, the appellant obviously took advantage of a young child to satiate his sexual thirst very early in the morning yet he was a married man with own children. The effect of the offence on the minor are long lasting and the psychological effect is even worse. However, as the appellant was a first offender, which factor was not taken into account when sentencing him, I hereby set aside the minimum mandatory sentence of 20 years imprisonment, which though lawful, and substitute it with fifteen (15) years imprisonment, acknowledging that the offence of defilement is heinous, but that the penal section 8(3) uses the term liable, which gives discretion to the trial court to consider not just the mandatory minimum sentence, but any other lesser sentence.



63. The appellant further submitted and urged the court to have his sentence comply with section 333 (2) of the Criminal Procedure Code. Section 333(2) of the Criminal Procedure Code provides that:
- ' Subject to the provisions of Section 38 of the Penal Code, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
- Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody.'
64. From the above proviso, in sentencing, the law requires courts to take into account the period the convict spent in custody. In the instant case, the court record and specifically the charge sheet brought against the appellant show that he was arrested on the October 22, 2018 and presented to court on the October 24, 2018 when the Bond was set at Kshs 100,000 which was settled the following day on the October 25, 2018 and the appellant released. The appellant thus spent 3 days in custody.
65. According to The Judiciary Sentencing Policy Guidelines:
- ' The proviso to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.'
66. The appellant was sentenced on the June 23, 2022 having been arrested on October 22, 2018 according to the charge sheet filed in court and released on cash bail on October 25, 2018 and thus served only three days in custody.
67. Accordingly, this appeal against conviction is dismissed. The appeal against sentence is successful to the extent that the twenty years imprisonment is set aside and substituted with fifteen years imprisonment, to be calculated, taking into account the 3 days that the appellant served in custody before he was released on cash bail.

Dated, Signed and Delivered at Kisumu this 12th Day of June, 2023

R.E. ABURILI

JUDGE

