Murimi v Republic (Criminal Appeal E020 of 2023)
[2025] KEHC 17966 (KLR) (20 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17966 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E020 OF 2023

ACA ONG'INJO, J

NOVEMBER 20, 2025

BETWEEN

EMMANUEL CHACHA MURIMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Conviction and Sentencing of Hon. P.N Areri in the Chief Magistrate's Court at Migori S.O.A NO. E048 of 2022 delivered on 15th February 2023)

JUDGMENT

1. The Appellant Emmanuel Chacha Murimi was convicted for the offence of defilement contrary to section 8(1) as read with section (2) of the *Sexual Offences Act* No. 3 of 2006 in count 1 and for the offence of Kidnapping contrary to section 255 as read with section 257 of the Penal Code in count 2 and was sentenced to serve 22 years' imprisonment in count I and 5 years' imprisonment in count 2.
2. The particulars of Count I are that on diverse dates between 2nd day of September 2022 and 21st day of September 2022 in Kuria West Sub-County within Migori County, the Appellant intentionally caused his penis to penetrate the Vagina of LA a girl child aged 11 years.
3. The Particulars of Count II are that on the 2nd day of September 2022 in Suna West Sub-County in Migori County within the Republic of Kenya the Appellant Kidnapped LA a girl child aged 11 years from lawful guardianship of POO.
4. The Appellant was aggrieved by the judgement and lodged his petition for appeal which was undated on the following grounds:
    1. That he pleaded not guilty to the charge herein.
    2. That the Trial Court erred by failing to comply with article 50(2) (g) (h) of the Kenyan Constitution 2010.

3. That the Trial Court erred in both law and facts by failing to observe that the ingredients of the offence herein were proved as required in law.

4. That the Trial Court erred in both law and facts by ignoring his defense and mitigation.

5. Reasons wherefore he prayed for a leave to supplement/amend more grounds of appeal after receiving the lower court proceedings, the conviction quashed and sentence set aside or any other order deemed fit be granted.

6. The Appellant filed supplementary grounds of appeal dated 26th August 2024 together with his submissions on the following grounds:

1. That the Trial Court erred in law and fact in not making a finding that the circumstances under which the victim herein made her identification were not in favorable position for identification.

2. That essential witnesses were not called hence fatal to this case.

3. That lack of properly conducted identification parade perse fatal to the correctness of the victim's identification.

4. That the Trial Court erred in law and fact in not making a finding that the unexplained delay of the Appellant in the police cell for more than 6 days was fatal to this case.

5. That the Trial Court relied on a birth certificate whose authenticity was a suspect.

6. That the Trial Court erred in law in not appreciating the Appellant's defense.

7. That the Trial Court erred in law and in fact in not making a finding that 22 years sentence in count I ought to run concurrent with 5 years sentence in count II under the same transaction pursuant to Section 12, 14 CPC and 37 of the Penal Code.

8. That the Trial Court erred in law and in fact by not making a finding that the least prescribed sentence of the Appellant ought to run from the time of his arrest.

7. The Prosecution's case was supported by the evidence of six (6) witnesses who testified as follows: -

8. PW1 the Complainant testified that she was born in 2010 and identified a copy of her birth certificate before the Court. She gave evidence that before 2nd September 2022 she was living with her brother PW4 and his family at [Particulars Withheld] estate within Migori town and that she attended [Particulars Withheld] Primary School. She stated that on 2nd September at around 8Pm she was at her brother's home and was sent by her brother's wife to Kamadanga center which was near their residential house to buy Royco and airtime. That she went alone and carried no light and was dressed in a light blue top and a black trouser. She testified that she went to the shop and bought the items but on her way back home she found two men who were standing a few metres apart and identified one of the two men as the Appellant before the Trial Court. She informed the court that on reaching where the two men were, the Appellant greeted her then said something in Kuria language and the other man caught her. She stated that the men covered her mouth and put her on a motor cycle which the Appellant rode while the other person sat behind her sandwiching her between them and they took her to a homestead where they kept her in one of the unoccupied depilated mud walled houses. That the Appellant then gave the other man his motor clycle and the man rode off leaving the Appellant and the Complainant in the house.

9. PW1 stated that there was no light in the house she was kept in and that it had a chair, a table, and a bed with a small mattress. PW1 stated that the Appellant told her that they would sleep together and ordered her to undress and she obeyed upon which the Appellant also undressed and then took his genital organ and inserted into her vagina. She gave evidence that the Appellant did that to her every subsequent night for the two weeks she was captive until she was rescued and that she was not offered any food save for the bananas that the Appellant hanged in that house and instructed her to eat as they had ripened. PW1 informed the Court that the Appellant left every morning after locking her in that house and would then return in the evening to spend the night defiling her and leave the next morning. She further testified that sometimes the Appellant's accomplice would accompany him to the house but only the Appellant defiled her and that the trend continued until one day when the Appellant forgot to lock the house when leaving in the morning. That she went outside and met a young man whom she borrowed a mobile phone and contacted PW4 her brother and informed him that she was kept in a house in Kuria. That no sooner had she divulged little information to PW4 than the Appellant re-appeared and the young man took his phone and ran away as the Appellant dragged her back to the house and threatened her to never call her brother again. That on 21st September she once more managed to contact her brother who in the company of PW5 and PW6 went and rescued her. That the Appellant was arrested on the same day as he escaped and they were both taken to Oruba police station where the case had been reported and from there she was taken to Migori County Referral hospital for examination and treatment.

10. PW2 EAO the mother to the Complainant confirmed that her daughter was about 12 years old and stated that she previously stayed with her but later on PW1 went to stay with her brother POA. That on 3/9/2022 she received a call in the evening that her daughter was missing after being sent the previous day in the evening to the shop but she did not return. She narrated how her search for PW1 took her to church, P's home and [Particulars Withheld] Primary school to no avail. That they reported the matter to the Police at Oruba Police Station and the same at Migori Police Station. That after 2 and a half weeks they found the child and prior to that and just four days after she went missing, P had told her that PW1 had called him and divulged to him that she was in Kuria. She stated that the Police used the phone number to track her location and rescued her then took her to the hospital and the person who had her daughter was arrested. She also identified the Appellant as the perpetrator before the court and stated that when she first saw him he was dirty and had Rastas but now had no dreadlocks and was clean. On Cross-examination she stated that the child identified the Appellant.

11. PW3 Boke Rael Chacha the Clinical Officer testified that she examined and treated the complainant on 21/9/2022 at around 3.50Pm after being brought to the facility in the company of two police officers and the alleged perpetrator who defiled her severally on diverse dates between 2/9/2022 and 20/9/2022. That on examination she found that there was erosion of PW1's vaginal wall and that it was caused by penetration. That the hymen was broken but not freshly broken and that she had healing bruises on the labia minora. She stated that the pregnancy test was negative, urinalysis was positive indicating UTI and the Syphilis test was negative. She stated that she gave the Complainant antibiotics and PEP and formed an impression that she had been defiled. PW3 produced the P3 Form, Treatment Notes and PRC Form in respect to the Complainant as Exhibits 2-4. In cross examination she said that the victim said that the Appellant had been defiling her.

12. PW4 POO confirmed that he was PW1's guardian and that she disappeared on the night of 2nd September 2022 after his wife sent the child to the shop. That he reported the matter at Oruba Police Station and informed PW5 that they should begin a search for the child. He testified that one day PW1 called him and informed him that she was kept in a house in Kuria and he gave the phone number that PW1 used to contact him to the police who sought the assistance of the Directorate of Criminal

Investigations in tracing the owner of that number but did not manage to trace it at first as the phone was switched off. He gave evidence on the various steps they took to try and trace the number including trying to send Kshs. 1 to the number which revealed that it was registered to one Susan Nyamohanga and eventually recorded their statements with DCIO Suna East and were asked to return the following day in the morning. That the next day in the company of 3 police officers they once more left to look for the Complainant and were led to the home of the said Susan Nyamohanga whom they spoke to and showed a photograph of the Complainant. That amidst the conversation, some children informed them that they had seen the Complainant in one of their homes on the lower end and one child revealed that she saw the Complainant with one of her brothers and led them to the home. PW4 stated that upon arriving at the home, they saw the Appellant running away and the Child informed then that it was the Appellant that had brought the Complainant to the home and PW4 chased after him and caught him and a police officer arrested him. He stated that it was his first time to see the Appellant and the Complainant upon rescue confirmed to them that the Appellant was one of the people that had kidnapped her. On cross examination he stated that the Appellant was pointed out to him when he was running away and that he was in the same homestead the Complainant was rescued from.

13. PW5 PC Robert Artumasa the DCI Suna West testified that he sought the Assistance of the Criminal Intelligence Unit who traced the phone to Masaba Location, Nyamagagana Village in Kuria West. That on 22nd September 2022 in the company of his colleagues, PW2, PW4 they went to Nyamagagana village in search for the Complainant and rescued her from the Appellant's house after her parent's identified her and the Appellant was arrested and escorted to Migori Police Station.

14. PW6 Jemima Aoit the Investigating Officer in this matter testified that on 22/9/2022 at around 8:30Am she was at the station when the OCS Mr. Chesaria informed her that there was a case of a missing child reported on 4/9/2022 and that the Child had been traced and she was instructed to take over the case.

15. That she went to the DCI officer and met PC Robert who gave her the police file with the statements of the victim and witnesses as well as the medical report. That she took over the file and wrote a covering report in her statement and compiled the file and on 28/9/2022 the Appellant was charged before the court. She identified a copy of the Complainant's birth certificate as Exhibit 1. On cross-examination she stated that she saw the original birth certificate and made a photocopy and that the Complainant's age was indicated on the Birth Certificate.

16. The Appellant was placed on his defense and he testified that he was a form three student. He stated that he was sick for about one year and that he was arrested at home on the material day when he was with his siblings. That he was taken to the police station on allegations of defiling a girl whom he did not know and was also charged with kidnapping the girl on 2/8/2022. That on the said kidnapping date he was at home and sick and that on the said date he could not even walk as he was being taken to Ombo Hospital Migori for treatment and returned home. He denied knowing the Complainant. On Cross-examination he stated that it was not true that he had the Complainant during all that period and that he knew where the she was found and it was not his home.

17. This Appeal was canvassed by way of written submissions. The Appellant's submissions are dated 26th August 2024.

18. The Appellant submitted that on the day PW1 was waylaid by strangers she had no light to be able to identify her attackers and only stated that she heard them speak in Kuria but failed to mention whether she saw their faces. That she also stated that she was kept in a dark house and thus the Appellant questioned if and how she was able to see her Kidnapper/Attacker every morning as he left. He Submitted that the witnesses who pointed out the Appellant to the police officers were not called

to testify thus it was averse to the prosecution's case. He also submitted that he was arrested away from the house where the victim was found thus a well conducted identification parade was necessary and the dock identification was worthless.

19. On his second ground pertaining to time spent in police custody before arraignment, he cited the case of Rep V Amos Karungu Karatu (2008) eKLR (Criminal Case No. 12 of 2006) where the Court stated: -

> " A prosecution mounted in breach of the law is a violation of the rights of the accused and it is therefore a nullity. It matters not the nature of the violation. It matters not that the accused was brought to court one day after the expiry of the statutory period required to arraign him in court. Finally, it matters not that evidence available against him is weighty and overwhelming. As long as that delay is not explained to the satisfaction of the court, the prosecution remains a nullity."

20. On his third ground pertaining to the Complainant's Birth Certificate, he submitted that the original Birth Certificate was not produced but only a photocopy of the same. That as such it was contrary to Section 68 and 69 of the *evidence Act* CAP 80 of the Laws of Kenya.

21. On his fourth ground on sentencing, he cited the case of Peter Mbugua Kabui v Rep Criminal Appeal 66 of 2025 (2016) where the Court of Appeal had this to say:

> " the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.
>
> As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."

22. He also cited the case of William Kimani Ndichu v Rep (2015) eKLR where the meaning of the phrase "same transaction" was defined as follows:

> " If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction."

23. It was thus submitted that the Appellant should benefit from the same subject to section 37 of the Penal Code.

24. On his last ground of appeal of the sentence to run from the date of his arrest, the Appellant submitted that he relied on the provisions of Section 333(2) of the CPC and Paragraph 5.1.21 of the Judiciary Sentencing Policy Guidelines Revised 2023.

25. In conclusion he submitted that the conviction be quashed, sentence set aside and he be set free and the Court to make such other complete lenient orders as it may deem fit.

26. The Respondents did not file any submissions. What is uploaded is a charge sheet in criminal case No. E530 of 2024 where James Otieno Ogigi and Nelson Ochieng Odongo are charged with the offence of forcible detainer.

Analysis and Determination

27. In a first appeal, the duty of the court was stated in Mark Oiruri Mose vs. R (2013) eKLR thus;

> "…. the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."

28. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the Appellant, the issues for determination are: -

1. Whether or not the Trial Court complied with article 50(2) (g) (h) of the Kenyan Constitution 2010.
2. Whether the ingredients of the offences herein were proved to the required standards in law.
3. Whether or not the Trial Court considered the Appellant's defense and mitigation.
4. Whether or not the Appellant's custody in the police cell for more than 6 days before arraignment was fatal to this case.
5. Whether or not the Appellant's sentences ought to run concurrently.
6. Whether the Appellant's remand period was factored in his sentence.

29. On whether or not the Trial Court complied with article 50(2) (g) (h) of the Kenyan Constitution 2010, in Republic v Karissa Chengo and 2 others [2015] eKLR the Court of Appeal stated that:

> "It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The *Constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."

30. After thoroughly reviewing the Trial Court's record, this court has noted that the Appellant was informed of his rights under Article 50 (2) of the *Constitution* and the Court informed him of his right to choose and be represented by an advocate and encouraged him to exercise the said right as well as his entitlement to apply to the Legal Aid Board for assistance. The Appellant preferred to proceed without the same and stated "I will take plea without an advocate."

31. Further, the Accused actively took part in the trial and even cross-examined the prosecution witnesses and was able to mount his defense. Therefore, his claim that his right under Article 50 (2) (g) & (h) was violated is unfounded.

32. On whether the ingredients of the offences herein were proved to the required standards in law, the Appellant was charged with two counts which this court considers below as follows.

33. Count I was defilement contrary to section 8(1) as read with section (2) of the *Sexual Offences Act* No. 3 of 2006.

34. On whether the ingredients of the offence of defilement were proven beyond reasonable doubt, Section 8(1) of the Sexual Offence Act No. 3 of 2006 provides that:

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

35. In this regard, the offence of defilement is anchored on three (3) main ingredients namely; (1) The Age of the victim, (2) Penetration, and (3) The Proper Identification of the Perpetrator as was established in George Opondo Olunga v Republic [2016] eKLR.

35. On proof of age the Court of Appeal in Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR) 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."

36. Likewise, the Court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... 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."

37. The Complainant testified that she was born in 2010 and identified a copy of her birth certificate before the Court. The said birth certificate indicated that she was born on 9th October 2010 which proves that she was 11 years old and a few months' shy from turning 12 years by the time of the offence. PW6 also produced a copy of the said Complainant's certificate of birth as Exhibit 1. The Appellant submitted that the original Birth Certificate was not produced but only a photocopy of the same. That as such it was contrary to Section 68 and 69 of the *evidence Act* CAP 80 of the Laws of Kenya. However, the said Section 69 of the *Evidence Act* provides that:

> " Secondary evidence of the contents of the documents referred to in section 68 (1) (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice

to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case"

38. The Appellant never raised the concern with the Trial Court nor did he request for the original copies to be availed in Court via notice. As such, raising the same with the Appellate court is an afterthought. Moreover, the said Birth Certificate was Registered on 1st of March 2018 and issued in 2020 before the alleged offenses herein. As such the Appellants claim that the said certificate was fake is unfounded.

39. On proof of Penetration, 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."

40. This definition has been given judicial interpretation in the case of Mark Oiruri Moses V R [2013] eKLR when the Court of Appeal stated thus:

> Many times the attacker does not fully complete the sexual act during commission of the sexual act. That is the reason why the law does not require that evidence of 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.

41. This position was fortified by the same court, differently constituted, in Erick Onyango Ondeng v Republic [2014] eKLR where it was held: -

> " In sexual offences, the slightest penetration of female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen is raptured"

42. PW1 gave evidence that on the night she was abducted, the Appellant told her that they would sleep together in the house where he had detained her and ordered her to undress and she obeyed upon which the Appellant also undressed and then took his genital organ and inserted into her vagina. She gave evidence that the Appellant did that to her every subsequent night for the two weeks she was captive until she was rescued. The evidence of PW3 who examined and treated the complainant on 21/9/2022 at around 3.50Pm corroborated the Complainant's evidence. She stated that on examination of PW1's genitalia, she found that there was erosion of her vaginal wall and that it was caused by penetration. That the hymen was broken but not freshly broken and that she had healing bruises on the labia minora. She stated that she gave the Complainant antibiotics and PEP and formed an impression that she had been defiled. As such the element of penetration was proved beyond reasonable doubt.

43. On Identification of the perpetrator, PW1 testified that on the day she was kidnapped, she had gone to the shop and bought the items she was sent to buy but, on her way, back home she found two men who were standing a few metres apart and identified one of the two men as the Appellant before the Trial Court. Further, during her captivity and on one of the days that the Appellant forgot to lock the door when leaving, she stated that she went outside and met a young man from whom she borrowed a mobile phone and contacted PW4 her brother and informed him that she was kept in a house in Kuria. That no sooner had she divulged little information to PW4 than the Appellant re-appeared and the young man took his phone and ran away as the Appellant dragged her back to the house and threatened her to never call her brother again. Further, it was the evidence of PW1 that she stayed with the Appellant for more than two weeks and he defiled her every single night during her captivity. She stated that the Appellant was arrested on the same day she was rescued after she identified him.

44. PW4 also testified that on the day they rescued the Complainant, they saw the Appellant running away and a Child who had led them to the house where the Appellant was holding the Complainant informed them that it was the Appellant that had brought the Complainant to the home and PW4 chased after him and caught him and a police officer arrested him. He stated that it was his first time to see the Appellant and the Complainant upon rescue, confirmed to them that the Appellant was one of the people that had kidnapped her.

45. PW5 also confirmed that the Complainant was rescued from the Appellant's house and her parents identified her, and the Appellant was arrested and escorted to Migori Police Station.

46. There is no doubt that the Complainant stayed under the Appellant's captivity for more than two weeks and interacted with him on those days particularly at night when he defiled her. The Complainant also singled out a day when the Appellant forgot to lock the door and she managed to contact her brother using a phone from a "young man." There is therefore, no doubt that the Complainant saw the Appellant's face and identified him as the perpetrator. Her evidence is corroborated by that of PW4 and PW5 who rescued her and made the arrest when the Appellant attempted to flee when he saw the police arrive in the homestead where he was with the Complainant.

47. Count II was Kidnapping contrary to Section 255 as read with Section 257 of the Penal Code.

48. Section 255 of the Penal Code defines the offence of kidnapping from lawful guardianship and states thus:

> " Any person who takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of a lawful guardian of the minor or person of unsound mind, without the consent of the guardian, is said to kidnap the minor or person from lawful guardianship."

49. From the provision above, to prove the offence of Kidnapping the prosecution must prove:

    1. The Appellant took or enticed any minor under 14 years if male and 16 years if female, or any person of unsound mind.

    2. That the person took or enticed the said minor or person of unsound mind out of the keeping of a lawful guardian and

    3. That the taking or enticement was without the consent of the lawful guardian.

50. From the evidence adduced by the prosecution witnesses, PW1 was in the lawful custody of her brother PW4 who was her lawful guardian. The Appellant and another man forcefully took PW1 from the custody of PW4 without the consent of the said guardian and it was done at night when the minor had been sent to the shops to buy Royco Cubes and Airtime card. Froom the evidence of prosecution's witnesses, the Appellant kidnapped a child from the lawful custody of a guardian contrary to section 255 of the Penal code and the charge has been proved beyond any reasonable doubt.

51. Based on the foregoing, the Prosecution proved both Count I and Count II beyond reasonable doubt against the Appellant.

52. On whether or not the Trial Court considered the Appellant's defense and mitigation, on page 6 of the Judgment, the Trial Magistrate considered the Appellant's defense and stated that the Appellant admitted that he was arrested in his home in the presence of his family and members of the public. That he however did not call any of those persons to come to his defense which led the Trial Magistrate to

conclude that had they been called, they would tell the truth to his detriment. As such the Appellant's claim that the Trial Court did not consider his defense is unfounded.

53. On whether or not the Appellant was kept in custody at the police cell for more than 6 days before arraignment in court was fatal to this case, the Appellant never raised the issue of spending 6 days in custody with the Trial Court before the trial begun. He instead participated in the whole trial process and even when cross-examining the prosecution witnesses, he neither questioned the Investigating officer nor raise the issue in his defense. In any case he comfortably cross-examined the prosecution witnesses as well as mounted his defense. Had he raised the issue with the Trial Court the same would have been remedied and the Trial Court would have sought an explanation from the arresting and Investigating officers on why the Appellant was not arraigned in court in time. In any case the alleged violation of the Appellant's rights cannot vitiate the Complainant's rights to redress for the sexual abuse committed by the Appellant. The Appellant is at liberty to petition for redress against the officers who detained him beyond the constitutional period.

54. On whether or not the Appellant's sentences ought to run concurrently, in the case of Peter Mbugua Kabui v Rep Criminal Appeal 66 of 2025 (2016) the Court of Appeal held that: -

> " As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."

55. In this case, the Appellant jointly with another kidnapped the Complainant and detained her for 2 weeks where he defiled her repeatedly thereby perpetuating the crimes against a vulnerable 11 years old child. The Trial Magistrate properly exercised discretion to order that the sentences run consecutively therefore no illegality was committed.

56. On whether the Appellant's remand period was factored in his sentence, The Appellant was sentenced to serve 22 years' imprisonment on count I for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 and 5years' imprisonment on Count II for the offence of Kidnapping contrary to section 255 as read with section 257 of the Penal Code.

57. Section 8(2) of the *Sexual Offences Act* provides:

(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.

58. Section 257 of the Penal Code provides: -

> " Any person who kidnaps any person from Kenya or from lawful guardianship is guilty of a felony and is liable to imprisonment for seven years."

59. In consideration of the penalty provided for under Section 8(2) of the Sexual Offenses Act and Section 257 of the Penal Code the sentenced meted against the Appellant is very lenient and this court finds that had the prosecution filed a notice to enhance the court would have sentenced him to the maximum possible penalty. The Appellant's prayer that sentence should run concurrently and that the same should be reviewed is dismissed.

60. The Appellants appeal on conviction and sentence lacks merit and the same is dismissed. Right of appeal 14 days explained.

Orders Accordingly.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 20TH DAY OF NOVEMBER, 2025.

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HON. ANNE ONG'INJO

JUDGE