



**Ongori v Republic (Criminal Appeal E074 of 2024)
[2025] KEHC 17173 (KLR) (20 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E074 OF 2024
DKN MAGARE, J
NOVEMBER 20, 2025**

BETWEEN

JOHN ORINA ONGORI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the trial court, Hon. V M Moguche (SPM) given on 28.05.2024 in Etago CMCSO No.E056 of 2024.
2. The Appellant was charged with defilement contrary to Section 8(1) & (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that the Appellant, on 17.12.2023 at Ikoba trading centre in Gucha south subcounty within Kisii county intentionally caused his penis to penetrate the anus IM, child aged 9 years.
3. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006. The particulars of the offence were that the Appellant, on 17.12.2023 at Ikoba trading centre in Gucha south subcounty within Kisii county intentionally and unlawfully committed an indecent act by touching the anus of IM, a child aged 9 years using his penis.
4. The Appellant was arraigned and he denied the charges. A plea of not guilty was consequently recorded. He was admitted to Ksh 250,000/= bond. The appellant sought a reduction in the bond terms, as he had been forced to sign a statement, but the state opposed, arguing that the statement was inadmissible. The Trial Court found the bond terms reasonable. The court heard sworn testimony from a total of 4 prosecution witnesses and the Appellant. The court considered the evidence and rendered the Judgement. The Court found the Appellant guilty and sentenced them to 35 years' imprisonment. The Appellant, aggrieved, lodged this Appeal. the Petition of Appeal raised the following Grounds:



- a. That the learned trial magistrate erred in law and fact in convicting him on evidence which did not meet the required standard
 - b. That the learned trial magistrate erred in law and fact by relying on extrinsic evidence that was not adduced during trial.
 - c. That the learned trial magistrate erred in law and fact by depending on evidence which was based on theory and conspiracy between the Appellant and the complainant's mother and that the said offence was not proved beyond reasonable doubt by the prosecution witness.
 - d. That the sentence of 35 years is extremely harsh and excessive given that the Appellant herein never committed the alleged crime.
 - e. That the medical report was not authentic to place the appellant into the crime.
 - f. That the learned trial magistrate erred in law and fact by convicting him on charges that were not tallying and were unfavorable to him; and
 - g. That the appellant prays to be present during the hearing of the appeal to enable him lodge more grounds of appeal.
5. The summary of the appellant's appeal was that the court relied on extrinsic evidence, which was based on a theory of conspiracy. Secondly, he contested the 35-year sentence, arguing that it was excessive. He posited that the medical report was not authentic, resulting in unfounded charges.

The law

6. The law under which the appellant was charged is provided under Section 8(1) and (2) of the *Sexual Offences Act* as hereunder:
- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
7. On the other hand, Section 11 of the *Sexual Offences Act* provides as follows:
- (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.
 - (2) It is a defence to a charge under subsection (1) if it is proved that such child deceived the accused person into believing that such child was over the age of eighteen years at the time of the alleged commission of the offence, and the accused person reasonably believed that the child was over the age of eighteen years.
 - (3) The belief referred to in subsection (2) is to be determined having regard to all the circumstances, including the steps the accused person took to ascertain the age of the complainant.
 - (4) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* (Cap. 92) and the Children's Act (Cap. 141)



- (5) The provisions of subsection (2) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

Evidence

7. PW1 was the minor. A *voire dire* examination was conducted, and the court found him sufficiently intelligent to take an oath. He was accordingly sworn by the Holy Bible and stated that he was born on 25.09.2014. He recalled that on the material day, he was at home with his mother, PW2, and her sister H, when the appellant called him to teach him mathematics, as the appellant was his tuition teacher. The minor used to go to the house for tuition as the appellant was a next-door neighbour.
8. The minor found the appellant alone watching a movie, wearing trousers. The appellant removed the trousers and remained in boxer shorts. He requested the minor to take the trousers to the bedroom. Upon his return, he found appellant, whom he referred to as John, lying on the sofa. He made the minor lie on the bed as it was usual and removed the minor's trousers. The minor remained with the appellants' boxers. The appellant then inserted his penis into the minor's anus without protection. He did that several times. He had inserted the penis on previous occasions. The mother caught them in the act.
9. The appellant threatened the minor that he would fail in his examinations if he told anyone. The minor told the mother that the appellant was trying to insert his [penis] into the minor's anus. Later, the minor showered, and the appellant asked whether the mother knew, but the minor lied, saying she did not. The mother was reported to Ikoba, and he was taken to Nduru Level 5 hospital. A P3 and PRC were filled. He confirmed that the appellant inserted his penis into the minor's anus.
10. On cross-examination, he stated that he never told anyone that the appellant was threatening him. He added that his mother had called him to the house and questioned him about the incident. He maintained that his testimony reflected what had actually happened.
11. PW2 was the minor's mother. She stated that she did not have a job at that time. She said that she was the mother of PW1, who was born on 25.09.2014. On the date of testimony, the minor was 10 years. She recalled that on 17.1.2.2023, she was preparing to go to the market. He left to ask the appellant whether she could get tomatoes from the market, but did not knock. She found the accused in a vest and boxer shorts, which were on his knees. His penis was erect, and she could see it well. The child woke up and said he was hurt after the fall. He went back to the house and interrogated the child. The child confirmed that the appellant was inserting his penis into the child's anus. This was being done every time he went for tuition at the appellant's house. He identified the appellant on the dock. She stated that the minor had been going for tuition since February 2023.
12. On cross-examination, she stated that he told the father of the minor that she had gone to ask if she could get tomatoes from the market for the appellant. She stated that the appellant was at the door. The witness did not ask the appellant anything, but the appellant was not fully dressed. She had not noticed that the minor was sodomised and had never threatened the minor.
13. She continued that she did not have any affair with the appellant, and she did not owe a sum of Ksh. 10,000/= to the appellant. She denied ever going to the house in a petticoat and said she did not even have one. She stated that she told her husband, but he did not record a statement. She denied any romantic liaison or desire between herself and the appellant. She maintained that he saw that the appellant's penis was erect.
14. PW3 was Victor Oduor Muga, a senior clinical officer from Nduru subcounty who had studied at KMTC. He had attained a diploma in clinical medicine and specialized in mental health. He produced



- the PRC Form and the P3 Form for the minor, PW1. He stated that PW1 was presented on 17.12.2023, accompanied by the mother, with a history of being defiled by a neighbour. The mother found them in the act, which the victim reported was ongoing. He further stated that the minor was unable to control himself during long calls.
15. Based on the examination, tests, and history, he found that the condition consisted of anal defilement. The minor was treated and given antibiotics.
 16. On cross-examination, they found that the inner wear had a white stain, and the bed cover was mud-stained. There was tenderness on the right armpit, but no laceration or bruises. There was a laceration on the anal orifice at 12 o'clock of the anus with minimal bleeding. there were no spermatozoa. The findings were consistent with defilement.
 17. On cross-examination, he stated that he did not carry out tests. He stated that the child had trauma as a result of the defilement. The history was consistent with the physical examination. The minor had mentioned that the appellant was the perpetrator. He stated that the injury's severity did not determine whether the minor could walk. He stated that the bleeding was intermittent and not continuous. It was his case that the minor gave a history of the mother catching the appellant in the act, in flagrante delicto. he stated that if there were no sperms, then he may not have ejaculated.
 18. PW4 was PC Stephen Anyango of Tabaka police station. He received a case of defilement on 17.12.2023, which was reported by PW2. PC Kenya visited the scene, arrested the appellant, and escorted him to the police station. They went to Nduru hospital for examination. He recorded the statements of PW1 and PW2 and has a doctor re-examine the minor on 18.12.2023. He recalled two incidents: one at 11 am on 17.12.2023 and another at 1.30 pm the same day. According to the witness, the perpetrator went to the victim's house and called him to follow him for tuition. The perpetrator came again and called the victim after he finished eating.
 19. The mother returned a second time and found them together. She left and called the boy for interrogation, upon which the minor opened up and narrated what had transpired. The matter was reported to PW2's husband and subsequently to the police station.
 20. On cross-examination, he stated that he was investigating a case of defilement and not whether the appellant was registered with the Teachers Service Commission. He further stated that the mother found the appellant in the act and that the appellant was later found seated at Ikoba Market. He added that the minor's innerwear had stains that appeared to be sperm, though he clarified that only experts could confirm the same.
 21. The prosecution thereafter closed its case, and the appellant was placed on his defence. Section 211 of the Criminal Procedure Code was duly complied with, and the appellant opted to give sworn evidence without witnesses.
 22. The appellant gave sworn testimony on 20.04.2024 and stated that he was a teacher by profession. He testified that on 17.12.2023, he went to till his land until 1:00 p.m. He then went home at Ikoba, where he met PW1, PW2, and a cousin, H. As he was opening the door, the complainant snatched his phone, saying he wanted to play games. The appellant allowed PW1 to retain the phone.
 23. He later called the complainant to return the phone, but the complainant said he was eating. The complainant eventually brought the phone at 3:00 p.m. The appellant took it and proceeded to his tailoring classes, where he stayed until 5:00 p.m.
 24. He continued that the complainant's mother passed by and saw him. She told the appellant that she was going to get tomatoes from Ogembo. Three minutes later, police officers came and arrested him.



- They went back home, where he was told that he had defiled the minor. He was compelled to open his door, where the police took photos of the sofa.
25. He stated that the complainant's mother had threatened him outside. He recalled that on 10.02.2023, PW2 moved to their plot and began an affair, as she had no husband. He later discovered that she was cheating and confronted her, but she was unwilling to end the relationship. Subsequently, he moved to Molo for work, although PW2 later inquired about his whereabouts. When he returned to check on his house in November 2023, PW2 would visit the appellant's house dressed in short outfits.
 26. He claimed that PW2 wanted to engage in sexual relations, but he declined. He further stated that PW2 was displeased because he bought things for his children, though they often watched movies late into the night. He also testified that he lent PW2 Ksh. 10,000/=, which she failed to refund despite several reminders. On 15.12.2023, after he reminded her about the debt, he was arrested two days later, on 17.12.2023. He added that the parties paid Ksh. 2,000/= to the doctor at Nduru Hospital.
 27. On cross-examination, he denied ever tutoring PW1. He stated that he had four neighbours, but did not know whether any of them would be willing to testify. He thereafter closed his defence.
 28. Upon conviction, the court called for a pre-sentence report following mitigation. In his mitigation, the Appellant stated that he was the firstborn in his family and that his siblings depended on him. He pleaded for leniency. The court considered his mitigation, the Sentencing Guidelines, and the gravity of the offence, ultimately imposing a sentence of thirty-five years' imprisonment.
 29. In finding the appellant guilty, the court considered the key elements of the offence. The elements were set out in the case of *Duncan Odhiambo Onyango v Republic* [2019] KEHC 5301 (KLR), where, A. C. Mrima J, posted as follows:

The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence.
 30. The court then considered each of the three elements and found that age penetration and the appellant being a perpetrator were proved. The court placed reliance on section 124 of the *Evidence Act*. The court set out the reasons for believing the account of the complaint to the fullest extent possible. The court found the defence given to be far-fetched and unbelievable.

Submissions

31. The appeal was canvassed by way of written submissions. The Appellant contended that the prosecution's evidence was rife with inconsistencies, particularly regarding the time of the alleged incident. It was submitted that PW1 and PW2 gave conflicting accounts: one placed the incident at 2:30 p.m., while the other stated it occurred at 11:00 a.m. Further, PW4 indicated that the material time was 11:00 a.m., whereas other witnesses referred to 1300 hours. According to the Appellant, these contradictions went to the root of the prosecution's case, and on that basis, he urged the Court to find the conviction unsafe and to acquit him.
32. The Respondent filed submissions dated 25.08.2025 in which they contended that the sentence of 35 years' imprisonment was lenient. They further submitted that had the Appellant been "warned before filing the appeal," the court could have imposed a sentence of life imprisonment.
33. With respect, it is not clear what the State intended to communicate by that argument. The law on sentence enhancement is settled: an appellate court may enhance a sentence only after issuing a specific warning to the appellant, and that warning is issued in the course of the appeal, not before the appeal



is filed. The warning serves to notify the appellant that, should the appeal fail or should the court find the sentence illegal or manifestly lenient, the sentence may be enhanced.

34. Therefore, the suggestion that the Appellant ought to have been warned before filing the appeal is conceptually inconsistent with the appellate process. A warning can only issue after the appeal has been filed and is under consideration. On this basis, the Respondent's submission on the point appears legally untenable and does not advance their position.
35. They submitted that it was evident that the elements of defilement, being penetration, age, and the appellant being the perpetrator, were proved. The court was urged to dismiss the appeal. It was their submissions that PW2, when testifying, confirmed that the complainant was her son and that he was 10 years old at the time she gave evidence. She produced his birth certificate as Exhibit 1 (see page 6, paragraph 2 of the typed proceedings). This sufficiently established the minor's age at the time of the incident. Reliance was placed on the case of *Domnic Kibet Mwareng v Republic, Kitale H.C. Criminal appeal No. 155 of 2011*.

Analysis

36. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The Court of Appeal for Eastern Africa in *Pandya -vs- Republic [1957] EA 336* held as follows:-

On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

37. On a first appeal, the appellant is entitled to a fresh and exhaustive re-evaluation of the evidence on record, with the appellate court drawing its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses. In the case of *Okeno v Republic [1972] EA 32* at 36, the East Africa Court of Appeal stated on the duty of the court on a first appeal:

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 v. R.*, [1957] E. A. 336) 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. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 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 findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.



38. The issue in this case is whether the prosecution proved its case to the required standard. The most oft quoted English decision of Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 comes in handy in describing the legal burden of proof in criminal matters, that;

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

39. It was held by the Court of Appeal in *Moses Nato Raphael vs. Republic* [2015] eKLR as doth:

What then amounts to reasonable doubt? This issue was addressed by Lord Denning in *Miller v. Ministry of Pensions*, [1947] 2 ALL ER 372 where he stated:-

‘That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.’

40. The legal burden is the burden of proof, which remains constant throughout a trial. According to established principles, it rests upon the prosecution to prove the guilt of an accused person beyond reasonable doubt. This burden does not shift to the accused, save in a few exceptional statutory instances where the law expressly provides otherwise. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.

41. Brennan addressed the standard of proof required in such cases, J in the United States Supreme Court decision in *Re Winship* 397 US 358 {1970}, at pages 361-64 that: -

The accused, during a criminal prosecution, has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the



community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

42. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. Lord Denning in *Miller vs. Ministry of Pensions*, [1947] 2 ALL ER 372 had this to say: -

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43. The powers of this Court are circumscribed by Section 382 of the Criminal Procedure Code, which permits a first appellate court to confirm, reverse, or vary any finding, sentence, or order of the trial court. Within these limits, the court is duty-bound to subject the evidence to a fresh and exhaustive examination, reassess the credibility of witnesses, and weigh conflicting testimony to draw its own independent conclusions.

44. Throughout this process, the legal burden of proof remains constant, resting squarely on the prosecution to establish the appellant's guilt beyond reasonable doubt. It is only by carefully scrutinizing the evidence in its entirety, while remaining faithful to the statutory framework, that the court can ensure the appellant receives a full and fair re-evaluation of the case. The section reads as follows:

382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

45. Courts in criminal matters must remain mindful of the standard of proof and the consequences that a conviction bears upon an accused person. In the present case, the Appellant faced a life sentence in law or 35 years' imprisonment, effectively a substantial portion of his natural life, for the offence with which he was charged. Such a grave penalty underscores the need for the most precise and most cogent evaluation of the evidence before consigning an individual to incarceration for so significant a duration of his life.

46. Proof beyond reasonable doubt was the standard, also based on the nature of criminal offences, whose punishment went beyond the effect on the individual to the state. Conviction and sentence as a sexual offender were a badge that a convict could only deserve based on undoubted evidence.

47. The Appellant contended that the allegations against him. He stated that he saw the child eat and later at 3pm. Effectively, the Appellant placed himself on the scene. The next question therefore is whether the state proved its case. There was medical evidence tendered that the medical report had evidence to



the contrary. It is important to note that there are exceptions as set in section 124 of the Evidence Act. The said section posits as follows:

124. Notwithstanding the provisions of section 19 of the oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

48. The latter part, or the proviso, is key in that it requires that the following conditions be met:
- a. The matter is a sexual offence,
 - b. The only evidence is that of the alleged victim of the offence,
 - c. For reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.
49. That is why the truth should always be recorded and the reasons for so believing. All the three conditions must be present for a conviction to occur. In the case of *Tekerali s/o Korongozi & 4 Others -vs- Rep* (1952) 19 EACA 259 the importance of the first report was appreciated, where the court posited as follows:

Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.

50. There were allegations of discrepancies and inconsistencies. These must be regarding major items. On this, the court must determine whether the alleged discrepancies and contradictions were fundamental and prejudiced the appellant. In *Joseph Maina Mwangi Vs. Republic* ca no. 73 of 1992 (Nairobi) *Tunoi, Lakha & Bosire Jja* held:

In any trial there are bound to be discrepancies. An appellate court, in considering those discrepancies, must be guided by the working of section 382 of the Criminal Procedure Code, to wit, whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.

51. The defence posited that he was framed. However, this is not borne out by evidence. It is not worth that a case cannot be based on suspicion. In the case of *Faith Lucas V Republic* [2008] KECA 267 (KLR), the court of appeal stated as follows:

It has not been shown that the appellant's explanation was not plausible. There was evidence of bad blood between the appellant's family and Konde's family. It is to be observed that indeed Konde and his sons were arrested and charged (jointly with the appellant) in respect of the death of the deceased. It would appear that the appellant was arrested, charged,



convicted and sentenced purely on mere suspicion. We must point out that suspicion, however strong, cannot be used as evidence in a criminal case of this nature. It was upon the prosecution to prove its case against the appellant beyond reasonable doubt. In this case, the members of Konde family and or their agents are not excluded from being persons who might have been involved in the death of the deceased.

52. Suspicion cannot be and must never be the basis of conviction. In the case of *Sawe v Republic* [supra] the court of appeal addressed the question of suspicion as follows:

... The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of *Mary Wanjiku v Republic* (Criminal Appeal No. 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge's view that the prosecution had proved its case against the appellant beyond any reasonable doubt.

53. The appellant was positively identified, and it was established that he was at the scene at the material time. The nature of the evidence he gave did not amount to any known defence. The perpetrator was also shown not to be known. The appellant was to be anywhere else. He did not raise any alibi. In this case recognition is more important than mere identification. The identification herein was by recognition and not identification. In *Anjoroni v Republic* 1980 KLR 59 the court thus:

Recognition of an assailant is mere satisfactory, mere assenting, and mere variable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other

54. The element of identification of the assailant was proved. The next issue for consideration is the minor's age. A birth certificate was produced showing that the mother was born. *Joseph Kiet Seet v Republic* (2014) eKLR where it was held that:

“Age of a victim can be determined by medical evidence and other cogent evidence. In the case of *Francis Omuroni – Versus Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus: In defilement case, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

55. A similar holding was reached by the Kenyan Court of Appeal in the case of *Mwolongo Chichoro Mwanyembe –Vs- Republic*, Mombasa Criminal Appeal No. 24 of 2015) (UR) (cited in *Edwin Nyambaso Onsongo –Vs- Republic* (2016) eKLR) where the court stated that:-

“...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.” “..we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”

56. However, the birth certificate was adequate. The minor was 9 years. Age was not thus contested.



57. The last issue is penetration. The minor was succinct about how the defilement occurred. I agree with the trial magistrate that the minor was truthful and consistent. His evidence was not shaken. The medical evidence and the minor corroborated each other. The appellant was caught in flagrante delicto. The evidence of the minor, investigating officer and the mother were good witnesses.
58. The evidence, therefore, is overwhelming that the appellant is guilty of the offense of defilement.
59. The next question is a sentence. The appellant complained that the sentence was excessive. Section 8(1), for which the appellant was charged, provided for only one question sentence: life imprisonment. The same is the minimum mandatory sentence. The question of such sentences was addressed in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR), where the Supreme Court, [MK Koome, CJ, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ] posited as follows:
11. Mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, the USA, Australia, and South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed
 12. Before Kenyan courts could determine whether or not the prevailing trends and decisions were persuasive, there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. That was the Supreme Court's approach and direction in *Muruatetu* which had to remain binding to all courts below.
 13. The Court of Appeal failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. That approach was problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.
60. Further, the same court delivered its decision in *Republic v Manyeso* [2025] KESC 16 (KLR), where is stated as follows:

Paragraph 11 to 14 of the *Muruatetu* directions are very clear that the decision in the *Muruatetu* case did not invalidate mandatory sentences or minimum sentences in the Penal Code, *Sexual Offences Act* or any other statute. Further, that the *Muruatetu* case cannot be said to be the authority for stating that all provisions of the law prescribing minimum sentences are inconsistent with *the Constitution*. Paragraphs 93 to 97 of the *Muruatetu* decision are also explicit that it is not for the court to define what constitutes a life sentence. While we appreciated that a life sentence could mean a certain minimum or maximum time to be set by a judicial officer, this court made the following recommendations to the Attorney General to develop legislation on what constitutes a life sentence: “94. We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment,



because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.⁹⁵We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.⁹⁶We therefore recommend that the Attorney General and Parliament commence an enquiry and develop legislation on the definition of ‘what constitutes a life sentence’; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing.

65. From the above paragraphs of the Muruatetu case any reading of that decision ought to lead to the conclusion that it is upon the Legislature to enact legislation on what constitutes a life sentence and not the courts.

61. Life sentence was the only sentence provided. The 35-year imprisonment was not proper. DCP proper. The question is what the court should do. There are two possible routes. If the sentence is legal but lenient, the court has a duty to warn the appellant of the likelihood of enhancement, to enable him to make an informed decision.
62. The next issue concerns the appeal against the sentence. This requires consideration of three elements, both in general and in specific terms: legality, harshness, and reliance on wrong principles. The principles guiding an appellate court in exercising its discretion to interfere with a trial court's sentence are now well settled. 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. To this, we would add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263). See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

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

63. The sentence imposed on the appellant was 10 years. The same is the minimum mandatory sentence. The question of such sentences was addressed in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR), where the Supreme Court, [MK Koome, CJ, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ] posited as follows:



11. Mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, the USA, Australia, and South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed
 12. Before Kenyan courts could determine whether or not the prevailing trends and decisions were persuasive, there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. That was the Supreme Court's approach and direction in *Muruatetu* which had to remain binding to all courts below.
 13. The Court of Appeal failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. That approach was problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.
64. Further, the same court delivered its decision in *Republic v Manyeso* [2025] KESC 16 (KLR), where is stated as follows:

Paragraph 11 to 14 of the *Muruatetu* directions are very clear that the decision in the *Muruatetu* case did not invalidate mandatory sentences or minimum sentences in the Penal Code, *Sexual Offences Act* or any other statute. Further, that the *Muruatetu* case cannot be said to be the authority for stating that all provisions of the law prescribing minimum sentences are inconsistent with *the Constitution*. Paragraphs 93 to 97 of the *Muruatetu* decision are also explicit that it is not for the court to define what constitutes a life sentence. While we appreciated that a life sentence could mean a certain minimum or maximum time to be set by a judicial officer, this court made the following recommendations to the Attorney General to develop legislation on what constitutes a life sentence: “94. We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in *Jackson Wangui*, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature. 95. We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism. 96. We therefore recommend that the Attorney General and Parliament commence an enquiry and develop legislation on the definition of ‘what constitutes a life



sentence'; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing.

65. From the above paragraphs of the *Muruatetu* case any reading of that decision ought to lead to the conclusion that it is upon the Legislature to enact legislation on what constitutes a life sentence and not the courts.

65. I find that the sentence is not lenient but illegal. Where a sentence is void, there is no need to warn, as the sentence is deemed to be known. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

66. The aspect of warning arises when the sentence is lenient. The next question is whether the sentence is befitting. The court is under an obligation to increase the sentence, in line with its duty to set aside an illegal sentence. Where a sentence is lawful but lenient, the court has a duty to warn the appellant. However, an illegal sentence must be set aside regardless. In the case of *Joseph Muerithi Kanyita v Republic* [2017] KECA 387 (KLR), the court of appeal [Waki, Nambuye, & M'inoti, JJ.A.] posited as follows:

In *JJW v. Republic*, Cr. App. No 11 of 2011, this Court held that notwithstanding the fact that section 354(3) of the Criminal Procedure Code empowers the High Court to enhance or alter the nature of the sentence imposed by the trial court, in the absence of an appeal against sentence, the court must warn the appellant before it enhances the sentence. The Court stated:

It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.

And in *Samwel Mbugua Kihwanga v. Republic*, Cr. App. No. 239 of 2011, the Court explained that although the practice of warning the appellant before enhancing the sentence was not a requirement



of law, it was a matter of practice that had gained notoriety and served to put the appellant on notice of the consequences that would befall him depending on the outcome of the appeal.

In this appeal, we are satisfied that the appellant was appropriately warned that should his appeal fail the State would seek enhancement of the sentence on the ground that it was too lenient. The warning took the form of a notice of enhancement of sentence that was duly served upon the appellant's advocate. In view of the fact that the filing and service of the notice is not challenged or otherwise contested, we do not see any basis in law for the contention that the appellant, who was represented by a lawyer, had to be personally served with the notice of enhancement of sentence.

The question still remains whether in the circumstances of this appeal the first appellate court was entitled to enhance the sentence. It is common ground that the sentence imposed by the trial court was a lawful sentence, which was within its jurisdiction to impose.

67. I have said enough to demonstrate that the impugned judgment is for upholding the conviction. However, the sentence meted out is unlawful. It cannot stand. In the circumstances, the fidelity to the law is sacrosanct. The 35-year sentence is unlawful. It is consequently set aside and replaced with a sentence of life imprisonment.

Determination

68. In the circumstances, I make the following orders: -
- a. The Appeal on conviction and sentence lacks merit and is accordingly dismissed.
 - b. The sentence given is unlawful and is therefore set aside and substituted with the only sentence prescribed, that of a life sentence.
 - c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF NOVEMBER 2025.
JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mr Koima for the State

Appellant in person

Court Assistant – Michael

