REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 28 OF 2019

FREDRICK OWINO KANGALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment, conviction & sentence passed by the Hon. G. Adhiambo on the 23.4.2019 in Ukwala SRM's Court Sexual Offences Case No 48 of 2018)

JUDGMENT

1. The appellant, Fredrick Owino Kangala, was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. Particulars of the offence were that on the 14th November 2018, in [Particulars Withheld] village, Madungu sub-location, East Uholo location in Ugunja sub-county, within Siaya County, he intentionally caused his penis to penetrate the vagina of BAO [Full name withheld for legal reasons] a child aged 14 years old.

2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

3. The appellant denied the charges and after a full trial, the trial court found him guilty of the alternative count, convicted him and sentenced him to serve 10 years' imprisonment on the 23rd April 2019.

4. Aggrieved by the conviction and sentence, the Appellant preferred lodged this appeal vide his undated petition of appeal filed on the 25.4.2019 setting out the following grounds:

a) That I pleaded not guilty to the charge

b) That PW1 testified that I had intercourse with her three times.

c) That the medical officer ruled out testimony of PW1 that I had intercourse with her

d) That the evidence adduced by PW1 cannot be relied upon to warrant conviction.

e) That there was no eye witness to confirm whether I was indecently touching the girl.

f) That sending this young girl to my house at around 2030hrs by his (-) for his phone to be charged was a trap to justify this allegation.

g) That it is me who called the police through my boss on the ground of being attacked by thugs and I could have not called the police if I was committing the act.

h) That I plead for proceedings in this case to enable me adduce more grounds.

5. The appellant prayed that his appeal be allowed in its entirety and that the conviction and sentence imposed on him be quashed forthwith.

6. The appeal was admitted to hearing on 20/9/2021 after the lower court file was availed to this Court on 1/9/2021 and directions were given for the appeal to be canvassed by way of written submissions. Only the appellant filed his written submissions on 25th November, 2021.The Respondent was granted time to file submissions but as at 20/12/2021 when the court reserved this appeal for judgment, no such submissions were filed and none are filed to date.

The appellant's Submissions

7. It was submitted by the appellant acting *prose* that the allegation by PW1 that she was raped by the appellant was a lie as he was being framed by PW1's father who had a grudge against him. The appellant submitted that PW1 was used, coached and instructed on what to say and do in the case before the trial court.

8. The appellant further submitted that the medical officer who testified ruled out the report of sexual intercourse in the instant case which further demonstrated that he was being framed. The appellant further submitted that it was a trap for PW2 to send his phone for charging.

9. It was submitted that there was contradictory evidence from PW1, PW2 and the Investigating Officer as to the source of light that the complainant referred to as what she used in identifying the appellant.

Analysis

10. This being a first appeal, before reaching my determination, I must reassess and re-evaluate afresh the evidence adduced before the lower court and reach my own independent conclusion bearing in mind the fact that I neither saw nor heard the witnesses as they testified and as a result, giving an allowance for such. See **Okeno v Republic [1972] EA 32.**

11. The evidence as adduced before the trial court was as follows:

12. PW1, the complainant was taken through a *voire doire* examination and found to understand the effect of making an oath. She testified on oath and recalled that on the 14.11.2018 at around 10pm, she left her parent's home for the toilet where something pricked her and upon checking on the same, someone held her abruptly and covered her mouth such that she could not scream after which he led her to his house.

13. She further testified that in the house, a lamp had been put off and the person proceeded to rape her. The complainant specifically testified that the person used his *dudu-* to fuck her. She reiterated that the person inserted his urinating thing into her vagina that she used to urinate.

14. PW1 testified that she screamed and her father came out to rescue her. She further testified that it was dark inside the house and her assailant had locked the door from inside forcing her father to order him to open the door. PW1 testified that her father had a torch and with the help of the torch she was able to see the face of the person who was defiling her.

15. PW1 further testified that both herself and the offender were taken to Sigomere Police Station and in the morning, she was taken to Sigomere Hospital together with the offender. PW1 identified the appellant as her defiler and stated that the appellant took her to his house which was within the home where he worked.

16. In cross-examination, the complainant reiterated her testimony in chief and stated that her parent's house was 15 metres from the appellant's house. She further stated that her father locked the door of the house from outside to prevent the appellant from escaping and that her father found them naked but they were dressed by the time the police arrived.

17. PW1 further stated that the doctor confirmed that the appellant did bad manners to her. She further stated that whenever they take phones to that home for charging, the phones are passed over the fence not through the fence. It was her further testimony that the appellant used to ask her to go to his house but she refused and that she even reported to her mother that the accused used to seduce her.

18. PW2, JO, the complainant's father testified that on 14.11.2018 after dinner, his children left to go and sleep and that at around 11pm he left the house to go and answer a call of nature when he heard two people conversing at the neighbour's worker's house. He stated that he recognized one of the voices as that of his daughter and so he went into the kitchen where his children used to sleep, to establish whether his daughter was there but she was not there. He therefore went to the neighbour's house by crossing the fence then he called out his daughter from outside the house but nobody responded. He then locked the door from outside and rung the brother to the employer of the appellant herein but he did not answer the phone. The witness then called the Assistant Chief who said he was unable to avail himself. It was his testimony that he heard the appellant make a phone to his employer claiming that people had attacked him and that shortly, the brother of the appellant's employer arrived and told him that he had been informed that thieves had invaded the home.

19. PW2 testified that he explained the events to the brother of the appellant's employer and after a short while, police officers arrived at the scene saying that they had been called by the owner of the home and told that his home was being invaded. It was his further testimony that when the police opened the door of the house, they found the appellant and the complainant standing inside the one roomed house. The two were escorted to the police station where PW2 recorded his statement. The complainant was escorted to hospital and examined and that the doctor confirmed that the complainant was defiled. It was his testimony that the appellant had been his neighbour for 3 months.

20. In cross-examination, PW2 stated that he did not go to court to withdraw the case but to tell the court what he saw. It was his testimony that he heard the appellant and complainant speaking in low tones and when he entered the house, he found the appellant wearing a pair of boots and an overall. He further stated that he was aware that the appellant had a wife and children who visited him every weekend.

21. PW3 Zakayo Ayieko, a brother to the appellant's employer testified that on 14.11.2018 at about 11pm, he received a call from his brother Ken Ayieko but he did not pick as he was asleep but his brother's wife rang PW3's wife and alerted her that people had invaded their home and further requested him to proceed there to find out what was happening.

22. It was his testimony that he alerted the police at Sigomere Police Station and in the company of his domestic worker, they proceeded to the scene where he found 2 gentlemen and a woman and one of the men, who was his brother's neighbour, informed him that he was

watching TV in his house when his daughter left the house and disappeared but that he soon discovered that his daughter was in the appellant's house so he locked the door from outside.

23. PW3 further testified that shortly after the police arrived and broke the appellant's door they found the appellant with the complainant in the house and o being asked of what she was doing there, the complainant kept quiet but the appellant stated that the complainant's father had sent her to take the phone to the house for charging.

24. In cross-examination, PW3 stated that there was no way a young man and a small girl can be in a locked room without an ill motive. He further stated that there was an opening on the fence created by Kenya Power Staff whenever they did their routine maintenance which was sealed but the opening he found on the fence was not created by Kenya Power as it was far from the Kenya Power Line.

25. PW4 No. xxxxxx PC Lenah Ngemo testified that on 15.11.2018 at about 2am a defilement case was reported at Sigomere Police Station and she was directed to investigate the same. PW4 corroborated the complainant's version of events and further stated that they took the complainant to Sigomere sub-county Hospital and that she also visited the house where the complainant reported that she was dragged into. It was her testimony that she established that the fence had been tampered with and that the age assessment report revealed that the complainant was between 13 and 14 years old. She further produced the complainant's age assessment report as PEX3

26. In cross-examination, PW4 stated that she conducted investigations and found that the complainant was truthful and that is why she charged the appellant. It was her testimony that the appellant damaged a big part of the fence through which he dragged the complainant and that the complainant did not scream.

27. PW5 Victor Godia, a Clinical Officer working at Sigomere sub-county Hospital examined the complainant and stated that her clothes were not torn and that her genitalia revealed that her vagina walls were not tender and the *labia majora* and *minora* were not lacerated. It was his testimony that the hymen was broken but it was long standing and that the complainant tested HIV negative.

28. PW5 testified that he noted semen on the *labia majora* that was dry and stated that it could have been vaginal discharge that drained to the lower part of the vagina. He further testified that the examination revealed signs of vaginal penetration by position of the semen as demonstrated by the dried up semen. He produced the complainant's P3 form as PEx 1a and her treatment notes as PEx 1b.

29. PW5 also produced the appellant's P3 form who upon being examined was found not to be intoxicated. Examination of his genitalia revealed the penile shaft was normal with no bruises and *there was* urethral discharge. He testified that the appellant tested HIV negative. He produced the appellant's P3 form as PEx 2a and his treatment notes as PEx 2b. In cross-examination, PW5 he reiterated his testimony in chief. The prosecution then closed their case.

30. Placed on his defence, the appellant gave sworn testimony and stated that on the material day at about 8.30pm, he was eating when the complainant brought him a phone for charging whereupon he offered the complainant a meal and told her that many people had brought their phones to be charged so she had to go back with the phone.

31. It was his testimony that the complainant asked him to have the phone charged for a short while. He stated that by then, the complainant's father had given him a sick chicken which infected his employer's chicken occasioning the death of five chicken and his employer had the complainant's father arrested with the condition that he would be released upon payment of Kshs. 10,000 which he did.

32. It was his testimony that he was not aware that his employer and the complainant's father were in bad terms and that he remarked that a mere caretaker would not occasion him to pay Kshs. 10,000.

33. The appellant further testified that he had not locked the door from inside and that he did not know who did so. He further stated that as he was talking to his employer on the phone, he heard the complainant's mother stating that he had warned him from doing what he had done but he did not listen.

34. The appellant testified that when the police arrived at the scene, they said that they received information that robbers had invaded the home but the complainant's father stated that he was spoiling his daughter. He further stated that when the OCS inquired from the complainant if she slept with the appellant she answered in the negative and stated that he her father had sent her to take the phone for charging.

35. The appellant further told the court that the following day, the OCS told him that PW2 wanted Kshs. 50,000 as a precondition for his release and further that the phones that were charging were stolen from the house when he was arrested. He further stated that on the 28th, PW2 approached him at the court cells and told him that he did not know that the issue was serious.

36. In cross-examination, the appellant reiterated his testimony in chief and further stated that he was framed because of the chicken issue. He further stated that the complainant was his wife's friend and used to visit him in their house. He further stated that the complainant used to fetch water in his compound at night as his boss never knew that they did so. He denied seducing the complainant.

37. In her judgment which is impugned herein, the trial magistrate found that: ***"Since no bruises were noted on the genitalia of PW1 and there was no evidence of partial or complete penetration, I will find the accused guilty of the alternative charge that is guilty of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act for the reasons that he touched the vagina of PW1 with his penis and that is how semen ended up being on the vagina of PW1.***

The accused is convicted of the alternative charge under section 215 of the Criminal Procedure Code…"

Determination

38. I have considered and analyzed the evidence adduced before the trial court and the grounds of appeal and the written submissions filed by the appellant. I find the main issue for determination in this appeal is whether the offence of committing an indecent act with a child contrary to section 11(1) was proved against the appellant beyond reasonable doubt. All other questions arising out of the grounds in the appellant's petition of appeal and in his submissions shall flow therefrom.

39. Section 11 (1) of the Sexual Offences Act provides that:

> ***"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term not less than ten years."***

40. Section 2 (1) of the said Act defines an '**indecent act'** as follows:

> ***"Indecent act means an unlawful intentional act which causes: -***
>
> ***Any contact between any part of the body of a person with the genital organ, breast or buttocks of another, but does not include an act that causes penetration;***
>
> ***Exposure or display of any pornographic material to any person against his or her will."***

41. In the instant case, the complainant testified that the appellant defiled her. She stated that the appellant had on numerous occasions attempted to have her go to his house but she refused. The evidence on record which was uncontroverted was that on the night of 14.11.2018, the complainant's father- PW2, PW3 and the police found the appellant and the complainant herein in the house where the appellant worked and lived.

42. The appellant explained that they were in the house as the complainant had brought his father's phone to be charged and that he was framed by PW2 as a result of a disagreement between PW2 and the appellant's employer.

43. I note that throughout the testimonies of the witnesses for the prosecution, the appellant never raised any issue of being framed by PW2 and as was noted by the trial magistrate, the appellant ad not even alluded to it in cross-examination. For that reason, and considering the entire prosecution evidence, I agree with the finding of trial magistrate that the appellant's defence appeared to be an afterthought.

44. According to the complainant, the appellant took his penis and inserted it in her vagina. The evidence by PW5, the Clinical Officer was that the complainant's hymen was broken though not fresh and that its seemed to be long standing. He further testified that there was semen that dried up on the complainant's labia majora though both the labia majora and *minora* were not lacerated. The appellant too was found to have dried semen on his urethra.

45. The appellant and complainant were arrested in a house which was locked both from outside and inside. I find no reason to doubt the evidence by PW1 that a penis was inserted in her vagina and this is evidenced by the presence of the semen in her genitals as well as on the appellant's urethra. Although there was no proof of penetration, I find that the prosecution proved beyond reasonable doubt that an indecent act was committed against the complainant by the appellant taking out his penis and placing it in the vagina of the complainant.

46. The appellant pleaded in his petition of appeal that the evidence of the complainant was unreliable and thus he should not have been convicted based on the same. I have perused the trial court record and the complainant's testimony and note that it was consistent even during cross-examination.

47. The appellant further submitted that the evidence of PW1, PW2 and the Investigating Officer was contradictory as to the source light the complainant referred to was unsubstantiated. PW1 testified that there was a lamp in the house where the appellant took her, which lamp he turned off before embarking on committing the offence charged and convicted of. She further testified that she identified the appellant when her father shone his torch on the appellant. It is not lost to this court that the complainant testified that the appellant was her neighbour and that he lived only 15 meters away and that he had been seducing her before. More so, there is uncontroverted evidence that the appellant was arrested while locked up in the house with the complainant and therefore the question of identification or mistaken identity does not arise.

48. The appellant further pleaded in his petition of appeal that the medical officer dismissed the complainant's testimony that the appellant had defiled her. This is not the case because, PW5, the Clinical Officer testified that on examining the complainant, he found signs of vaginal penetration by dint of the position of the semen on the complainant's *labia majora* demonstrated by the dried up semen. Obviously, considering the circumstances of this case, the only way that the semen would have gotten onto the complainant's *labia majora* is if the same was in one way or another deposited there by exposure of the appellant's penis to the complainant's vagina. The complainant in her testimony stated that the appellant used his *dudu* to fuck her. She reiterated that the person inserted his urinating thing into her vagina that she used to urinate. The complainant was firm on the fact that the appellant defiled her. This evidence, in my view, was not contradictory and did not even require other corroborative evidence. In addition, section 124 of the Evidence Act provides that:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act (Cap. 15), where the evidence of the alleged victim is 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 the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person***

if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

49. The trial magistrate observed that the prosecution witnesses were credible. She found, and I concur that the evidence of PW1 was well corroborated by that of her father, PW2, PW3 and the Clinical officer who examined her and the appellant. The trial magistrate also warned herself on the contents that the Clinical Officer stated to be semen found on the complainant's vagina and the urethra of the appellant and stated that although the evidence of semen was visual and no laboratory test was done to establish if it was semen, nonetheless, no other evidence controverted that evidence. As penetration was not proved beyond reasonable doubt, I find that the offence of committing an indecent act with a child was proved beyond reasonable doubt by the prosecution evidence adduced and therefore the trial magistrate did not err in convicting the appellant.

50. In the circumstances, I find that the appeal herein against conviction lacks merit. I dismiss it and uphold the appellant's conviction.

51. On sentence, section 11(1) of the Sexual Offences Act stipulates the sentence to be meted upon conviction for the offence of committing an indecent act with a child. The section provides:

"Any person who commits an indecent act with a child is liable upon conviction to imprisonment for a term of not less than ten years."

52. The appellant was sentenced to serve 10 years' imprisonment after he mitigated saying he has a family and therefore needed assistance of the court. He was also a first offender. The trial magistrate considered all the above factors and the age of the complainant which was between 13 and 14 years and the circumstances of the offence and imposed the sentence stipulate under section 11(1) of the Sexual Offences Act.

53. The issue that I must resolve is whether the sentence provided for in the section above is mandatory minimum and if so, whether this court has discretion to interfere with the same.

54. Generally, the circumstances under which an appellate court interferes with the sentence by the trial court are set out in **S v Malgas 2001 (1) SACR 469 (SCA)** at para 12 where it was held that:

"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

55. Equally, in **Mokela v The State (135/11) [2011] ZASCA 166**, the Supreme Court of South Africa held that:

"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

56. In the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, the predecessor of the Court of Appeal stated as follows on this issue:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

57. Odunga J citing the above decisions had this to say in the case of **Josiah Mutua Mutunga & another v Republic [2019] eKLR:**

"10. To this, I 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) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:

"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)."

58. The learned Judge further referred to the Court of Appeal decision in **Bernard Kimani Gacheru v Republic [2002] eKLR where it was** restated that:

"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 states is shown to exist."

59. In **Shadrack Kipchoge Kogo v Republic Eldoret Criminal Appeal No. 253 of 2003** the Court stated:

> ***"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.***

60. Section 8(1), (2), (3) and (4) of the ***Sexual Offences Act*** provides as follows:

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***

14. In the same case of **Josiah Mutua Mutunga & another v Republic** at Machakos High Court, the Court observed, comparing the wordings in the provisions of section 8 of the Sexual Offences Act on sentence and stated that:

> ***"It is true true that section 8(3) and (4) of the Sexual Offences Act applies the phrase is liable upon conviction to imprisonment for a term of not less than twenty years and fifteen years respectively.*** **Sir Henry Webb C.J.** in **Kichanjele S/O Ndamungu v Republic (1941) 8 EACA 64** had this to say on the proper construction of the words "**liable to**":
>
> ***"The wording used throughout the code is "shall be liable to" but a consideration of the various sections shows in our judgment, that the use of the words "shall be liable to" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated." [emphasis added]***

61. In **Opoya v Uganda [1967] EA 752 Sir Clement DeLestang V.P**. stated:

> ***"It seems to us beyond argument that the words "shall be liable to" do not in the 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."***

16. A similar position was accepted in **D W M vs. Republic** (supra) where the Court held that:

> ***"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "Shall be liable to imprisonment for life" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."***

62. In this case, the relevant provisions use the phrases ***"is liable, upon conviction to…"*** and "***not less than"*** in the same breath. As correctly observed by Odunga J in the **Josiah Mutua Mutunga & another v Republic** case, the two provisions suffer from the malady of poor legal draftsmanship since the two phrases imply, in legal terms, diametrically opposed positions. This is so because in criminal law, where there is an ambiguity in phraseology of sentencing, the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence, as was concisely put by Mativo J it in **Elizabeth Waithiegeni Gatimu v Republic [2015] eKLR** that:

> ***"The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea."***

63. This court is in agreement therefore that the twin subsections must be read as if the sentences provided are the maximum sentences. For that reason, and taking into account the circumstances of this case, I hold the view that the use of the words *"is liable upon conviction"* in section 11(1) of the ***Sexual Offences Act*** gives room for the exercise of judicial discretion in sentencing.

64. In sentencing the appellant, the learned trial magistrate took into account the fact that the appellant was a first offender, the age of the complainant and the prevalence of the offence and was of the correct view that the appellant deserved a deterrent sentence and sentenced the

appellant to serve ten years' imprisonment. Sexual Offences by their very nature are heinous and traumatizing to the victims especially the minors. It is a dehumanizing offence which brings indignity to the victim of the offence. It leaves stigma on the victims. This is the reason why the sentences provided for in law are harsh and appear in nearly all cases, to be mandatory minimums in nature. This was position was appreciated in **Tito Kariuki Ngugi v Republic [2008] e KLR** where it was stated that:

> ***"The appeal against sentence has also no merit. The Appellant…caused her trauma which she will have to live with for the rest of her life."***

65. In my humble view, the sentence imposed upon the appellant by the trial court was the maximum sentence. Taking into account my observations and the fact of the appellant was a first offender and appreciating what the Court of Appeal in **Charo Ngumbao Gugudu v Republic [2011] eKLR**, had to say regarding imposition of maximum sentences that:

> ***"It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence. It is true that the complainant suffered serious injuries but it is equally true that the appellant was provoked at the time that he hit the complainant. There was no basis for the finding made by the trial magistrate and upheld by the superior court, that the complainant was "completely mentally disabled."***

66. I find the ten-year imprisonment meted on the appellant to be excessive in the circumstances and calls for interference. I set aside the ten years' imprisonment meted on the appellant and substitute it with a prison term of Five (5) years to be calculated from the date of arrest of the appellant on 15/11/2018, in view of the fact that the appellant was granted bond but he never raised it until the trial was concluded. This is in line with the dictates of section 333(2) of the ***Criminal Procedure Code*** which provides that:

> ***"(2) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody." See Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR and Bethwel Wilson Kibor v Republic [2009] eKLR.***

67. In the end, I find the appeal against conviction to be devoid of merit. I dismiss it and uphold the appellant's conviction. I allow the appeal against sentence. I set aside the sentence of ten years' imprisonment imposed on the appellant and substitute it with a prison term of Five (5) years to be calculated from the date of his arrest on 15/11/2018. Orders accordingly. File closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 14TH DAY OF FEBRUARY, 2022

R.E. ABURILI

JUDGE