REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ITEN
CRIMINAL APPEAL NO. E054 OF 2024

JACOB KIPROP CHERUTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Appeal against the Judgment of Hon. E. Kigen-PM, delivered on 26/09/2024 in Iten Senior Principal Magistrate's Court Criminal - Sexual Offences – Case No. E045 of 2023*)

JUDGMENT

1. The Appellant was charged in the said criminal case with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act, 2006**. The particulars were that on the 2nd and 3rd days of October 2023 at **[……...]** Trading Centre in Keiyo South Sub-County, within Elgeyo Marakwet County, he unlawfully caused his penis to penetrate the vagina of **BJK,** a girl aged 4 years, reportedly his own step-daughter. The Appellant was also charged with the alternative offence of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the same date, time and place, he unlawfully and indecently caused his penis to come into contact with the vagina of the same girl aged 4 years.

2. The Appellant pleaded not guilty to the charges, and the case proceeded to full trial, in which the Prosecution called 4 witnesses. **Mr. Tarigo Advocate**, came in to represent the Appellant's Counsel after the first 3 witnesses had already testified, although he successfully applied for recalling of **PW2** and **PW3**, who then returned for cross-examination.

3. At the close of the Prosecution's case, the trial Court found the Appellant as having a case to answer and put him on his defence. He then gave a sworn statement and called 3 other witnesses. By the Judgment delivered on 26/09/2024, he was convicted on the main charge, and sentenced to life imprisonment. Dissatisfied with the decision, the Appellant, through **Messrs Tarigo Kiptoo & Co. Advocates**, filed this Appeal on 18/10/2024 against both conviction and sentence. He listed the following 7 grounds that:

   i) The Learned trial Magistrate erred in law and fact by failing to consider the evidence of the Appellant on merit.

ii) **The Learned trial Magistrate erred in law and fact by failing to consider the nature of the offence, the circumstances under which the Appellant was operating under at the time the offence occurred.**

iii) **The Learned trial Magistrate erred in law and fact by failing to consider the fact that prosecution had not proved their case beyond any reasonable doubt.**

iv) **The Learned trial Magistrate erred in law and fact by failing to consider the fact that prosecution evidences were contradicting themselves.**

v) **The Learned trial Magistrate erred in law and fact by failing to find that the complainant had been defiled by somebody else and not the Appellant.**

vi) **The Learned trial Magistrate erred in law and fact by failing to evaluate the medical record objectively.**

vii) **The Learned trial Magistrate erred in law and fact by convicting the Appellant and by sentencing him to serve life imprisonment which is too harsh for the Appellant considering he was a first offender.**

4. I will now recount the testimonies and/or evidence of the witnesses before the trial Court.

5. **PW1** was the minor (victim), **BC**. Due to her age, she was taken through a ***voire dire*** examination upon which the trial Magistrate found that she was too young to understand the effect of taking an oath and thus, directed that she gives unsworn evidence, which she did.

6. The minor then disclosed the name of her school, and stated that she was a PP1 pupil. She then testified that she was taken to the police station after "***baba***" (her father) removed her clothes, including her stockings, and did "***bad manners***" to her, and whom she identified in Court as the Appellant. She testified that the Appellant inserted his penis into her vagina (which she pointed at), and in the process, she felt a lot of pain and got injured on her private parts. She testified that at the time of incident, her mother had gone to work and she was therefore home alone with the Appellant, that she told her mother about it when she returned, who then took her to hospital, and also to the police. She stated that the Appellant did the "***bad manners***" in their room. In cross-examination, she reiterated that it was the Appellant (her father) who did the "***bad manners***" to her in the chair, although he had never done it before, and that they have a baby at home but who was still young and crawling, and who was asleep at that time. She denied that her mother had told her to come and lie in Court.

7. **PW2** was **Dr. Irene Simiyu,** from Moi Teaching & Referral Hospital (**MTRH**), who testified that she is the one attended to the minor. She testified that the minor had changed her clothes, told her that she felt pain while passing urine, and narrated to her how her father had taken her to bed, defiled her, and told her not to tell anyone, after which she was taken to a nearby health facility. She stated that her examination of the minor revealed that she had lacerations and healing bruises on the labia minora bilaterally, had edematous and hymenal tears at 4 and 7 o'clock position caused by a blunt object, and there were also pale tissues. She stated that her conclusion was that there was penetration consistent with defilement, and that she filled and signed the P3 Form on 5/10/2023, which she then produced in evidence. In cross-examination, she stated that the minor was seen at the facility 2 days after the incident.

8. **PW3** was **JCK**, the minor's (**PW1**) mother. She testified that on 3/10/2023 at 10:00 pm, the minor told her that she felt pain in her private parts, she checked and noted that it was not normal as it was dry, and on the next day, she took her to a nearby health facility by which time the minor had not yet told her what happened. She testified that upon the minor being examined, the doctor noted that she had been injured on her private parts, and on being asked, she revealed that her father had defiled her. She testified that she then went to Kaptagat Police Station where she reported the matter. She stated further that she was issued with a P3 Form, and the doctor confirmed the injuries. She stated that the Appellant is the minor's father, and that the minor, at the time of the defilement, was aged 4 years and 9 months as she was born on 8/12/2018. She then identified the minor's Certificate of Birth, and stated that the Appellant married her when she already had the minor, and that she had lived with him for 2 years. She then identified the Appellant in Court.

9. **PW4** was **Police Constable Leah Chebet**, from the Kaptagat Police Station, the Investigating Officer. She stated that she took over the file from another officer who had since been transferred, and testified that on 4/10/2023, a case of defilement was reported, they recorded Statements and a P3 Form was issued, after which the Appellant was arrested and charged. She reiterated that the Appellant is the minor's father, and that the minor was 4 years since her Certificate of Birth indicated that she was born on 8/12/2018. She testified further that the minor was first taken to a local dispensary, and later to **MTRH**, where the P3 Form was filled, and that the doctor confirmed the defilement.

10. As aforesaid, upon **Mr. Tarigo's** application, **PW2 and PW3** were recalled.

11. Upon her return, the minor's mother, **PW2**, basically reiterated her initial testimony. She however added that she is a casual labourer at a factory, that she used to go to work at 6.00 am, that the minor used to dress herself and go to school about 30 metres away, and she also had another child aged 1 ½ years, whom the Appellant was the biological father to. She agreed that they had neighbours but the minor did not scream during the incident, and that the incident occurred about 6.00 am after she had left for work, after which the minor went to school, and that the minor told her about it at about 10.00 pm. She stated that the minor's teacher told her that the minor looked tired, that that she (**PW2**) returned home around 2.00 pm, they had lunch together, and the minor returned to school at 3.30 pm, although she was not walking well. She testified that she bathed the minor at 9.00 pm and noted that her private parts had dry discharge which was colourless and gummy. She also agreed that at that time, her (**PW2**) relationship with the Appellant was not good, and that he was quarrelling a lot about the minor. She however denied that she had "fixed" the Appellant.

12. **PW3**, **Dr. Irene Simiyu**, upon her return, too, basically reiterated her initial testimony. She agreed that there was no trace of spermatozoa, and that she did not have the treatment notes from the first health facility that the minor was attended to. She ruled out the possibility that the injuries could have been caused by a finger since a finger could not cause "***edematous bilateral***" injury. She insisted that it was penile insertion, and stated that absence of spermatozoa does not rule out defilement.

13. As aforesaid, at the close of the Prosecution's case, the trial Court found the Appellant as having a case to answer and put him on his defence. The Appellant then, in his defence, gave a sworn statement, and called 3 other witnesses.

14. The Appellant, testifying as **DW1**, confirmed that **PW3** is his wife, whom she married in 2021, and who by that time already had the minor as her child, whose age he did not however know, and that they got another child. He testified that they did not have any dispute, and that the minor had an allergy which made her scratch herself and have red eyes. He then gave a long narrative of matters that however had little to do with the case at hand but in the end, he denied defiling the minor. He then stated that at some point, **PW3** got a job, and after some time asked him to go and live with her so that he could assist in taking care of the children, and that is how he ended up living in that area where he is alleged to have committed the offence. He testified that on 3/10/2023, **PW3** returned home looking disturbed and took the minor to hospital on 4/10/2023 but she did not talk to him, that she told him that the minor had been referred to **MTRH**, information which he did not

understand, and that he only knew on 6/10/2023 that the minor had been defiled when he was taken to Kaptagat Police Station and accused of the offence. He stated that they have neighbours around them. In cross-examination, he agreed that on 2/10/2023, he was in the area with the minor and **PW3**. He then stated that they all sleep in the same room but in different beds, and **PW3** sleeps with both minors. He agreed that **PW3** normally returned home at 2.00 pm, and the minor at 3.00 pm.

15. **DW2** was **Miriam Toiyoi**, who described herself as a herbalist and stated that the Appellant is her neighbour whose family and children she used to give herbal medicine, including the minor whom she treated for allergy. She testified that she was shocked to learn that the Appellant had defiled a minor since he used to stay with other kids but had they never heard of any negative reports. She stated that the scratches could have caused the minor to have discharge, and that a child can get marks if she is not bathed and dressed. She however agreed that defilement is different from scratching of private parts. In cross-examination, she revealed that she treated the family 2 years before as the family later relocated.

16. **DW3** was **Millicent Kiprop**, who described herself as the Appellant's sister. She testified that she had lived with the Appellant's wife (**PW3**) and her children, and she used to help her take care of the kids. She stated that the minor was unwell, her eyes had discharge, she used to scratch herself all over the body, and that she asked **PW3** to take her to hospital but **PW3** told her that she was using herbal medicine. She stated that the minor also used to get discharge in her private parts, and insisted that her brother (Appellant) was "**fixed**". It was also her testimony that **PW3** called the Appellant to go and help her take care of the children which the Appellant did, and that **PW3** and the Appellant used to have disputes, although the Appellant never talked about them.

17. **DW4** was **Annete Chebet**, who testified that the Appellant, **PW3** and their children, are her neighbours, and that **PW3** was her friend as they were both from Keiyo and got married in the same area. She testified that **PW3** told her that she did not like her in-laws, and also her husband (Appellant). She then stated that the minor had an allergy and scratches herself, that **PW3**, whenever she went to the market, would leave the minor with her (**DW4**), and that at some point, when **PW3** was away, the Appellant stayed with the minor for 2 weeks and they never heard anything negative. She also stated that **PW3** told her that once she left, she would never return, and she would make sure that she finds a mistake with the Appellant and then leave him.

18. The Appeal was canvassed by way of written Submissions. Both parties' Submissions are dated 3/06/2025.

Appellant's Submissions

19. Counsel for the Appellant, **Mr. Tarigo**, submitted that the State failed to establish a case beyond reasonable doubt, and majorly relied on verbal evidence that was unsupported by documentary proof. On this point, he cited the case of **JMN v Republic (Criminal Appeal E017 of 2021) [2022] KEHC 279 (KLR)**, and in respect to the burden of proof, he cited the case of **Republic v Patrick Ong'au Okioma [2021] eKLR**. He then averred that the Prosecution and the trial Court relied on inconsistent, unsupported and hearsay evidence, that **PW2**, the doctor testified that she examined the minor based on notes from another hospital, and there was also no discharge when she examined the minor. He cited case of **Juma Charo Ali vs Republic [2021] eKLR**. He urged further that the doctor agreed that insertion of fingers, and or anything else, could have caused the minor's hymen to rapture, that **PW4**, the investigating officer, testified that she had never seen the Appellant before and therefore she could not identify him in Court, that the investigating officer also testified that she visited the scene of the crime but did not find the minor, only the mother. Counsel argued that **PW4** did not state whether she collected any reliable evidence that would support the accusations against the Appellant, that the trial Court did not consider the evidence given by the Appellant's witnesses, and that the trial Court also failed to consider that the minor always had allergies and she used to be treated using herbal medicine provided by **DW2**. Counsel contended that the Appellant's sister, **DW3**, corroborated these statements by testifying that the minor was unwell and she used to scratch herself all over her body, and experience discharge on her private parts. She added that **DW4**, the Appellant's neighbour testified that she is the friend of **PW3**, (Appellant's wife), who had told her that the minor always had allergies and she also confided in her that she did not like her in-laws, including her husband. According to Counsel, this raises the suspicion that the Appellant's wife is using the minor to get back at her husband. He cited the case of **Serpepi Sanja Siromo v Republic [2020] eKLR.**

20. Regarding the life imprisonment sentence, **Mr. Tarigo** submitted that the same was excessive and illegal, that the trial Magistrate failed to consider the Appellant's mitigation, and that the trial Court did not consider that the Appellant had been in custody since 9/10/2023. He thus urged the Court to interfere with the sentence given recent rulings by the Court of Appeal and Supreme Court which bar life imprisonment. He cited the Court of Appeal case of **Malindi Criminal Appeal No 12 of 2021; Julius Kitsao Manyeso v**

Republic, and the Supreme Court case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR**.

Respondent's Submissions

21. On her part, Prosecution Counsel **Ms. Rachel Mwangi**, basically recited the testimonies of the witnesses, and documents on record, and submitted that penetration, age of the minor, and identification of the Appellant as the perpetrator of the offence were all proved. In respect to the allegation of contradictions in the testimonies of Prosecution witnesses, she submitted that there were no material contradictions that could create doubt as to whether the Appellant committed the offence. She cited the case of **John Nyaga Njuki & 4 others v Republic [2002] KECA 288 (KLR)**. She also urged that there was corroboration, and that the contradictions, if any, did not displace the evidence.

22. On the issue of sentence, Counsel submitted that **Section 8(1)** as read with section **8(2)** of the **Sexual Offences Act** provide for life imprisonment for the offence of defilement of a child aged 11 years or less, and the sentence was therefore within the legal confines of the law. She cited the **Supreme Court Petition (Application) No E018 of 2023-R V Joshua Gichuki Mwangi**. She urged the Court not to interfere since the sentence is not manifestly excessive or harsh, and cited the case of **Benard Kimani_Gacheru v Republic [2002] eKLR.**

23. In conclusion, Counsel urged the Court to dismiss the appeal, especially since this is an offence against a child of tender age who was defiled by a person whom she looked up to as a father. She submitted that the Court should protect children from irresponsible, inhumane behaviour.

Determination

24. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions, bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses. (See **Okeno vs. Republic [1972] E.A 32)**.

25. The issues that arise for determination in this matter are evidently the following:

a) **Whether the defilement charge against the Appellant was proved beyond reasonable doubt.**

b) Whether the sentence of life imprisonment imposed against the Appellant was justified.

26. For the offence of defilement to be established, 3 ingredients must be proved, namely, the age of the victim, penetration and positive identification of the offender (see the case of **George Opondo Olunga v Republic [2016] eKLR)**, and also the case of **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013**.

27. In a charge of defilement, the age of the victim is important for two reasons: **(i)** defilement is a sexual offence against a child; and **(ii)** age of the child is also used as an aggravating factor for purposes of determining the sentence to be imposed, the younger the child the more severe the sentence. In this case, the minor's Certificate of Birth produced in evidence indicates that she was born on 8/12/2018. There being no contrary evidence, and the alleged offence having reportedly been committed between 2/10/2023 and 3/12/2023, it was established that the minor was indeed, at the material time, about 4 years and 9 months years in age, thus within the category of "***a child aged eleven years or less***" stipulated in **Section 8(2)** of the **Sexual Offences Act**. In any case, the trial Court's finding on the age of the minor has not been challenged in this Appeal.

28. In respect to "***penetration***", **Section 2(1**) of the **Sexual Offences Act** defines the term as:

> **"The partial or complete insertion of the genital organs of a person into the genital organ of another person."**

29. In this case, medical evidence was provided by **PW2**, **Dr. Simiyu**, who testified that the minor told her that she felt pain while passing urine and that her father (Appellant) is the one who had taken her to bed and defiled her then told her not to tell anyone. According to the P3 Report she produced, she examined the minor on 4/10/2023 while the act of defilement was reported to have taken place between 2/10/2023 and 3/10/2023. I note that in the P3, the minor is recorded to have narrated about her father (Appellant) that ***"…. akaniambia tufanye tabia mbaya. Akaniwekea dudu yake kubwa"***. This, loosely translated, is that her father told her that "***they should do bad manners and he then inserted his big organ into hers***". The minor, in her own testimony in Court, testified that "***baba***" (father) removed her clothes, including her stockings, and did "***bad manners***" to her.

30. Regarding the minor's use of the term "***he did to me bad manners***", the Court of Appeal, in the case of **Muganga Chilejo Saha v Republic [2017] eKLR**, acknowledged that this is an acceptable description of defilement especially where penetration is established. In accepting that in Kenya, the society has adopted such terms as a euphemism to mean phrases generally used by children, and even adults, to describe sexual acts, the Court of Appeal stated as follows:

> "*Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a Court room. If the trend in the decided cases is anything to go by, Courts in this country have generally accepted the use of euphemisms like,* **"alinifanyia tabia mbaya***",* **(IE V R, Kapenguria H.C Cr. Case No. 11 of 2016***),* **"he pricked me with a thorn from the front part of this body."***, (***Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015***),* **"he used his thing for peeing",** *(***David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015***), "he inserted his* **"dudu"** *into my* **"mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu"***, (***Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011***), as apt description of acts of defilement. We, however, need to remind trial Courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See* **A M V R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015**, *among several others. Trial Courts should record as nearly as possible what the child says happened to him or her. (emphasis added)."*

31. The minor testified further that the Appellant (father) inserted his penis into her vagina and in the process, she felt a lot of pain and got injured on her private parts, which she pointed at. She stated that her mother had gone to work and she was therefore home alone with the Appellant, and that she told her mother about the incident when she came back, upon which the mother took her to the hospital and then to the police. The mother also testified that she bathed the minor at 9.00 pm and noted that her private parts had dry discharge which was colourless and gummy. The doctor also testified that upon examination of the minor, she noted that the minor had lacerations and healing bruises of the labia minora bilaterally, edematous and tender healing hymenal tears at 4 and 7 o'clock. On the basis of the above observations, she concluded that the minor had been defiled. These findings and conclusion are also apparent in the P3 Report produced in evidence.

32. I note that **PW3**, **Dr. Irene Simiyu**, agreed that she did not have the treatment notes from the initial health facility that the minor was attended to, before she was later taken to MTRH. While no explanation has been given by the Prosecution on why the treatment notes from that initial health facility were not produced, in the absence of any contradictory evidence, I do not find absence of such treatment notes to be so substantial that it can vitiate the trial Court's findings.

33. There were also arguments by the Appellant and his witnesses that the minor had been having some allergy which caused her to be scratching her private partes, leading to discharge, and that the findings made by the doctor were probably the effect of such scratching. First, the Appellant and his witnesses are not medical experts and their claims were not backed by any medical evidence. Even the alleged herbalist (**DW2**) who claimed that she treated the minor for allergy, did not produce any evidence to demonstrate that she is recognized as a qualified medical practitioner. Further, she conceded that she last "treated" the minor 2 years before the incident, and that the minor had healed. She also conceded that the physical evidence of defilement is different from that of scratching of private parts The defence witness's testimonies on this allegation were therefore, at the most, mere speculation, which a Court of law cannot rely on. In any event, **Dr. Simiyu** ruled out the possibility that the injuries could have been caused by scratching or by a finger since according to her, a finger could not cause "***edematous bilateral***" injury. She was emphatic that there was penile insertion.

34. The contention by the Appellant's Counsel that neighbours would have heard the minor's screams if she was really defiled, is also not a serious one. It does not automatically follow that every victim of defilement must necessarily scream during the act. There is no such theory at all. There could be many reasons why a victim may not scream or even fight back.

35. Counsel also argued that no spermatozoa was found upon examination of the minor. In respect to this contention, I cite the case of **Mark Oiruri Mose v R (2013 eKLR**, in which the Court of Appeal guided as follows:

> **"….. In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence if spermatozoa be availed.**

So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ."

36. It is therefore clear that in the absence of any other exonerating evidence, the mere absence of spermatozoa within the genitalia of the defiled minor cannot by itself vitiate a conviction.

37. In view of the foregoing matters, there being no evidence, medical or otherwise, to the contrary, I have no material before me to justify departing from the medical evidence produced by the doctor. I therefore have no reason to interfere with the trial Magistrate's finding that penetration was proved, and that the minor was defiled.

38. On the issue of identification, the Court of Appeal in the case of **Cleophas Wamunga v Republic [1989] eKLR** expressed itself as follows:

"**Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".**

39. In this case, there is no dispute that the Appellant is well known to the minor, as he is his father, even if not biological. The minor's identification evidence is therefore one of recognition, rather than that of a stranger. In respect to this nature of identification and its reliability, the Court of Appeal, in the case of **Reuben Tabu Anjononi & 2 Others v Republic [1980] eKLR**, stated that:

"……. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. …….

40. The Appellant is the husband to the minor's mother, and both positively identified him in Court. The Appellant, too, acknowledged this fact in his testimony. The Appellant was therefore not a stranger to the victim. In any event, the trial Court's finding on identification of the Appellant has also not challenged in this Appeal.

41. I also agree that the Appellant's defence was simply a mere denial of the incident which did not tackle the specific accusations raised against him. He was also placed at the scene of crime by the evidence on record. Regarding the claim by **DW4** that the minor's mother had told her that "***she did not like her in-laws***, ***and also her husband***", and that "***she would make sure that she finds a mistake with the Appellant then leave him***", no allegation of this nature was put to the mother during her cross-examination for her to respond, even after being recalled. That allegation, insofar as it was brought up for the first time at defence hearing stage, therefore reeks of an afterthought. In any event, the Appellant himself conceded that he did not have any dispute with the Appellant before the incident. There is therefore no evidence that the Appellant had any demonstrated motive for "***fixing***" the Appellant.

42. Regarding the allegation of contradictions and inconsistencies in the Prosecution witnesses' testimonies, it has also not been demonstrated that there were any serious contradictions that could create doubt on the credibility of the Prosecution witnesses. I have found none. In respect to slight contradiction and excusable inconsistencies in testimonies, the Court of Appeal, in the case of **Philip Nzaka Watu v Republic [2016] eKLR** guided that:

> **"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing in the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.**
>
> **In *Dickson Elai Nsamba Shapwata & Another v The Republic*, CR APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:**
>
> > ***"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."***

43. In fact, the only one possible inconsistency I noticed was the minor's contradictory testimony, on one part, that the Appellant defiled her on the bed, and on another hand, that the defilement took place in the chair. This fact was however not cross-examined upon, and was also not taken up in this Appeal. I therefore do not find it to be significant.

44. The primary testimony against the Appellant in this case was that given by the minor (**PW1**) who, although she gave unsworn testimony, I find no material to controvert the trial Court's finding that that such testimony was sufficiently corroborated by the testimony of the rest of the witnesses, and also by documentary evidence. No justification has therefore been demonstrated to warrant this appellate Court's interference with the verdict of conviction arrived at by the trial Court.

45. On the second issue, sentence, the applicable principles in re-considering sentence on appeal, were restated by the Court of Appeal in **Bernard Kimani Gacheru v Republic [2002] eKLR**, in the following terms:

> **"It is now settled law, following several authorities by this Court and the high Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial Court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial Court on sentence unless, anyone of the matters already stated is shown to exist".**

46. Section 8(2) of the **Sexual Offences Act** provides as follows:

> **"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction <u>be sentenced to imprisonment for life</u>."**

47. Section 8(2) therefore prescribes only one mandatory sentence – life imprisonment. In view thereof, it is clear that the sentence imposed by the trial Court, although the maximum stipulated, was within the statute. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory or minimum sentences should be discouraged, and that Courts should retain the discretion to depart from such mandatory

sentences, where justified. This was stated in the Supreme Court case of **Francis Karioko Muruatetu and Another v Republic [2017] eKLR.**

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

49. However, by the subsequent clarification made by the same Supreme Court in its subsequent directions given in **Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)**, the Supreme Court made it clear that **Muruatetu** only applied to murder cases, and not to any other type of case, not even sexual offences. The Supreme Court reiterated and restated these directions when dealing with an Appeal emanating under the **Sexual Offence Act**. This was in the case of **Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment)**, in which the Supreme Court set aside the decision of the Court of Appeal which had applied the **Muruatetu** reasoning in setting aside a mandatory minimum sentence of 20 years imprisonment imposed on the Appellant.

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

51. However, in respect to the sentence of life imprisonment, there is also emerging jurisprudence questioning its constitutionality. In regard thereto, I cite the Court of Appeal case of **Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) 7 July 2023) (Judgment)**, which dealt with a case of a sentence of life imprisonment imposed on an Appellant for the defilement of a 4 years old child. Upon setting aside the sentence of life imprisonment, the Court of Appeal substituted the same with a prison sentence of 40

years. However, on further appeal, the Supreme Court faulted the Court of Appeal for usurping the role of the Legislature by purporting to declare the life sentence as unconstitutional. It then swiftly reinstated the sentence. This was in the recent case of **Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment) [2025] KESC 16 (KLR)**, in which the Supreme Court held as follows:

> **"70. Our findings hereinabove effectively lead us to the conclusion that the Judgement of the Court of Appeal delivered on 7th July 2023 is one for setting aside. The Court of Appeal did not have jurisdiction to interfere with the sentence imposed by the trial Court and affirmed by the first appellate Court. Consequently, the life imprisonment sentence remains lawful and in line with Section 8 of the *Sexual Offences Act*."**

52. In view of the above, it is clear that the sentence of life imprisonment imposed by the trial Court, was within the law. This observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh, which I now hereby do.

53. The Supreme Court, in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR),** guided that, in sentencing, the following mitigating factors would be applicable; **(a)** age of the offender; **(b)** being a first offender; **(c)** whether the offender pleaded guilty; **(d)** character and record of the offender; **(e)** commission of the offence in response to gender-based violence; **(f)** remorsefulness of the offender; **(g)** the possibility of reform and social re-adaptation of the offender; and **(h)** any other factor that the Court considers relevant.

54. I also cite **Majanja J**, in the case of **Michael Kathewa Laichena & another v Republic [2018] eKLR,** in which, quoting the **Muruatetu case (supra),** he stated that:

> **"The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ……"**

55. Similarly, in the case of **Daniel Kipkosgei Letting v Republic [2021] eKLR,** the Court of Appeal held as follows;

> **"……. we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ……."**

56. Applying the above principles to the facts of this case, I consider that the crime of defilement is treated as a serious offence under Kenyan law and society at large, and is always severely punished. It is also relevant to note that the victim in this case was a 4-year child of tender age, such a vulnerable human being who required protection from all, including, and particularly, from the Appellant, her father, whom she trusted.

57. I do not have to be a psychologist to discern that the minor will suffer lifelong trauma resulting from the act and will forever remember that her chastity was robbed from her by a person who was supposed to protect her. The whole family must also be silently suffering from serious trauma caused by the act. Taking all these factors into account, it cannot be denied that the offence merits a stiff and deterrent sentence.

58. Having said so however, I also find the existence of substantial mitigating factors. From the record of the trial Court, the Appellant is currently aged about 42 years. There was also no evidence that he was not a 1st offender. Although the offence he was convicted of merits his being put away for a long time, I believe that retribution will be best achieved, not by incarcerating him for an unreasonably long period of time but by giving him a second chance in life, to come out of jail, once he has hopefully learnt his lesson, and rebuild his life.

Final Orders:

59. In the circumstances, I make the following Orders:

i) The appeal against the conviction of the Appellant in **Iten SPMC (SO) Criminal Case No. E045 of 2023**, fails, and the same is upheld.

ii) However, in respect to sentence, I hereby set aside the sentence of life imprisonment imposed by the trial Court, and substitute it with a sentence of 30 years imprisonment, to be computed as from the date of the Appellant's arrest, namely, 06/10/2023, as indicated in the charge sheet.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 23RD DAY OF OCTOBER 2025

……..……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

The Appellant

Ms. Mwangi for the State

Mr. Tarigo for the Appellant

Court Assistant: Brian Kimathi