Kamau v Republic (Criminal Appeal E072 of 2022) [2025] KEHC 16202 (KLR) (4 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16202 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E072 OF 2022

AK NDUNG'U, J

NOVEMBER 4, 2025

BETWEEN

PATRICK MAINA KAMAU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The Accused, Patrick Maina Kamau, was charged with Defilement contrary to Section 8 (1)as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 6th day of April, 2017 within Kieni East in Nyeri County, unlawfully and intentionally caused his penis to penetrate the vagina of B K B a child aged 6 years. He was convicted after trial and sentenced to serve to life imprisonment.

2. Aggrieved by the conviction and sentence, the Appellant lodged this appeal based on grounds filed in court on 8.12.22 which grounds were amended and filed in court on 25.2.25. Suffice it to note that the amended grounds were filed without the leave of court.

3. Even though the prosecution did not take issue with this omission, this court must reiterate the legal position that such leave is mandatory and this trend that is gaining root in appeals of this nature must be checked. In deference to the court's primary duty to do justice to the parties, and noting that the Appellant was acting in person and was therefore disadvantaged in knowledge of legal procedures, and in view of the fact that the Respondent was served and has submitted on the new grounds, I admit the same and deem them as properly filed and proceed to make findings thereon the irregularity notwithstanding. It would be remiss of this court to fail to emphasize the need for concerted civic education, more particularly in our prisons to ensure compliance with the law.

4. The amended grounds are reproduced verbatim as hereunder;

1. That, the learned trial magistrate erred in the points of law and facts by convicting and sentencing appellant herein to life imprisonment without observing that the ingredients of the charge of defilement was not proved beyond reasonable doubts in the instance matter as it was stated in the case o flaw of; Remmy Wanyonyi Wanjoji – Vrs – Republic Cr. Appela No. 53 Of 2019 A Anungoma Hih Vort Coram; REICH (J) (2020) EKLR.

   Thus this Hon. Court be pleased to invoke its discretion and proceed to set him at liberty.

2. That, the learned trial magistrate erred in the points of law and facts by failing to conduct the voire dire examination in the instance matter failure by the trial court to conduct a voire dire rendered the evidence of PW1 to be null and void because the trial court did not establish by way of asking questions the alleged complainant failure by the trial court to conduct a proper voire dire made the trial court to take the evidence of PW1 understood the duty of speaking the truth; I cite in the case of law of Nyasani S/o Bichana – Vrs – Republic(1958) E.a 190 In Samuel Wahini Ngugi -vrs – Republic (2012) EKLR.

3. That, the learned trial magistrate erred in the points of law and facts by rejecting his plausible defence statement which was collaborated by my defence statements witness who purported in court that they were with appellant herein doing (Kazi Mtaani) from 4th day of April, 2017 up to arresting date. Failure by the trial court to consider my plausible defence statement which was collaborated by two witness tended appellant herein to suffer a prejudice Hon. Court f dealt with the similar situation and proceeded to set at liberty the appellant therein on this single ground. He rely on the latest decitation of the court of appeal sitting at Nairobi in; Dicson Amalemba Lisanza & Another – Vrs – Republic Cr. Appeal No. 67 Of 2016 At Kisimu Court Of Appeal judgment dated and delivered at Nairobi this 16th day of April 2021 (referred to paragraph 35) (Coram; Okwengu, Kiage & Sichale Jja).

   In the above cited case law Hon. Court of appeal allowed the appeal of 2nd appellant because he called a defence witness who collaborate his defence statement that indeed on the material date he was with the appellant therein and the appellant was not a culprit in light of the above. This hon. Court be pleased to set him at liberty on this single ground of appeal.

4. That, the learned trial magistrate finally faulted in the point of law by failing to note that appellant herein was not accorded a fair trial as guaranteed by Article 10 of universal declaration on human right elevated by Article 25 (c) of the current constitution. Thus failure by the trial court to exercise discretion in the instant matter breached rules 7(1) of point two of the sixth schedule to *the constitution* of Kenya 2010 entitled ‘’existing laws’’ which proved as follows;

   i. ‘’all law in force immediately before the effective date continue in force and shall be construed with alteration, adaptation, qualification and exceptions necessary to bring it into conformity with this constitution. Thus Section 8 (2) of the Sexual Offence Act is not in conformity with the current constitution as it provides a life sentence which is inhuman and degrading treatment contrary to Article 2(d) (f) of the current constitution.

5. That, the appellant herein was recommended by the ministry of the interior state department for correctional service as a prisoner of good character thus the mandatory nature of life sentence prescribed under Section 8 (2) of the Sexual Offence Act. Was shakened. (sic). Thus this court be pleased to consider this report herein after referred to as recommendation report and proceed to set aside life sentence enclosed herein with is a copy of the said report. Cite in

the European's verdict in vinter & Others – Vs – United Kingdom application No.'s 6609/09, 130/10 &3896/10.

5. The Appeal was canvassed by way of written submissions.

6. The Appellant submitted that the charge was not proved beyond reasonable doubt. That the ingredients of the offence of defilement were not proved and reliance was placed on the case of Remmy Wanyonyi Wanjoki [2020] eKLR. It is submitted that the use of the words "slept on me" doesn't mean anything regarding penetration. (sic). That thePW1 never mentioned any organ that was inserted in her organ. The case of Arthur Mshila Manga vs Republic CR. Appeal No. 14 of 2014. (Mombasa).

7. It is submitted further that the evidence of PW4 did not prove penetration as the clinical officer indicated the hymen was intact.

8. The Appellant adds that PW1 did not give evidence of sensory details of the act thus falling short of the decision of the court in Julius Kioko Kivuva vs Republic [2015]eKLR.

9. The identification of the Appellant as the perpetrator is challenged on the basis that despite PW1 testifying that she knew the Appellant, a neighbor, the report made to PW4 did not include the Appellant's full names. It is the Appellant's case that a person cannot purport to know an assailant very well and fail to report the names of the said assailant at the earliest opportunity. Reliance was place on the decision in Alex Wenua Chituno vs Republic [2023]eKLR and Simiyu & Another vs Republic (2005) 1 KLR 192.

10. The trial court is faulted for failing to conduct a proper voire dire to establish if the child understood the meaning of an oath and whether she was possessed of sufficient intelligence that justified the reception of her evidence.

11. The Appellant maintains that the trial court erred for rejecting his defence which was corroborated by 2 witnesses.

12. Regarding sentence, the trial court is faulted for imposing the mandatory sentence prescribed at Section 8(2) of the *Sexual Offences Act*. That the said sentence is unhuman, cruel, and degrading.

13. Counsel for the Respondent submitted that all the ingredients of the offence were prove beyond reasonable doubt. On the question of age, it is submitted that the same was proved by way of a birth certificate.

14. Regarding penetration, it is submitted that the same was proved by the evidence of the victim and supported by the medical evidence.

15. On identification, counsel submits that the Appellant was known to the victim before. That he is the person who took her to the bush, took off her trousers and inner wear and defiled her. That the said evidence was confirmed in cross examination.

16. As to whether the Appellant's defence was dismissed without consideration, it is submitted that the Appellant took the court through the events of 5th and 6th of April 2017 leading up to his arrest. He provided no clear statement of where he was at the time offence was committed or who was with him at the time. That he called 2 witnesses whose statements were irrelevant to the time in question.

17. Regarding sentence, it is submitted that the sentence was proper as the aggravating factors considered far outweighed the mitigating factors by the Appellant.

18. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach independent conclusions on the facts laid before the trial court.

19. This duty was set out in Okeno vs. Republic [1972] EA by the Court of Appeal as follows;

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

20. Similarly, in Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

21. In a nutshell the evidence before the trial court was that the Appellant whom PW1 knew before took her from her Aunt's (Purity's) home to some bushes. He removed her trousers and inner wear. He also removed his trousers and inner wear and slept on her. She cried due to pain in her private parts. She pointed the part with her finger. She stated that the Appellant was putting his thing where she pointed. She felt pain and cried. The Appellant gave her sh 20 and told her not to tell her mum. She was bleeding.

22. On cross examination, she maintained she knew the Appellant as he lived within a plot and she denied that her mother had told her what to say.

23. PW2 testified that that she noticed some blood stains in the complainant's urine. She was complaining of pains and explained that the Appellant had slept with her before giving her Sh 20. Matter was reported to the area Chief who advised that same be reported to the police. The witness testified that the Appellant used to be her friend and she lived with him from December 2015 to December 2016. That when she left him, he had been threatening. He lived near her.

24. PW3 was the investigating officer. She recorded the initial report where on Patrick was named as the assailant. She referred the complainant to hospital. A P3 form was duly filled. She received Sh. 20 which had been given to the minor after the act. She also received the minor's birth certificate and a blood stained inner wear. She produced the items as exhibits.

25. PW4 examined the complainant. He received a blood stained inner wear. He observed slight lacerations on the labia minora. The hymen was inflamed but not broken He concluded there was forced penetration.

26. The Appellant gave a sworn defence. He stated that on 5.4.17 he woke up and proceeded to work after collecting his tools. It was 6.30 am. He was with 3 others working on a public road. At 9am, he learnt the police were looking for him. He alerted his colleagues and the Sb Area. He presented himself to the Sub Chief. He was later arrested by 3 men. He stated that the case was made up against him. On cross examination, he stated that on the material day he was all alone at home.

27. DW2 testified that on the material date he was with the Appellant work where they were working on a road. The started on 4.4.17 and were still there on 5.4.17 One Mucheke went to the place and told the Appellant about the allegation in this case. DW2 advised the Appellant to report to the police.

28. On cross examination, he stated that on the material day the Appellant went to his place at 6.30 am as he had left his jembe there. That they used to work up to 8.00pm and they each would go their way.

29. DW3 told the court that on the 5.4.17, he was working at Kazi Kwa Vijana. He reported at 6.30 am and the Appellant joined him at 6.45am. They worked up to 7 when he heard about this case. On cross examination, he confirmed that he was not sharing a home with the Appellant and that he would not know his moves and deeds at night.

30. I have had occasion to consider the evidence at trial. In so doing, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard of the submissions made and case law cited. I have taken into account the applicable law. The broad issue for determination is whether the prosecution proved its case to the required degree. To answer this question, the court will have to scrutinize the evidence to find whether each ingredient of the offence was proved. I note the Appellant raises a point of law that the trial magistrate erred for failure to conduct a voire dire examination of PW1. I will dispose of this issue first.

31. Section 19 (1) of the Oaths and Statutory Declaration Act is the provision under which voir dire examinations are underpinned to determine the child's understanding of the nature of an oath. The provision states:

> " Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure"

32. Section 19 talks about child of tender years but does not define who is a child of tender years. Our superior courts have in different occasions interpreted the above sections in a bid to find out who is a child of tender years. For example, in George Kioko Nzioka v Republic [2020] eKLR, the Court of

Appeal was guided by the case of Maripett Loonkomok v Republic [2016] eKLR where Maripett case reviewed cases going back to Kibageny Arap Kolil v Republic [1959] EA 82 which held that:

> " There is no definition in the Oaths and Statutory Declaration Ordinance of the expression 'child of tender years' for the purpose of Section 19. But we take it to mean, in the absence of special circumstances, any child of any age, or apparent age, of under fourteen years."

33. In a more recent decision of the Court of Appeal in the case of MK versus Republic [2015] eKLR, the Court termed as unnecessary voir dire examination conducted on a child aged 15 years by the trial court. It was held that voir dire examination is done where a child witness is a child of tender years. The Court of Appeal concluded by saying that;

> " In In light of the above jurisprudential exposition by the Court itself, on the issue of who is a child of tender years for purposes of Section 19 of the Oaths and Statutory Declaration Act. We find no reason to depart from the position taken by the Court in the above Warui & Maripett's cases (supra), approving the stand taken by the Predecessor of the Court in the Kibageny case (supra), that for purposes of section 19 of the *Oaths and Statutory Declarations Act*, a child of tender years is one who is fourteen (14) years and below."

34. From the foregoing, and noting that PW1 was a child of tender years, she was subject to undergoing a voire dire examination. Was this done?

35. At page 13 of the proceedings at the trial court, the trial Magistrate in what is titled "Court to witness" examined PW1 and at page 14, upon the examination formed the opinion that the witness did not understand the meaning of an oath and the court directed that she was to give an unsworn statement and which she proceeded to do.

36. It is important to note that voire dire does not have to take any particular form. There is not standard way to conduct a voire dire examination. Am satisfied that the court duly complied with the law and the evidence of PW1 properly taken.

37. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be prove penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 2006.

38. Proof of age is important in a sexual offense. In Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

39. In this case, the age of the complainant was proved through the official Government document on certification of birth, a birth certificate. The age was indeed not disputed and am satisfied the complainant was a child aged 6 years at the time of the incident.

40. On the question whether there was evidence of penetration, On it is now well settled that penetration can be proved by direct or circumstantial evidence. The Supreme court of Uganda put it succinctly in

Bassita v Uganda S.C. Criminal Appeal No. 35 of 1995 which was quoted with approval in Sammy Charo Kirao v Republic [2020] KLR where the court stated;

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to proved sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

41. I note PW1 gave a graphic detail of how the Appellant took her to a bush, removed her trouser and inner wear, removed his trouser an inner wear and slept on her putting his thing at her private part which she pointed at. She felt pain and cried. This evidence finds collaboration from the evidence of PW4, the clinical officer, who, on examining PW1 found injury on her labia minora and an inflamed hymen though not broken. This examination was hours after the incident. PW2 also observed the injuries and handed over the bloodstained PW1's inner wear to the police.

42. This evidence has been attacked on the basis that the statement by PW1 'slept on me' does not prove penetration of her genital organ. That she did not mention any genital organ inserted to her organ.

43. The complainant herein was 6 years old at the time of the incident and 7 years at the time of her testimony. In Kenya, when children who are victims of sexual offences testify in court, courts and practitioners have observed that children often use euphemistic language (i.e., mild or indirect expressions) rather than explicit legal or anatomical terms. It is now settled that the courts recognize that children may not use adult, legal or medical language in their testimony in sexual offences. This for reason that children may be shy, embarrassed, frightened, or lack the vocabulary to describe sexual acts precisely. Courts recognise that children's communication skills are still developing and appreciation of the sexual act by children as is known to adults is remote. It is worthy of note that in our contemporary African societies, sex is not freely discussed.

44. Thus use of euphemisms is the norm in majority of sexual offences trials where the victims are of tender years.

45. Some commonly referenced euphemisms in Kenyan judgments are as follows;

> " Alinifanyia tabia mbaya" (he did bad manners on me) — used to denote sexual intercourse. "He used his thing for peeing" — example of a child describing penetration. "He inserted his 'dudu' into my 'mapaja'' . "He used his munyunyu", "Tabia mbaya" on its own—used in Kiswahili by a child witness saying someone did "bad manners" to her, interpreted by the court to mean sexual intercourse.

46. In Abdulsalim v Republic (Criminal Appeal E005 of 2023) [2023] KEHC 25863 (KLR) (30 November 2023) this court citing relevant precedents stated;

> "Proof of penetration can be either by way of medical evidence or other evidence (See Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa). The Appellant claimed that penetration was not proved to the required standard. He submitted that the words that were used by the complainant to describe what happened were not clear and that the complainant did not state what she felt, what she saw, heard or even experienced. That a broken hymen and reddening of the vagina could not prove defilement. Further, the doctor

did not mention when the hymen was broken. He submitted that the medical evidence did not corroborate the charge in that the P3 form indicated that the sexual intercourse was habitual as from 23/10/2021 to 28/10/2021 whereas the charge sheet indicated that the offence was committed on 28.10.2021. The Appellant's view is that the words used by the complainant that 'akachukua mdudu wake akawueka hapo kwangu kwa kwenda haja ndogo' left doubt as to what was inserted. The Court of Appeal in acknowledging the use of euphemisms by children when describing acts of sexual intercourse in Muganga Chilejo Saha v Republic [2017] eKLR had this to say;

> "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."

47. In Wachira v Republic (Criminal Appeal E024 of 2023) [2024] KEHC 5972 (KLR) (24 May 2024) (Judgment), this court summed the rationale for acceptance of euphemisms in this context as follows'

> " What is the rationale of acceptance of such euphemisms? I think the answer may not require any scientific research. The evidence of a child in a sexual offence case presents obvious discernible peculiar difficulties. Number one, the level of communication skill is still at its development stage and one may have to be extra keen to decipher what the child is communicating and certainly the trauma arising from the incident and the expected timidity of a child among strangers in a court setting cannot be ignored.
>
> Secondly, the child does not appreciate as yet the description of sexual organs and/or sexual intercourse generally.It therefore behoves on the court to be extra vigilant in reception of such evidence to ensure that the communication from the child is understood and put in context.
>
> No wonder the *Sexual Offences Act* allows for the use of intermediaries under Section 31(4)(b) where the challenge on the child or other vulnerable person so demands. Amidst all these challenges, one indisputable strength and reliability in the evidence of a child is the natural innocence of a child of tender years. Such a child is difficult to coach to adopt a particular desired narrative. A child will tell things as they perceived them by way of seeing, hearing and feeling. As a common joke goes around in the country where a hiding debtor instructs his

child to tell a creditor that the father is not at home, only for the child to innocently answer 'dad told me to tell you he is not at home', a child's propensity to lie is remote.

Despite the frailty and vulnerability of this class of citizens, a child victim of a sexual offence is entitled to equal treatment before the law and i wouldn't hesitate to state that the constitutional protection should be applied and guarded by prosecutors and courts alike with extra care given the disadvantaged position of such victims all the while aware of the need to protect the constitutional rights of the accused in any particular matter.

That should not be understood by any way to mean that the burden of prove in a criminal case involving a child is in any way lessened by the situation of a child. Not at all. What it means is that the prosecution must go an extra mile to ensure that the child's evidence is meticulously presented to the court and with clarity even where the child may communicate in euphemisms.

In that context, the submission by the Appellant that the minor did not allude to having been penetrated by a male penis is watered down. Any element on incoherence or disjointed manner of her evidence is explained away by the above exposition. In the present appeal, evidence abounds that there was actual penetration of PW1's vagina as there is medical evidence that the vagina was inflamed and the hymen freshly broken. Further, it has been shown by way of circumstantial evidence that the Appellant had the opportunity to commit the act which circumstantial evidence corroborates the direct evidence of the minor.

48. In the instant appeal my evaluation of the evidence leads me to the conclusion that PW1 clearly pointed out what was done to her, she gave details of how her trouser and inner wear was removed, how the assailant removed his trouser and inner wear and slept on her. I agree with counsel for the prosecution that the "thing" the complainant referred to as put by the assailant in her must mean, and is, the penis of the assailant.

49. Section 2 of the *Sexual Offences Act* defines "penetration" as:

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

50. Therefore, for the offence of defilement to be proved evidence must show that the appellant inserted his penis into the vagina of the complainant. It is not sufficient that the said organs came into contact. However partial insertion suffices for the purposes of penetration as the said insertion need not be complete.

51. From the medical evidence produced in evidence, it is clear that the penetration was partial and falls perfectly within the definition of penetration in Section 2 of the Act. From the evidence, am satisfied that PW1's gentle organ was penetrated by the genital organ of the assailant.

52. The next issue is whether the Appellant was identified as the perpetrator of the act. PW1 was positive in her evidence that it is the Appellant whom she knew before who took her to the bush and removed her trouser and inner wear, removed his trouser and inner wear and slept on her.

53. A submission is made by the Appellant that the report to the police did not include his full names and it would be expected that someone who knew another would give the full names. I have considered this line of argument and I find it not entirely correct. Identification id both physical and by name. It is not unusual to have neighbours who one knows by one name only or by appearance.

54. PW1 was firm in cross examination that she knew the Appellant. PW2 corroborates this evidence by her confirmation that she lived with the Appellant for one year. This fact has not been challenged in the cross examination of the witness or in the defence. PW1 was thus familiar with the Appellant.

55. In countering this evidence, the Appellant gave an alibi defence stating that on 5.4.17 he went to work at 6.30 am after collecting his tools. He learnt the police were looking for him at 9.00am. On 6th he presented himself to the sub chief. He states that he was arrested on 6.4.17 by 3 persons, one of whom who stated that he was the father of the complainant. DW2 and DW3 narrate the events of 4th and 5th April 2017. Whereas the Appellant states that Mucheke gave him information at 9.00am on 5.4.17, DW3 states he worked with the Appellant until 7pm on 5.4.17 and that is when he heard about the case. This disparity on the time the information on the case was received at where they were working is not explained.

56. It is imperative to note that the offence herein is alleged to have taken place on 6.4.17. The Appellant's witnesses' testimony is irrelevant as the address the happenings of 4.4.17 and 5.4.17.

57. The court in Erick Otieno Meda v Republic [2019] KEHC 4959 (KLR) observed as follows in considering alibi defence;

    (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.

    (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

    (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

    (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014) (emphasis added)

58. The Appellant's alibi as seen above is not corroborated. He did not raise it early in the trial to allow it to be tested. I acknowledge the law in that the Appellant had no duty to prove his innocence. The accused did not need to prove the alibi. The court has to consider the alibi and the evidence presented by the prosecution and weighing the same determine whether the prosecution has proved its case to the required degree. It is obvious that the alibi turns out to be completely unuseful to the defence cause as it addresses days other than the material day of the offence. In cross examination, the Appellant sums up the issue thus;

    " On the material date I was in my home all alone"

    Therefore there is strictly speaking no alibi evidence to talk home about.

59. The Appellant also raised the issue that it is PW2 who made up this case. He however did not cross examine the witness on this aspect. He has not given any reason why PW2 would frame him.

60. I have put the evidence for and against the identification of the Appellant as the one who penetrated the PW1. In light of the evidence on record, the Accused defence cannot possibly be true. I hold, just like the trial court correctly concluded, that based on the evidence the Appellant was positively identified as the perpetrator of the act complained of.

61. The Appellant challenged the sentence of life imprisonment meted out on him faulting the mandatory nature of the same and for being cruel, inhuman and degrading.

62. 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"

63. It is trite law that sentencing is at the discretion of the trial court.

64. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S vs. 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"

65. Similarly, in Mokela vs. 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."

66. The predecessor of the Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows:-

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

67. 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)"
>
> (See also Bernard Kimani Gacheru vs. Republic [2002] eKLR).

68. I have perused the record of the trial court at sentencing. The court considered the Appellant's mitigation. It considered that the offence was serious. The aggravating factor was that the Appellant

preyed on a very young child to satisfy his sexual desires instead of showing it care. The sentence meted out is provided for in statute. It is legal Relevant factors were considered, no irrelevant matters were considered. No wrong principle was applied. I have not found any ground upon which to interfere with the exercise of discretion by the trial court.

69. On the challenge based on the mandatory nature of the sentence, the Supreme Court has now put the legal position into proper perspective in it decision in 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)

wherein the court stated;

> 'We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.
>
> 67. This is why, even in the Muruatetu case, this Court was keen to still defer to the Legislature as the proper body mandated to legislate. While the courts have the mandate to interpret the law and where necessary strike out a law for being unconstitutional, this mandate does not extend to legislation or repeal of statutory provisions. .... 68.Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence".

70. The sentence meted out was sound in law and circumstances of the case.

71. With the result that the appeal herein lacks merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED THIS 6TH DAY OF NOVEMBER 2025.

A.K. NDUNG'U

JUDGE