Koech v Republic (Criminal Appeal 15 of 2023)
[2025] KEHC 15024 (KLR) (23 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15024 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL 15 OF 2023

JRA WANANDA, J

OCTOBER 23, 2025

BETWEEN

EDWIN KIBET KOECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment dated 27/10/2022 and sentence delivered in Iten Senior Principal Magistrates Criminal - Sexual Offence - Case No. E008 of 2022 by Hon. V Karanja-PM)

JUDGMENT

1. The Appellant was charged in the criminal case stated above with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. It was alleged that the Appellant, on 18/02/2022, at [particulars withheld] village, Kiptuilong Location in Keiyo North Sub County, within Uasin Gishu County, intentionally and unlawfully caused his penis to penetrate the vagina of MJ, a girl aged 9 years.

2. He was also charged with the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

3. The Appellant pleaded not guilty to both the charges and the case then went to full trial in which the Prosecution called 5 witnesses. At the close of the Prosecution case, the Court found that the Appellant had a case to answer and put him on his defence. The Appellant gave a sworn statement and called no witnesses. By the said Judgment, he was convicted on the main charge and sentenced to serve life imprisonment.

4. Dissatisfied with the decision, the Appellant filed this Appeal on 09/11/2022, against both conviction and sentence on the grounds reproduced verbatim as follows:

i. That, the trial Magistrate erred in both law and fact by not observing the offence of defilement under section 8 (1) (2) SOA 3 of 2006 was not proven beyond reasonable doubt.

ii. That, the trial Court failed to recognize that, the complainant family framed the Appellant so that they cannot (sic) pay him accrued wages.

iii. That, the trial Magistrate erred in law and fact by shifting the burden of proof on the Appellant herein.

iv. That, the trial Magistrate erred in both law and facts by not observing that the prosecution case was not proven beyond reasonable doubt.

v. That, the trial Magistrate erred both law and facts by failing to recognize the recent High Court decision under Petition No. E017/2021 at Machakos and Petition No. 97 of 2021 at Mombasa.

5. I now recount the testimonies of the respective testimonies.

6. PW1 was MJ, the minor-complainant. Due to her age, she was taken through a voire dire examination after which the trial Magistrate recorded that she was too young to understand the effect of taking an oath, and thus directed that she gives unsworn evidence, which she then proceeded to do.

7. The minor stated that she was a 9 years old grade 3 pupil but could not state her age. She then pointed at the Appellant seated in the dock and testified that "he did her wrong". She stated that they call the Appellant "uncle" but she did not know his formal name, but he used to graze their goats and sheep and lived with them. She stated that on the material date, she was asleep in the house of "Gogo" (grandmother), with another boy named V and T, that she was sleeping alone on the bed and V in another, and "Gogo" was in another house. She stated that the Appellant came and woke up V then also woke her (minor) up, he told V to close the door which V did, then the Appellant slept with her (minor) on the bed, removed all her clothes, including inner pants, and did "tabia mbaya" (bad manners) in her genitals (she pointed to her groin area). She testified that V was asleep during all this time, and that after the Appellant finished, he washed her (minor), and he slept on the minor's bed with her until morning, in the morning, the Appellant dressed then asked to do it again, but the minor refused as she wanted to go to school. She stated that in the morning, "Gogo" came and talked to her through the window and asked her to prepare to go school, upon which the Appellant quickly left. She stated that in the evening after she returned from school, she told "Gogo" about the incident who then took the minor to hospital.

8. PW2 was V referred to above, a 13 years old boy. He, too, was taken through a voire dire, examination upon which the trial Magistrate found that he understood the nature of an oath and allowed him to give sworn evidence, which he then did.

9. He testified that the minor (complainant) is his sister and the accused, whom he referred to as Edwin, also known as Abraham, and also as "Chomba" (uncle), used to look after their cattle. He stated that on the material night, in respect to which he could not recall the date or month, they were asleep with T, with whom he was sharing a bed, while the minor (PW1) was sleeping alone, that the accused called him (PW2), and told him to open the door, which PW2 did as he recognized the Appellant's voice, he thought the Appellant wanted to pick something and leave but the Appellant told him that he had come to sleep with the minor and that he saw the Appellant well because electricity lights were on in the house. He testified that the Appellant then told him to close the door, which he did, and told PW2 and T to sleep, which they did. He stated that T did not wake up, and he, V, also fell asleep and only woke up in the morning when he saw the Appellant putting dressing and leaving to go and take care

of the cattle, and he (PW2) then went to school but also told "Gogo" that the accused had slept with the minor.

10. PW3 was SK, the minor's grandmother referred to as "Gogo". She stated that in the morning of 18/2/2022, the children, (presumably, the minor and V) went to school and when they returned home at noon, the minor was crying, when she asked what had happened, the minor told her that "Abu" (Appellant) had defiled her. PW3 then identified the Appellant in Court and stated that he used to graze their cattle at home.

11. PW4 was RB, the minor's mother. She testified that the minor was 9 years old and identified the minor's Certificate of Birth which indicated the minor's date of birth as 29/5/2012. She stated that on 18/2/2022, she had gone to graze cattle and when she returned home, "Gogo" (PW3) called her and told her that the minor was unwell, upon which she gave the minor medicine, and they then slept as she was also feeling unwell. She testified that when she woke up, "Gogo" told her that the Appellant had slept with the minor the previous night. She stated that she then examined the minor who was crying, and whom she then took to hospital in Tambach, she then went to look for the Appellant, who was found in the bushes and the police came and took him away. She stated that the Appellant had worked for them for about 6 months. She then identified the treatment documents, including the P3 Form. In cross-examination, she stated that she had gone for a "kesha" (overnight church prayer session) on the night when the incident is alleged to have occurred.

12. PW5 was Luka Kiprop, a Clinical Officer at the Tambach Sub-County Hospital. He stated that the minor, aged 9 years, was brought to the facility on 18/12/2022 with a history of sexual assault. He stated that upon examination, he noted that both of the minor's labials were inflamed, and hymen was absent, but with with no discharge or deposits. He stated that he also examined the Appellant but nothing positive was found on him. He then produced the respective P3 Forms.

13. PW6 was PC Jairus Kimetei attached at the Tambach Police Investigation office. He stated that his office received a distress call on 19/02/2022 that a suspect had been arrested on allegations of defilement, and he went to the scene and arrested the Appellant, whom he later escorted to hospital. He produced the treatment notes, and also the minor's Certificate of Birth.

14. As aforesaid, upon close of the Prosecution case, the Court found that the Appellant had a case to answer and put him on his defence. The Appellant then informed the Court that he would give unsworn testimony, and would not call any other witnesses. He then gave evidence as DW1, although the record then captures his testimony as "sworn", which however, I believe, was simply an inadvertent error on the part of the trial Magistrate as the Appellant was not cross-examined.

15. The Appellant (DW1) stated that he was employed by RB, the minor's mother (PW4) around 25/08/2021 as a farm-hand, at an agreed monthly salary of Kshs. 4,000/-, and that he started working in September 2021. He stated that in October 2021, he demanded for her salary which had delayed and when he was also not paid the salary for November 2021, he called PW4's husband to ask about it, who told him that he had long sent the money to PW4, who however disputed that claim. He stated that PW4 then called him to her bedroom and demanded that they have sex, which he refused, and that PW4 told him that she had not conceived with her husband. He stated that on 15/01/2022, PW4 again demanded for sex but he again refused and demanded for his salary, and that when the husband returned home on 20/01/2022, the Appellant again asked him for the salary but the husband told him that he did not have any money. He testified that when he (Appellant) returned from Kerio on 18/02/2022, he was confronted by neighbours and PW4 came and ordered that he be taken to the police on allegations that he had raped a child, upon which the Appellant was tied and taken to the police.

16. After analysing the evidence, the trial Court, on 27/10/2022 found the Appellant guilty and convicted him of the offence of defilement. The Appellant was then given an opportunity to mitigate which he did. The trial Court then sentenced him to serve life imprisonment.

17. The Appeal was canvassed by way of written Submissions. The Appellant's Submissions is dated 16/04/2025, while the Respondent's is dated 30/01/2024 by Prosecution Counsel, Calvin Kirui.

Appellant's Submissions

18. In his submissions, the Appellant set out what he described as "Amended Supplementary Grounds of Appeal" although I find no evidence to demonstrate that he sought or obtained leave to do so, belatedly at this stage. Nonetheless, and in the interest of justice, I will still consider it. The same is premised as follows:

    i. That, among other things reform and rehabilitation of the Appellant should form the main basis of the sentence.

    ii. That, final punishment lacks elements of mercy and leniency.

    iii. That, the Appellant is of a productive age, first offender, remorseful, reformed and rehabilitated for the period already served.

    iv. That, the Court did not consider Appellant's mitigation, that despite mitigation the trial Court went ahead to sentence him to life imprisonment without stating the reason of imposing the sentence.

    v. That, the mandatory nature of sentence is discriminatory and denies the Appellant's right of fair trial, benefit of least severe sentence and benefit of section 333(2) of the Criminal Procedure Code. (Article 50(2) (p), 27(E)(2), 20(3)(a)(b), 28 and 19(2))

    vi. That, the mitigation of the appellant was not considered.

    vii. That, the mandatory nature of sentence denied the Hon. Trial court to exercise its own discretional power and independency to pronounce a lenient determinate sentence.

    viii. That, the sentence imposed was not in-line with the new developments in our jurisprudence and the sentencing guideline policy developed of 2023

    ix. That, the trial court did not consider the effect of life imprisonment on the appellant his family and the society at large that depends on him and the possibility of reform and rehabilitation of the offender.

    x. That, the Hon. Court to stand guided by the above authorities cited.

19. As can be easily discerned, the above grounds are entirely about the sentence. It thus appears that the Appellant may have abandoned the portion of the Appeal relating to the conviction.

20. He then submitted that he has deep regrets and feelings to the minor and her family, as he has thought over his actions and he has realised the offence committed was regrettable, and he is deeply remorseful. Regarding the sentence, he cited provisions of *the Constitution*, and statutes, and also several authorities to urge that the objective of imprisonment ought to be about rehabilitation, and not long incarceration or turning corrective facilities into detention camps. He urged that the sentence imposed being the maximum punishment lacks elements of mercy and leniency, and ignores other factors to be considered in a democratic society. He submitted that the mandatory nature of the sentence renders it discriminatory and denies him the right of fair trial. He cited the case of Julius Kitsao

Manyeso Vs Rep. Cr. App. No. 12 of 2021 at Malindi Court of Appeal, and also the case of Francis Karioko Muruatetu and another Vs Rep (2011) eKLR. He submitted that the above reasoning equally applies to the imposition of a mandatory indeterminate life sentence as it denies a convict facing life imprisonment the opportunity to be heard. The Appellant then submitted that he is remorseful, of a productive age, first offender, reformed and rehabilitated. He stated further that he had just started a young family that has been brought down and which depends on him, and he prays that this Court to save him from further breakage by giving him a chance in life.

Respondent's Submissions

21. On his part, Prosecution Counsel submitted that the offence of defilement was proved beyond reasonable doubt as the ingredients of the offence, as set out in the case of George Opondo Olunga v Republic [2016] eKLR, as being identification or recognition of the offender, penetration and the age of the victim, were all established. He appreciated that the Prosecution is under a duty to establish or prove all the above elements of defilement beyond reasonable doubt and that the duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the Prosecution. Regarding identification of the perpetrator, he submitted that the evidence is that of recognition. He then recounted the testimony of the witnesses and submitted that the complainant knew the Appellant well and there is no doubt that he was well identified. On penetration, Counsel cited the definition in Section 2 of the Act to mean "the partial or complete insertion of the genital organs". He urged that the minor testified that she was defiled and therefore, the question was whether that evidence requires corroboration. He cited Section 124 of the *Evidence Act* and submitted that the evidence of the complainant of her being defiled was corroborated by that of the clinical officer (PW5), and that absence of the hymen was further evidence of penetration, while the swollen labia indicated that the penetration was recent, and which corroborates the minor's testimony. Counsel also submitted that PW2's evidence also placed the Appellant at the scene and corroborates the minor's evidence. He urged further that, as noted by the trial Court, there was no other evidence of anything that would have caused the injuries on the minor's genitalia.

22. On age, he submitted that the Investigating Officer (PW5) produced the minor's Certificate of Birth which indicates that she was born on 29/05/2012. He submitted that the Appellant chose to adduce unsworn evidence which thus denied the Prosecution the opportunity to test its veracity. He observed that the Appellant admitted to being employed by PW3 as a farm-hand since 28/08/2021, and as regards the Appellant's allegations that PW4 had failed to pay his salary and also asked him for sex, he submitted that the Appellant did not raise such issues during cross-examination, and that by reason thereof, the trial Court rightly held that these were afterthoughts. He asserted that the Prosecution availed overwhelming credible evidence proving the case beyond reasonable doubt.

Determination

23. 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).

24. 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.

25. 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.

26. In a charge of defilement, the age of the victim is important for two reasons: (i) defilement is an 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 29/05/2012. There being no contrary evidence, and the alleged offence having reportedly been committed on 18/02/2022, it was established that the minor was indeed, at the material time, about 4 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.

27. 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."

28. In this case, the minor (PW1) very vividly described and gave a clear narrative of how she was defiled. She described how the Appellant, their farm-hand, thus well-known to her, came into their room (which she was sharing with other two children) at night, asked the door to be opened for him, and when allowed entry, he sneaked into the minor's bed, undressed her and defiled her. She gave a clear description of what transpired, including how the Appellant "washed" her after the act, how he then fell asleep on her bed until morning when their grandmother emerged, from across the window, to wake her up, reminding about going to school, and how the Appellant had, in the morning, asked her for a second session of sex, which she declined. PW2, the one other boy who shared the room with the minor, also testified that it is him who opened the door for the Appellant when the Appellant came knocking at night, and while he assumed that the Appellant had come to pick up something and leave, the Appellant told him that he had come to sleep with the minor, and, indeed, proceeded to the minor's bed. The respective testimonies also indicate that the minor reported the matter to her grandmother (PW3) later in the day, who, in turn, informed the minor's mother (PW4), who, on the night of the incident, was said to have been away, having gone for "kesha" (church overnight prayer vigil). I do not find any inconsistencies or contradictions in the testimony given and, like the trial Magistrate, I, too, have no grounds not to believe it.

29. Medical evidence was provided by PW5, Luka Kiprop, the Clinical Officer, who testified that the minor was brought to the facility with a history of defilement, and that on examining her, he noted that both her left and right labia were inflamed, and the hymen was absent. The treatment notes he produced also indicated the same. Although the Clinical Officer was not seriously cross-examined, perhaps due to the Appellant's lack of legal representation, and thus his findings not deeply scrutinized, in the absence of any contrary evidence, I find no reason to depart from the trial Magistrate's findings on the testimony.

30. Regarding the minor's use of the term "he then did to metabia mbaya" (bad manners), the Court of Appeal, in the case of Muganga Chilejo Saha v Republic [2017] eKLR, acknowledged that this nature of phrase is an acceptable description of defilement especially where penetration is established. The Court of Appeal accepted 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.

31. Although the treatment notes indicate that no spermatozoa was found upon examination of the minor, I am guided by the holding reached by the Court of Appeal in the case of Mark Oiruri Mose v R (2013 eKLR, 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."

32. 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.

33. In view of the foregoing, 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 Clinical Officer. I therefore also have no reason to interfere with the trial Magistrate's finding that penetration was proved, and that the minor was defiled.

34. On the issue of identification, the Court of Appeal in the case of Cleophas Wamunga v Republic [1989] eKLR expressed the need for caution, 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".

35. In this case, there is no dispute that the Appellant is well known to the minor, as he had been their farm-hand for 6 months. The minor's identification evidence is therefore one of recognition, rather than that of a stranger. According to the minor, the electricity lights in the room were on when the Appellant walked in. Therse facts were also corroborated by the other child present in the room (PW2) who, too, testified that he recognized the Appellant. 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. .....

36. The Appellant, too, acknowledged, in his testimony, that he was not a stranger to the minor.

37. It is also evident 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 his claim that the minor's mother (PW4) "fixed him" because of his unpaid salary, or because he declined her sexual advances, no allegation of this nature was put to the mother during her cross-examination for her to respond. Those allegations, insofar as they were

brought up for the first time at defence hearing stage, reeks of an afterthought. In the circumstances, I have no reason to fault the trial Magistrate for disbelieving him.

38. 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 the medical 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.

39. In any event, as aforesaid, the Appellant, in his Submissions submitted that he expresses his deep regrets and feelings to the minor and her family, as he has spent time thinking over his actions, and he has come to realise the offence he committed was regrettable, and that he was deeply remorseful. He never, at all, raised any issue against the conviction. It is therefore presumable that he abandoned the portion of the appeal challenging his conviction.

40. 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".

41. 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 be sentenced to imprisonment for life."

42. 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.

43. On the strength of the Muruatetu, 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).

44. 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.

45. 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*.

46. 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*."

47. 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.

48. 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.

49. 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. ....."

50. 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. ....."

51. 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 9-years old child, a vulnerable human being who required protection from all. I do not have to be a psychologist to discern that she will suffer lifelong trauma resulting from the act, and will forever remember that her chastity was robbed from her at a tender age by an adult who ought to have known better. The whole family must also be silently suffering from serious trauma and "silent whispers" arising from the act. Taking all these factors into account, it cannot be denied that the offence merits a stiff and deterrent sentence.

52. Having said so however, I also find the existence of some mitigating factors. From the record of the trial Court, the Appellant is currently aged about 36 years. There was no allegation 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:

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

    i. The appeal against the conviction of the Appellant in Iten SPMC (SO) Criminal Case No. E008 of 2022, 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, 19/02/2022, 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:

Appellant present virtually from Kamiti Prison)

Ms. Mwangi for the State

Court Assistant: Brian Kimathi