



**CKM v Republic (Criminal Appeal E054 of 2024)
[2026] KEHC 234 (KLR) (21 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 234 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E054 OF 2024
DKN MAGARE, J
JANUARY 21, 2026**

BETWEEN

CKM APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the trial court, Hon. E.N. Angima SPM, in Nyeri CMCSO No. E004 of 2023, delivered on 30.07.2024
2. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that the Appellant, on 11.02.2023 at around 2100 hours, at[Particulars Withheld], in Kieni West Subcounty, within Nyeri county, intentionally and unlawfully caused his genital organ, namely the penis, to penetrate the vagina of RKM, a girl aged 13 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 11.02.2023 at around 2100 hours, at[Particulars Withheld], in Kieni west subcounty, within Nyeri county, intentionally and unlawfully touched the breast, buttocks and vagina of RKM, a child aged 13 years with his fingers and penis.
4. The Appellant was arraigned in court on 16.02.2023 and denied the charges. He was supplied with witness statements and supporting documents. The court heard sworn testimony from a total of five prosecution witnesses and the Appellant. The court considered the evidence and rendered the Judgement. The Court found the Appellant guilty and sentenced them to 20 years' imprisonment, with the sentence to run from the date of arrest, 15.02.2023. He was informed of the right of appeal.



5. The Appellant, aggrieved, lodged this Appeal vide a petition of appeal on. 5.08.2024. The same was subsequently replaced with new grounds as follows:
 - a. That the learned trial magistrate erred in law and fact by failing to note that the prosecution had not proved penetration, identity, and age of the complainant beyond a reasonable doubt.
 - b. That material contradictions and inconsistencies were not resolved in favour of the appellant.
 - c. The trial court improperly shifted the burden of proof to the appellant.
 - d. The trial court improperly failed to inform the appellant of the right to legal representation under Article 50(2)(g) of *the Constitution*, hence vitiating the entire trial.
 - e. That the sentence was excessive in view of the mitigating factors.
6. The grounds, except the fourth one, are materially the same as the ones set out in the original ground. The trial thus set out only 3 issues for determination:
 - a. Proof of the offence.
 - b. Legal representation under Article 50(2)(g) of *the Constitution*.
 - c. Sentence being excessive.
7. In essence, the appellant complained that the conviction was unsafe, having been reached without proof beyond a reasonable doubt, through the application of improper considerations, and in disregard of material inconsistencies in the evidence. He further asserts that the trial process was fundamentally unfair, as he was denied access to Legal representation under Article 50(2)(g) of *the Constitution*

Submissions

8. The appellant filed humongous submissions and addressed each of the grounds on the amended grounds. On proof of ingredients, the appellant maintained that the state was under a duty to prove three elements of age of the complainant, penetration, and positive identification of the perpetrator. Reliance was placed on the cases of Mark Oiruri Mose v Republic [2013] KECA 67 (KLR). However, the quote was a hallucination and not part of the case. The same for the purported case of G.O. V Republic. On that element, he also relied on the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013, which highlighted it is incumbent upon the court to exercise utmost caution in the absence of corroborative medical evidence in cases depending entirely on the credibility of the complainant.
9. He submitted that there were material contradictions in the case. He did not, however, pinpoint any. He relied on the case of John Nyaga Njuki & 4 others v Republic [2002] eKLR Criminal Appeal 160 of 2000.
10. On shifting the burden of proof, the court is said to have inferred guilt in his failure to testify on certain issues. This was said to shift the burden of proof. These issues are not named. Reliance was placed on the locus classicus and the most oft quoted English decision by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481. Further reliance was placed on the case of Sekitoleko v Uganda (1967) EA 531 at p 533, where the legendary sir Udo Udoma C.J stated as follows:

As a general rule of law, the burden of proving the guilt of a prisoner beyond reasonable doubt never shifts, whether the defence set up is an alibi or something else. That burden always rests on the prosecution.



11. The bulk of the proceedings were on the last ground, that of the alleged violation of Article 50(2)(g) of *the Constitution*. He posited that he was never informed of the right to choose legal representation. He quoted in extension the following decisions, AMR v Republic [2021] KEHC 5935 (KLR) and Joseph Kiema Philip v Republic [2019] KEHC 7989 (KLR), among others. The appellant concluded that there was insufficient, contradictory evidence, the burden of proof was shifted to him, and his right of representation was affected. He urged the court to quash the conviction and set aside the sentence or credit time in custody and give him a reduced sentence or noncustodial sentence.
12. The respondent filed submissions dated 7.10.2025 and maintained that the appellant was correctly convicted. However, they lamented that the sentence was too lenient, since the mandatory minimum is 20 years. The respondent invited the court to rely on the case of Okeno v Republic [1972] EA 32 at 36 for guidance on the court's duty in a first appeal.
13. It was the State's submission that it had discharged the burden of proof by establishing the three elements it was required to prove. Accordingly, the Respondent addressed the Court on four sub issues, namely:
 - a. Penetration.
 - b. Proof of Age of the victim.
 - c. Identity of the perpetrator.
 - d. Appropriateness of sentence.
14. They submitted that Section 2 of the *Sexual Offences Act* provides that penetration can be complete or partial. Reliance was placed on the case of Mark Oiruri Mose v Republic [2013] KECA 67 (KLR), where the court of appeal [Onyango Otieno, Azangalala & Kantai JJ.A], where the court of appeal held as follows:

Many times, the attacker does not fully complete a sexual act during the commission of the offence. That is the main 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.
15. They submitted that medical evidence is not necessary to prove penetration. The victim evidence on being lured into an isolated place and inserted the vagina of the victim. PW3 testified that there was penetration.
16. On proof of age, reliance was placed on the case of Francis Omuruo v. The Republic of Uganda. No reference was given for the foreign case. However, I have a inkling that they could be referring to the case of Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. This matter was referenced in the case of Uganda v Mawejje Ronald (HCT00CRSC0122 OF 2006) (HCT00CRSC0122 OF 2006) [2007] UGHC 16 (6 December 2007), the high court posited as follows:

In Francis Omuroni Vs Uganda, Court Appeal Criminal Appeal No. 2 of 2000 (unreported) it was held inter alia that in defilement cases, medical evidence is paramount in determining the age of the victim and that the doctor is the only person could professionally determine the aged in the absence of any other evidence, like a birth certificate, etc.



17. They state that the birth certificate showed that the appellant was born on 30.09.2010. Regarding the identity of the perpetrator, it was submitted that it was established because the appellant was the victim's grandfather. There was no possibility of mistaken identity.
18. They also addressed a sentence, stating that the sentence was appropriate. They went ahead nevertheless and relied on the South African case of *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A); 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA) (19 March 2001), where, the Supreme Court of Appeal of South Africa [Harms, Marais, Cameron JJA Chetty Et Mthiyane AJJA], sitting in Bloemfontein, held as follows:
 12. The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the wellknown triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. 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. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. 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. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.
19. Further reliance was placed on the case of *Shadrack Kipkoech Kogo v Republic, Eldoret Criminal Appeal No.253 of 2003*, the Court of Appeal stated that:

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 factors, 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 with.
20. Finally, they relied on the case of *Republic v M; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) on the mandatory nature of sentences under the *Sexual Offences Act*.
21. The appellant indicated to the court that he filed submissions physically, although the same could not be traced on the court record. I had to adjourn the matter from yesterday to today, to ensure the submissions are considered.



Evidence

22. The accused person was arraigned in court, granted bail, and the matter was set for pretrial. Subsequently, on 23.03.2023, the hearing commenced. The trial court conducted *voire dire* on the complainant. The court found her suitable to tender sworn testimony. She stated that she was 12 years old and in grade 7. She lived with her grandmother in the same house. The minor had gone to the appellant's house, which she refers to as I's house. I is the appellant's wife. They watched videos with *agemates*. The appellant came in drunk as they were peeling potatoes in the sitting room. They had all been told by a minor, M, to peel, wash and soak potatoes, which they duly did. Another minor, MW, fell asleep, and the grandmother, I, took the child to sleep.
23. The appellant, Guka K went to where the complainant was seated and pinched her on the thighs. She went outside where M was cooking. She took the phone from where she was cooking, and they played until the food was ready. She went to the toilet, which was not far. She placed her phone outside and went to the toilet. Coming out the phone was not there.
24. She saw Guka with the phone in a house where no one lives. She went there, and no one else was there except the two of them. The appellant told her to remove her clothes, which she refused. He removed her shirt and skintight. She wanted to scream, but the appellant took a jacket and placed it over her mouth with his hands. Guka then removed his trousers and inserted his penis into the complainant's vagina.
25. She continued that the appellant's wife, I, found them having sex. She lit a torch saw them and started screaming. The appellant rose and started running after the said I. M went to the scene and untied her. I took the complainant to the complainant's grandmother, J. She told J everything. She said that the appellant had defiled her 4 times before, but was given 10 shillings by the appellant and told not to report. She identified the P3, PRC, and her birth certificate, showing she was born on 30.09.2010. She also identified the appellant as Guka K. She stated that she occasionally plays with his children.
26. On cross-examination, she stated that she vividly recalls the day when she went to the appellant's home at 6 pm. She stated that the appellant owed her 25. She had sent one of the appellant's children to buy biscuits. They used the money to top up rice, as the money they had was not enough.
27. She testified that the appellant was pinching her as they went and had sex. He stated that she had not come for money on 11.2.2023. She stated that they were watching games on her grandmother, J's, phone, when the appellant pinched her.
28. PW2 was JW, a farmer from Enderasha and a grandmother of the complainant. She stays with the complainant. She recalled that on 11.02.2023, they had dinner, and the appellant went to his wife's (IN) house. The appellant is a brother of PW2. The minor took PW2's phone and went to visit the home. She ordinarily did that and came back sleepy. The homes are 30m apart. There is a cowshed in between. While in the house, I started shouting. She came asking why I was sleeping while K was defiling a child.
29. I took the complainant to the witness's mother, who said that this was a police case. She followed up later. I, the complainant, and their cousin went to Enderasha hospital, where they were advised to go to the police station. They later went to the location of the incident in the complainant's area. They found the appellant hiding there. A fight ensued, and the witness's mother intervened. The complainant's mother took the child to PGH. She testified that she had lived with the complainant since the time the complainant was in nursery school. He was not aware of the other incidents since the appellant threatened to kill the witness, the complainant's mother, and siblings.



30. It was her evidence that they related well and never thought the appellant could do what he did. The appellant was charged with the offence. She identified the appellant in the dock.
31. On cross-examination, the witness stated that it is the appellant's wife who found the appellant having sex with the complainant, and she is the one who reported to the police. She stated that the child was on her smartphone watching TikTok. They related well until the appellant defiled the complainant.
32. She stated that on the day they were fighting, she held the appellant by the waist and asked if she committed the offence. It was her evidence that the appellant replied that he was being framed.
33. PW3 was the complainant's mother. She stated that she has three children, among them the complainant, who lives with PW2. She lives with the other 2. She was at home on 11.2.2023 when PW2 called and kept mum. IN told her that the husband had raped the child. She advised them to take the child to the hospital and not to change clothes. The next day, she travelled, found the minor had been taken to Endarasha, and took her to Nyeri PGH. She talked to the child, who told her that Guka K 'raped' her. The defilement had occurred five times. The defilement started when the complainant had finished grade 6 exams.
34. The complainant kept quiet since the appellant was threatening to kill her whole family. She stated that the minor was born on 30.09.2010. She produced the original birth certificate. She also referred to the PRC form and the P3 form. It was her evidence that the appellant was her uncle, and they were getting along well until this fateful day.
35. She stated that on 12.2.2023, she confronted the appellant and demanded an explanation as to why he had defiled her child. The grandmother came with a panga and beat them all, and she advised taking the case to the police station. She stated that the appellant, K, is the complainant's grandfather.
36. On cross-examination, she stated that it is the appellant's wife who found the appellant defiling the complainant. The appellant's wife saw bushes shaking and suspected someone was there, so she went to check. She stated the appellant threatened the complainant.
37. PW4 was Dr Nderitu Marvin, holding a Bachelor of Medicine and Bachelor of Surgery from KIU, Uganda. He had worked at PGH for 8 years. He had documents signed by Dr Muriuki who was out of the country. A female patient was examined over an alleged incident on 11.2.2023. The assailant was said to be a known 40-year-old grandfather. There was noted vaginal violence; no condom was used. The hymen was old and broken. Her clothes were dirty. Tests were conducted; a high vaginal swab showed no spermatozoa, Pregnancy Test was negative, and urinalysis showed +++++ pus cells and epithelial cells. HIV and VDRL (Venereal Disease Research Laboratory) test for syphilis, were negative. On cross-examination, he stated that he got the information from the child about the perpetrator.
38. PW5 was 242486 PC(W) Ruth Mwaura of Endrarasha police station. She received a report on 12.2.2023 from a Minor accompanied by the mother. The child was 13 years old and reported that she visited her cousins at her grandfather's house until 9.00 pm when the appellant followed her. The witness was stood down, but no reason was assigned.
39. She was sworn again on the next hearing date. She stated that the complaint was accompanied by two grandmothers, J Wanjiku and IN. The child had reported that CK, her grandfather, defiled her. They stated that she had gone to her grandfather's house to watch movies. The appellant came while drunk and started pinching her on the waist without others seeing. She opted to go to the house. She went for a short call in a toilet within the accused's compound and left her phone outside. She found the accused waiting for her with the phone; the appellant took her to an incomplete building. The girl wanted to shout, but the accused threatened her. The appellant shut her mouth and held her down.



- He defiled her for a long time. As a result, the appellant's wife heard the commotion and went to check. The appellant's wife found the child being defiled. The matter was reported, and the witness station recorded statements. The appellant was arrested on the same day in the same compound. The wife did not testify as she was threatened.
40. On cross-examination, she stated that the last time she was testifying, she had many files. She stated that the child was defiled on 12.2.2023.
41. The appellant was found with a case to answer. He was placed on his defence. Upon compliance with Section 211 of the Criminal Procedure Code, the appellant opted to give sworn testimony and had no witnesses.
42. He testified that on 11.02.2023, he was not even at home. He was away at a charity centre. He got arrested while assisting his mother at home. He maintained that PW3 was his enemy since 2022, when she swore to bring the appellant to court. He stated that he had the complainant's debt of Ksh 25/=. On 5.3.2023, the minor came for it, but he did not have it. The complainant left when she was angry. He stated that the mother beat the complainant. It is, however, not clear when it happened. It was his evidence that, as from 1.12.2023, he started going to work very early and returned home at about 2200 hours. It appears that it did not cross his mind that 5.2.2023 was within the period he ought to have come early, but was speaking with the child about 25/=.
43. On cross-examination, he stated that IN was his wife. She saw her when he went home on the material day. She was with their three children, SS, KVL, and GG. He said that he did not see the complainant on the said date. He stated that he had no grudge against her sister, PW2. He further noted that PW1 was beaten to falsely implicate him. He maintained that at the time the alleged offence was committed, he was at the charity shopping centre closing the shop. He closed his case.

Impugned Judgment

44. The court analysed the evidence and, albeit briefly, addressed all the essential elements required of a judgment. The court relied on the evidence of PW3, who found that the act was consistent with penetration. On the perpetrator, the court found that the appellant was positively identified. The court noted that the appellant's wife did not testify. The court stated it was aware of the protection given to a spouse. The court placed reliance on section 124 of the *Evidence Act*. The court also relied on the case of *David Toeti Migesha v Republic* [2019] KEHC 6571 (KLR), where the court, R.E. Aburili J. posited as follows:
- In addition, the proviso to Section 124 of the *Evidence Act* allows the Court to convict on the sole evidence of a victim of sexual offence if the court is satisfied that the victim is being truthful.
55. Accordingly, the Prosecution need not call all witnesses who may have information on a fact and such failure to call a witness will only be fatal if the evidence presented by the Prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.
45. The court convicted the appellant of the offence of defilement contrary to section 8(3) of the *Sexual Offences Act*. Upon being invited to present mitigation, the appellant offered none. The court was informed that the appellant was a first offender. Consequently, the appellant was sentenced to twenty (20) years' imprisonment, to run from 15th February 2023. Aggrieved by both the conviction and sentence, the appellant lodged the present appeal.
46. The appellant applied for the appointment of an advocate to represent him in this appeal at the State's expense. Upon review of the record, this court found that he did not meet the criteria



for such representation. There was no demonstrated miscarriage of justice, and the appellant had already filed detailed and coherent submissions. The court therefore reserved any further comment for determination in the judgment, particularly noting that one of the issues falling for consideration in the appeal was the appellant's right to legal representation.

Analysis

47. This being a first appeal, this court is under a duty to reevaluate 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 firsthand. 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.

48. On a first appeal, the appellant is entitled to a fresh and exhaustive reevaluation 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* [supra], 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.

49. 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.

50. 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 page 36164 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.

51. 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:

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.

52. 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. 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.

53. Within these boundaries, the Court is obliged to conduct a fresh and thorough examination of the evidence, reassess the credibility of witnesses, and evaluate any conflicting testimony to reach its own independent conclusions. Throughout this exercise, the legal burden of proof remains unchanged, resting entirely on the prosecution to establish the appellant's guilt beyond reasonable doubt. Only by meticulously scrutinizing all the evidence, while adhering strictly to the statutory framework, can the Court ensure that the appellant is afforded a full and fair reevaluation of the case.

54. Courts dealing with criminal matters must always remain mindful of the high standard of proof required and the serious consequences that a conviction imposes on an accused. The standard of proof beyond reasonable doubt applies, particularly given the nature of criminal offences, whose



consequences extend beyond the individual to society at large. A conviction and sentence as a sexual offender carry a lifelong stigma and can only be justified based on indisputable evidence.

The law

55. The law under which the appellant was charged is provided under Section 8 of the [Sexual Offences Act](#) as hereunder:

8.

- (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.
- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
- (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
- (5) ...
- (8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

56. On the other hand, the appellant was charged with an alternative count under Section 11 of the [Sexual Offences Act](#), which 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.

57. In the case of Charles Wamukoya Karani v. Republic, Criminal Appeal No. 72 of 2013, it was held that the essential elements constituting the offence of defilement are the age of the complainant, proof of penetration, and positive identification of the assailant. These key ingredients of the offence of



defilement, were similarly elucidated in the case of *George Opondo Olunga v Republic* [2016] eKLR are;

- a. Proof of the age of the complainant,
- b. Proof of penetration and
- c. Proof that the appellant was the perpetrator of the offence. And,
- d. {I must add that the penetration is of a sexual organ,[of the vagina or anus] by a sexual organ}.

58. The first element, age, is a bit relaxed, especially for children of tender years. It can be proved, though, by a birth certificate, baptism card, or by oral evidence of the child if the child is sufficiently intelligent, or by the evidence of the parents or guardian, or medical evidence, among other credible forms of proof. The key element in proof of age is credibility. In more grown-up children, the difference between young adults and children is razor sharp. The court must be vigilant to prevent adults masquerading as children. 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.

59. While addressing the question of age of the victims in the Sexual Offences Act, the court in *Kaingu Elias Kasomo vs. Republic, Malindi*, the Court of Appeal in Criminal Appeal No. 504 of 2010 stated as follows:

Age of the victim of the 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.

60. The age of the minor is relevant to the extent that it is to make a distinction between those aged 18 and under 18. If, for any reason, it is proved that a person is a child under the age of 18, but there is a difference in respect of whether the child is 13 or 14, then such a difference is irrelevant. Where the age flows into the next age for purposes of the offence, an acquittal cannot follow. The offence of defilement is complete upon proof that a person is under the age of 18. The actual age is required only when the court is considering, for purposes of sections 8(2), 8(3), and 8(4). The Court of Appeal in the case of *Stephen Nguli Mulili v Republic* [2014] KECA 408 (KLR), addressed this aspect as follows:

In the case of *Kaingu Elias Kasomo V R, Malindi CR. NO. 504 OF 2014*, the Court of Appeal stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence.

However, as the Court clarified in *Tumaini Maasai Mwanja V R, MSA CR.A. NO. 364 OF 2010*, proof of age for the purpose of establishing the offence of defilement, which is committed when the victim is under the age of 18 years, should not be confused with proof of age for the purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age.



61. It is only when there is evidence of doubtful origin that a doctor can determine the age scientifically. In the case of Francis Omuroni Vs Uganda Court of Appeal No. 2/2000, the court held that:

In defilement cases, medical evidence is paramount in determining the age of the victim. 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.

62. The appellant was a grandfather and a person who is related to such child within the prohibited degrees of blood or affinity within section 8(8) of the *Sexual Offences Act*. The minor's age is within the appellant's knowledge; he did not dispute the age on cross-examination. The medical evidence and birth certificate show that the minor was 13 years old. the minor was below 18 years. Hence, the age was proved for defilement. For punishment, the age of 13 years was proved. It is irrelevant, for both conviction and sentence, whether the minor was 12 or 13 years old. The distinction is immaterial.
63. The medical evidence showed that there was an old, broken hymen. It does not of itself show penetration. However, epithelial cells were indicating violent sexual activity. The evidence from the P3 and the PRC showed evidence of penetration. The appellant took issue with the absence of spermatozoa. By the familiar rule of thumb, often expressed as "garbage in, garbage out," there must be evidence of sperm deposition before they can be found. There was no cross-examination on whether there was ejaculation. The court cannot thus relate the absence of spermatozoa to the absence of penetration. Not every sexual encounter result in the release of sperm into the vagina. Section 2 of the *sexual offences act* provides as follows regarding penetration:

“penetration” means the partial or complete insertion of the genital organs of a person into the genital, organs of another person;

64. Therefore, exchange of seminal fluids is not part of the definition of defilement. The second aspect is that the appellant impugned the medical evidence. These were expert evidence. In addressing expert evidence, the court must have regard to the entire gamut of evidence, not just expert evidence. Courts have consistently emphasized the value of expert opinions in judicial proceedings; such evidence is not necessarily conclusive or binding. As was held in...Shah and Another vs. Shah and Others [2003] 1 EA 290:

The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so.

65. Further, the Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:

... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.



66. Courts must give proper respect to the opinions of experts; such opinions are not, as it were, binding on the courts, and the courts must accept them as stated in *Parvin Singh Dhalay vs. Republic* [1997] eKLR; [1995/1998] 1 EA 29, it was held that:

It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo vs. George Matata Ndolo*, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:

The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say: Because this is the evidence of an expert, I believe it.

67. The appellant was caught in flagrante delicto by his wife. It was earlier understood that a spouse of an accused person was neither competent nor compellable. Section 130 of the *Evidence Act* provides as follows:

- (1) No person shall be compelled to disclose any communication made to him or her during marriage, by the other spouse; nor shall a person be permitted to disclose such communication without the consent of the person who made it, or of his or her representative in interest, except in suits between the parties to the marriage or in any of the cases referred to in paragraphs (a), (b) and (c) of section 127(3) of this Act.
- (2) In this section, "marriage" means a marriage, whether or not monogamous, which is by law binding during the lifetime of the parties thereto unless dissolved according to law, and includes a marriage under native or tribal custom.

68. It is the court's considered view that the use of native or tribal custom is pejorative. These were colonial relics that arose from the very early bigoted decisions, as shown in the case of *R V Amkeyo* (1917) EAPLR 14. The proper word should be customary marriage. However, there are exceptions to the competence and compellability as set out in section 127 (2) and (3) of the *Evidence Act*, as aforesaid. the said section is introduced by the schedule to the *Sexual Offences Act*, states as follows:

In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:

Provided that—

- (i) the person charged shall not be called as a witness except upon his own application;
- (ii) save as provided in subsection (3) of this section, the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;
- (iii) the failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution.



- (3) In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged-
- (a) with the offence of bigamy; or
 - (b) with offences under the *Sexual Offences Act* (Cap. 63A);
 - (c) in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise.
69. The appellant's wife did not testify, with the investigating officer citing threats. the point was neither proved nor disproved. The law to that effect is set out in section 3(4) of the *Evidence Act*.
4. A fact is not proved when it is neither proved nor disproved.
70. The complainant gave cogent evidence placing the appellant in the locus in quo. The appellant, on the other hand, gave a non-alibi, alibi. he said he was not at home. At the end of cross-examination, he found himself at home with his three children, thus shuddering at his own alibi. it is true that the burden of proving the falsity of an alibi is on the prosecution. this was addressed in the case of Victor Mwendwa Mulinge –v- R, [2014] eKLR as follows:
- It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution....
71. However, the belated attempt to set up an alibi did not materialize. The difficulty with raising an alibi defence is that, once it collapses, other defences that may have been available in law cannot be meaningfully tested, as the appellant's account is rendered untenable while the complainant's evidence remains unchallenged and intact.
72. The minor testified that the appellant, who was his grandfather, that is, a brother to his grandmother, lured him to a desolate place and defiled her. They were caught having sex, in flagrante delicto. The chain of custody was not broken. To expect a discharge from a 12-year-old girl is failing to understand human biology. True, the hymen was old broken. The complainant testified that the appellant's prior activity was the cause of the complaint. The court placed reliance on section 124 of the *Evidence Act*. By that very section, if the court, for reasons to be recorded, finds that the complainant was stating the truth, then even without corroboration, the court can convict. the said section provides 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.
73. 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.
74. 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 madeup 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.

75. The minor’s evidence was not shaken at all during the hearing. The appellant was raising questions that did not go to the fact of the commission or non-commission of the offence. None of the factual matrices were impugned. The appellant did not find it helpful to cross-examine on the alibi. He may not necessarily set it earlier. However, he had a chance to show he wasn’t there, but he didn’t. Further, his children were present when he was allegedly absent; none were called. This is not setting him to prove the falsity of the alibi, but these were witnesses who were in the locus in quo. They will have shown, not that he was at the charity centre, but that he was not at home, and the complaint was lying. The complainant’s evidence is enough to place the appellant not just in the locus in quo but in the act of defilement itself.
76. The next question is whether there was evidence to prove the appellant’s guilt. Having dealt with direct evidence, the court turns to circumstantial evidence. It is settled that circumstantial evidence must be inconsistent with an accused’s innocence. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, [P. Kihara K, PCA, M’Inoti & Murgor, JJ.A] Court had this to say on circumstantial evidence:

However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.

77. The threshold as stated in *R vs Kipkering Arap Koske* [1949] 16 EACA 135 is that such evidence must exclude coexisting circumstances which would weaken or destroy the inference of guilt. In *Sawe vs Rep* [2003] KLR 364, the Court of Appeal expressed that:

In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other coexisting circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other



reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.

78. The evidence on record shows a clear record of what transpired. The appellant was with the complainant and him alone when he was found. the minor ended up being penetrated. There was nobody else who had a chance, in the room where they were, the two of them, except the appellant. The evidence on record irresistibly points to the guilt of the appellant and no one else.

79. The last aspect was the question of not being informed the right to representation. article 50(2) (b), (c), (g) and (h) of *the Constitution* provides as follows:

(2) Every accused person has the right to a fair trial, which includes the right -

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if, substantial injustice would otherwise result, and to be informed of this right promptly;

80. In this appeal, the applicant was aware of his right under Article 50(2)(h). The court analyzed and found that in this case, there was no likelihood of substantial injustice resulting. This was because, from the proceedings, the appellant understood the charge facing him, represented himself well, but the facts were heavily against him. representation does not yield acquittal. In that respect, the court below could not inform him of the right under Article 50(2)(h). The maximum sentence was only 20 years' imprisonment.

81. The second aspect is the question of Article 50(2)(g). The right to choose, and be represented by, an advocate, and to be informed of this right promptly. Reliance had been placed in the case of Ignatious Kibiwot Kitur v Republic [2016] KECA 500 (KLR), the court of appeal [DK Maraga, DK Musinga, AK Murgor] posited as follows:

There is no evidence on record that the trial court informed the appellant of the aforesaid rights before the plea was taken. The question that now arises is whether the failure by the trial court to inform the appellant of his right to legal representation vitiated his conviction and sentence. We do not think so. The appellant unequivocally pleaded guilty to the charge of defiling a child of tender age and even if he had legal representation and had elaborate mitigation made on his behalf, that would not have varied the mandatory sentence that was passed by the trial court.

82. The Court of Appeal again dealt with the question in the case of Juma v Republic [2023] KECA 40 (KLR), where they rendered themselves as follows:

In effect the appellant's claim is that he was not given an advocate to represent him in the trial, and he was also not provided with the prosecution evidence in advance. It is noteworthy that the appellant never raised the foregoing issues with the trial court. He did not ask for counsel and neither is there indication on record that the prosecution failed to supply him with the evidence it sought to rely on. In any case the record shows that the appellant had ample opportunity, which he seized, to cross-examine each of the prosecution witnesses. We



are therefore not convinced that the appellant's rights to a fair trial were infringed in the way that he alleges.

83. The Court of Appeal, differently constituted [MK Koome, HM Okwengu, GBM K] as they were, addressed itself on the rights under article 50 as follows in the case of Hamisi Swaleh Kibuyu v Republic [2015] KECA 296 (KLR), posited as follows:

The rights that are encapsulated in the fifth schedule were meant to be progressively realized and Parliament was given timelines by *the Constitution*. In respect of the right to fair trial under Article 50, four years was the time-frame given. As this period had not elapsed as at the time of the hearing and disposal of the first appeal in the High Court, the appellant became a victim of the progressive realization of the right to legal representation. That was unfortunate. However, though the ideal position is one where the appellant should have had legal representation, we find on the facts and evidence, there was proof beyond reasonable doubt that justice was served and the decision reached by the two courts below was correct. In our view, the failure of legal representation did not occasion substantial injustice to the appellant.

84. The thread of the binding decision of this court is that the reading of both the rights under Article 50(2)(g) and Article 50(2)(g) must be read in a manner that breach must cause substantial injustice. *The constitution* does not envision a situation where there is technical compliance of *the constitution* to fetish in a way that strict compliance is seen as a form of worship and not delivery of substantive justice. It is clear that the record did not indicate that he was informed of the right to choose. However, it is not correct that the failure to indicate on record is fatal to the matter.
85. It bears strong emphasis that this issue was never raised before the trial court. Equally significant is the fact that the question under Article 50(2)(g) of *the Constitution* was introduced only through the amended grounds on the very date the judgment date was given. As a result, the State was completely deprived of an opportunity to respond and to establish one of two critical matters, that is, whether the appellant was in fact informed of the right to legal representation, but such information was not recorded, or whether the appellant was not informed at all. The idea of ambushing the other party is anathema to efficient delivery of justice.
86. However, perusing the record, it is clear that the court below delivered both substantive and procedural justice. Failure to record that the appellant was informed of a right under Article 50(2)(g) does not automatically vitiate a trial. This is even more poignant where there was no miscarriage of justice. the appellant was properly convicted on the evidence on record.
87. The appellant raised a question of discrepancies. However, none were set out. The court has pursued the entire record several times. The court cannot see any discrepancy or contradiction. A party cannot throw allegations to the court and hope that the court searches through the proceedings for suspected discrepancies. In any case, the court must determine whether the alleged discrepancies and contradictions were of such a fundamental nature as to have prejudiced the appellant's defence. It is well established that not every inconsistency or discrepancy in evidence will vitiate a conviction; what matters is whether the inconsistency goes to the root of the case and undermines the prosecution's proof beyond reasonable doubt. In Joseph Maina M v Republic, the High Court emphasized that appellate courts must be guided by section 382 of the Criminal Procedure Code in determining whether recorded discrepancies are so fundamental as to have occasioned a failure of justice, and only then can they prejudice an appellant's right to a fair trial.



88. Having found that there is no inconsistency, then this ground is otiose and is accordingly dismissed. Having dismissed all grounds on conviction, I find that the appellant's conviction is safe. the appeal on conviction is accordingly dismissed.
89. The court then has to deal with the issue raised obliquely, the question of sentence. The nature of sentences under the Sexual Offences Act is circumscribed. This particular offence under section 8(3) of the *Sexual Offences Act* provides for a minimum sentence of 20 years imprisonment. The question of such sentences was addressed in the case of Republic v M; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [supra] 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.
90. Further, the same position was reiterated by the supreme court in 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.
91. The appeal meted out was the minimum sentence. The court equally complied with section 333(2) of the Criminal Procedure Code. Consequently, the appeal on sentence is untenable and therefore dismissed.

Order

92. In the circumstances, I make the following orders:
- a. The Appeal dismissed on both conviction and sentence.
 - b. 14 days right of appeal.
 - c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 21ST DAY OF JANUARY, 2026 .
JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Ms. Kaniu for the State

Appellant in person.

Court Assistant – Michael

