CTN v Republic (Criminal Appeal E013 of 2024)
[2026] KEHC 238 (KLR) (20 January 2026) (Judgment)

Neutral citation: [2026] KEHC 238 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E013 OF 2024

DKN MAGARE, J

JANUARY 20, 2026

BETWEEN

CTN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arises from the judgment of the trial court, Hon. M.N. Okuche SPM, in Nyeri CMCSO No. E044 of 2019 delivered on 30.11.2023.)

JUDGMENT

1. This appeal arises from the judgment of the trial court, Hon. M.N. Okuche SPM, in Nyeri CMCSO No. E044 of 2019 delivered on 30.11.2023. The appeal was filed out of time, with leave granted vide Misc. Application No. E081 of 2023. The appellant was sentenced to 40 years imprisonment.

2. The Appellant was charged with defilement contrary to incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that the Appellant, on between April 2019 and November 2019 within Nyeri county, being a male person, unlawfully and intentionally caused his penis to penetrate the vagina of RWT, a child aged 17 years who is to his knowledge, his daughter.

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 between April 2019 and November 2019 within Nyeri county, being a male person, intentionally and unlawfully touched the vagina of RWT, a child aged 17 years, with his penis.

4. The Appellant was arrested on 10.11.2019 and arraigned in court on 11.11.2019. A total of 8 witnesses testified for the state. thereafter the appellant was placed on his defence. He gave sworn evidence and was cross-examined. The court found the appellant guilty and sentenced him to 40

years' imprisonment. He was dissatisfied and presented this appeal. In his Petition of Appeal, wrongly indicated as a memorandum of appeal, the Appellant raised the following grounds:

a. That the learned trial magistrate erred in points of law and fact in failing to appreciate that the instant matter was not proved beyond reasonable doubt.

b. That the learned trial magistrate erred in points of law and fact in failing to appreciate that the charge as laid down was incurably defective, contrary to section 214 of the Criminal Procedure Code, hence based on quicksand occasioning dereliction of justice(sic).

c. That the learned trial magistrate erred in both law and fact in failing to appreciate that the critical elements of defilement were not proved to the required standards, thus occasioning a prejudice.

d. That the learned trial magistrate erred in both law and fact when she convicted me to a sentence which was harsh and traumatising.

e. That the learned trial magistrate further failed to appreciate that the instant matter was riddled with material discrepancies capable of unsettling the verdict and further misdirected herself on very pertinent issues, including reliance on the accused's defence to fill in glaring gaps in defence, occasioning a serious dereliction of justice.

Submissions

5. The Respondent field submission stating that the first appellate court has a duty as set out in the case of Okeno v Republic [1972] EA 32 at 36, where the former East Africa Court of Appeal guided as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya 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."

6. They set out four elements of incest. They included age, which is not an essential element to prove incest. It is helpful only at the sentencing level. They set out the following elements

a. Proof of penetration of the genitalia of another.

b. [proof of age of the complainant]

c. Identity of the perpetrator

d. Proof of the relationship between the complainant and the accused.

7. In regard to penetration, they submitted that PW9 produced a P3 form showing discharge and pregnancy. PW7 produced a DNA report proving the appellant was the father of both the complainant and the issue that arose between the complainant and the accused. Reliance was placed on the case of WLN v Republic [2021] KEHC 5311 (KLR).

8. They posited that the age of the complainant was proved as the birth certificate showed she was born on 5.5.2001 and was 17 years at the time of the incident.

9. On the identity of the perpetrator, they submitted that PW2, PW3, and PW4 testified on the relationship. These were the brother and sister of the complainant, and PW3 was their village elder. They placed reliance on the case of LOA v Republic [2020] KECA 927 (KLR), where the court of appeal [Asike-Makhandia, Kiage & Odek, JJ.A)] held as follows:

> On the other hand, the respondent takes a contrary view; that a step-daughter is just as good as a daughter as she is among the persons whom a parent is prohibited from having sex with. Section 22 of the *Sexual Offences Act*, sets out the persons with whom having sex with will amount to incest. These are brother, sister, half-brother, half-sister, adoptive brother and sister, father, half father, uncle of first degree, mother and half mother and an aunt of the first degree. No doubt the appellant was PW1's half father and or stepfather. Therefore, the two having sex was incestuous.

10. On sentence reliance was placed on the 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). In that south African case, the Supreme Court of appeal of South Africa [Harms, Marais, Cameron JJA Chetty Et Mthiyane AJJA] 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 well-known 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. (quote completed by the court in italics).

11. Further reliance was placed on the case of Court of Appeal decision in the case of Shadrack Kipkoech Kogo v R. Eldoret Criminal Appeal No.253 of 2003 where it was held 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 that a wrong principle was applied or that short of these, the sentence

itself is so excessive and therefore an error of principle must be interfered (see also Sayeka v R (1989 KLR 306)"

12. Finally, in opposing the appeal on sentence, the state sought refuge in the Supreme Court decision, where the apex court [Koome CJ & P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ] guided as follows:

> "(51) In light of the structural and supervisory interdicts issued, the Court issued the Muruatetu Directions, wherein it, inter alia, pronounced itself on the application of its decision in the Muruatetu Case to other statutes prescribing mandatory or minimum sentences as follows:
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> .....
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> 14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.
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> (56) Mandatory sentences leave the trial court with absolutely no discretion, such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences, however, set thefloor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and a minimum sentence can neither be used interchangeably nor in similar circumstances, as they refer to two very different sets of meanings and circumstances. (Entire quotation lifted instead of quoted excerpts for completeness of record).

13. The appellant indicated that he had filed submissions. In spite of insistence by the court that the position was not true, he indicated that he had filed submissions. The same are neither on the physical record nor the CTS. I will take solace in the fact that they are not evidence. Submissions are not, strictly speaking, part of the case, the absence of which may do prejudice to a party. Their presence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis

of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

14. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

Evidence and Proceedings

15. The proceedings are not some of the best the court has seen in the recent past. They appear to be an extract from a horror movie. The appellant was arraigned before the trial court on 11.11.2019. He pleaded not guilty. He was subsequently released on bond on 19.12.2019. Bond approval was granted on 27.12.2019. On 20.2.2020, PW1 stood surety for the appellant, who is her brother. The court was informed that the minor had given birth and was still at PGH Nyeri. On 6.1.2.2021, Dr. Symon Musau testified that the minor had mental issues; she was said to be illogical in space and time, with poor attention, concentration, and judgment. She was of abnormal mental status, with schizophrenia. The recommendations were that she continue with treatment, but could not testify normally. On cross-examination, he stated that the minor is unlikely to be coherent in her thoughts but was unlikely to be violent.

16. On application of the learned prosecution counsel, on the strength of the evidence of PW1, she was declared a vulnerable person under section 31(1)(c) of the *Sexual Offences Act*. The court carried out voire dire first to confirm this. It was then applied that MM be the guardian. This is a very unenviable position in which she surely stood by her brother and was then placed under a legal obligation to protect her niece.

17. MM was then sworn in as PW2, as an intermediary and guardian. She then posed questions to the minor. Who confirmed her residence, and he stated that she stayed with a male called Luke. She said that she used to stay with her father before. They used to sleep in the same room with their father. He stated that the minor was conceived in the father's place with one Thumbi, who cuts grass. She stated that it was not the father who made her pregnant. She stated that the appellant knew the minor's father.

18. On cross-examination, she stated that she has six brothers. She further stated that the child's father stayed at [Particulars Withheld] village. It was her evidence that the father and mother stayed together in Mweiga.

19. PW3 was Simon Wanjohi, a village elder of [Particulars Withheld] village, who is also a mason. He knew the appellant, his wife, W, and stated that she knew the complainant and appellant as villagers in his village. He received information from Margaret Hinga that the appellant had defiled the minor, and reported to the police, and the appellant was arrested that very day. On cross-examination, he stated that he reported that the father had impregnated the minor. His report was in his official capacity as a village elder. He stated that the appellant and the wife were separated for a very long time.

20. PW4 was JN. The record wrongly indicates as PW3, (there are two PW2s on the record). She stated that she stays in [Particulars Withheld] village. In 2019, she was staying in that village. She knew the

complainant. She is also a village elder. He had known the complainant since 2007. The complaint was stayed with the father and mother, who later separated. She noted that the father was the appellant. She said that she was informed that the minor was pregnant. She reported to the assistant chief and later to the police. She identified the appellant as the father in the dock. There was no cross-examination.

21. PW4, JW, testified that he stayed in Nyeri Municipality. He knew the complainant as the niece. He stated that on 5.11.2019, the complainant was staying with the father. On 7.11.2019, he saw the complainant pregnant. When she went to his home, he asked his wife to confirm whether the complaint was pregnant. He asked his wife, HK, to liaise with his sister, MM (PW2). He did not discuss anything with the minor. He used to stay with the Appellant. The complainant's mother is separated from the appellant. There was no cross-examination.

22. PW6 was John G Ndungu, a neighbour who stays at [Particulars Withheld] village. He stated that he knew the complaint and the father. He has not seen his wife (Mama Caro) go to church. He stated that they reported the issue. [Part of the proceedings are missing as the evidence is not complete). There was no cross-examination.

23. PW7 was Christine Mutindi, a government analyst. She holds a bachelor's degree in chemistry and a master's in chemistry from the University of Nairobi. She received saliva samples from the appellant, the complainant, and the minor's son. He found that the appellant was the father of both the complainant and the child of the complaint. In other words, the appellant was both the father and grandfather of the minor's son. On cross-examination by the accused. It is noted that when the government analyst came to court, the advocate who was present withdrew from acting, and the appellant opted to proceed.

24. PW8 was PC Stella Nthenya Peter of Ndururumo police station. She recalled that on 7.11.2019, she was at the police post when Simon Munene (PW3) reported that a person had defiled a daughter. She recorded the report, and on 8.11.2019, colleagues went and arrested the appellant but did not find the complainant. They went to Mweiga at her auntie's place and found het. they took the minor to PGH for examination and was found to be pregnant. On 11.11.2019, the appellant was arraigned in court. At that time the pregnancy was 29 weeks.

25. The minor, who was 17 years old, was mentally challenged. DNA samples were taken and confirmed that the appellant was the father of the new minor and the complainant minor. They found that the complainant was staying alone with the minor while the mother was in Nyahururu. The minor was born on 5.5.2001, and, according to the birth certificate, the father was CTN.

26. On cross-examination, the witness stated that it is the appellant who committed the offence. He stated that the complainant was the appellant's daughter. he denied ever seeking a bribe from the appellant.

27. PW9 was Dr Simon Kioge Kariuki a medical officer from Nyeri PGH. He holds a Bachelor of Medicine and Bachelor of Surgery (MBChB). He produced the PRC and P3 on behalf of Dr William Muriuki who was on a two-year study leave. The PRC was filled by Silas Mwangi. Their handwritings and signatures were known to the witness as they worked together for four years.

28. They found out, on examination on 9.11.2019, that the hymen was old broken. the minor was recorded to be 17 years. the PRC form was filled first. There was no cross-examination.

29. The appellant was found to have a case to answer. The court complied with section 211 of the Criminal Procedure Code. The appellant opted to give sworn testimony and call two witnesses. His evidence was so short that I can only do justice by reproducing all of it:

> My name is CTN. I am from Muthua-înî. I am a farmer. I have never defiled my daughter. I was framed of the offence.

30. On cross-examination, he stated that the complainant was his daughter. The daughter was born on 5.5.2000. He stated that he used to stay with her and other children, including Maxwell. In 2019, she was 15. The complaint was that the complainant used to spend time with his brother, but he was in his own room. He knew the complainant got pregnant and gave birth. He went for a DNA test, and the test showed that he was the father of the minor's child.

31. The court then reserved a judgment date, wherein judgment was duly delivered. The court set out three issues, which he returned all in favour of the prosecution. The minor was 17 years old, a child of the appellant, and the appellant penetrated the complainant's vagina, and she conceived a child and gave birth. The case was found to be proved beyond a reasonable doubt.

32. The appellant, upon mitigation and the court finding him to be a first offender, was sentenced to 40 years' imprisonment. In mitigation, he stated that he did not commit the offence.

Analysis

33. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence 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.

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

> An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was

> some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.

35. 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.

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

> The accused, during a criminal prosecution, has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

37. Unlike the court below, the test for incest on the part of a male person is not three but two.

    a. Indecent act or an act which causes penetration with a female person.

    b. To his knowledge, the female person is his daughter, granddaughter, sister, mother, niece, aunt, or grandmother.

38. Once the appellant or accused has been found guilty, then the court does a second test for the purpose of sentencing, that is:

    a. Where it is proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life.

    b. Where the female person is not under 18 years, then, a convict is liable to imprisonment for a term of not less than ten years:

39. Age is not relevant when it comes to the proof of the offence. This is because the act expressly states that it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person. It is a strict liability offence.

40. The two elements and the supplementary question of age were addressed by the court of appeal[Asike –Makhandia, Musinga & Gatembu, JJ.A] in the case of SS v Republic [2021] KECA 450 (KLR) as follows:

> The charge has three components namely, sex between the perpetrator and the victim, the relationship between the two, and the age of the victim for purposes of sentencing. This in essence means that the respondent was under a duty to prove both penetration and the relationship between the appellant and DS in order to prove the offence of incest.

41. In fact, it is equally immaterial whether there is penetration or an indecent act. The offence is complete when either is committed. The differentiation in sections 3, 8 and 11A of the *sexual offences act* is not applicable to the offence of incest.

42. Having settled the legal imbroglio, the next question is whether the appellant knew that the minor was his daughter. This he freely admitted in court. Further, the minor was staying with him as a daughter. It is actually irrelevant whether she was a daughter or a stepdaughter. In this case, the science itself showed that she was a biological daughter. The evidence regarding the relationship between the minor and the appellant was thus proved beyond a reasonable doubt.

43. The next question is whether there was indeed defilement. The minor was shown in her own evidence and the evidence of PW1 to be a person with severe schizophrenia. She was not coherent. She, however, said she became pregnant at home. Given her mental incapacity, she was prone to suggestibility. It was surprising that she could say that it is the father who knew the man who impregnated her. However, in the defense, the appellant tried to shift the blame to his own hapless son, Maxwell. However, it was noted that the investigating officer did a stellar job. He placed every piece together with meticulous military precision.

44. The appellant did not question the DNA results. The same showed him as the father of not only the complainant but also the complainant's child. Nothing was impeaching the scientific method of examination. The chain of custody was not questioned. The results excluded everyone other than the appellant.

45. This Court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and 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."

46. 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."

47. 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:-
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> > "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."

48. The court below was satisfied with the expert witness's report on the DNA results. This court has perused the same and is satisfied that they accurately reflect the position. The pregnancy belonged to no one other than the appellant. In the case of WLN v Republic [2021] KEHC 5311 (KLR), F. M. GIKONYO, J., addressed the question of positive DNA results are proof of penetration as follows:

> In cases of defilement, the fact that the victim became pregnant as a result of sexual intercourse with a child is proof of penetration and identity of the culprit. Except, it is a different thing altogether if the pregnancy was conceived through other modern fertilization and conception methods. Of great evidentiary importance, however, is that in criminal cases, defilement or rape, DNA result that proves a person to be the biological father of a child conceived through defilement is proof of penetration by the person so found to be the biological father of the child. I wish, however, to disabuse the appellant of the notion that, because he was excluded by DNA results, he did not defile the victim. He may have caused penetration of the child at other time which did not result into a pregnancy and so not covered by the DNA result. Nonetheless, such must be proved through other evidence as required.

49. The only defence was that he was framed. It is not clear who could blame him and cause his sperm to enter the vagina of his daughter and impregnate her.

50. In any case, even circumstantial evidence, places and points irresistibly to the appellant as the person who impregnated his own daughter. Circumstantial evidence must be inconsistent with the accused's innocence. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, [P. KIHARA KARIUKI, PCA, M'INOTI & MURGOR, JJ.A] the 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."

51. The court of appeal [RO Kwach, AA Lakha & EO O'Kubasu, JJA] expounded the position on circumstantial evidence in the Locus classicus decision of Sawe v Republic [2003] KECA 182 (KLR), thus:

> " 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 co-existing 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 remains with the prosecution. It is a burden, which never shifts to the party accused."

52. The minor, even in her mental status, knew that she was living in the same room with her father. This was not questioned in cross-examination. He suggested that some grass cutter could be responsible. However, in his defence, he blamed his son, maxwell. The DNA results show that there must have been penetration by the father of the child, that is, the appellant's grandson and son CT. I dismissed as far-fetched the idea that the court used the defence evidence to fill gaps. There were no gaps in the prosecution's case to be filled. His own evidence squarely places him as a culprit. The court cannot ignore admissions made in cross-examination. In any case, they were superfluous as the scientific evidence had already nailed him.

53. The appellant raised, in the memorandum of appeal, defects under section 214 of the Criminal Procedure Code. the said section provides as follows:

(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended

for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

54. I cannot see any defect in the charge. The charge, as it is, was answered correctly, and the appellant responded not only to the charges but also defended himself. There is no error. The allegation is dismissed. In the circumstances, I find that the conviction was proper and there was no error of law or fact.

55. On sentence, the jurisdiction of this court is circumscribed. This is because sentencing is a discretion. The appellate court can only differ with the lower court on two aspects. First, if the sentence is illegal, and secondly, if the discretion was not exercised judiciously, that is, this Court will normally not interfere with the exercise of discretion by the court appealed from unless it is demonstrated that the court acted on a wrong principle; ignored material factors, took into account irrelevant considerations, in the case of Gacheru, Bernard Kimani v Republic Criminal Appeal 188 of 2000; [2002] KECA 94 (KLR), the court of appeal addressed the issue of appeal on sentence as follows:

> It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

56. The court of appeal in the case of Wanjema v. R. (1971) EA 493, 494 that:-

> " An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this Court's interference with it on each of these grounds. No account was taken, as it should have been, of the fact that the appellant pleaded guilty: Skone (1967), 51 Cr. App. R. 165 and Godfrey (1967), 51 Cr. App. R. 449.

57. The duty of the appellate court is set out in section 382 of the Criminal Procedure Code as follows:

> 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.

58. There were no defects in the charge raised earlier. The sentence of 40 years was imposed because the court found, as a fact, that the appellant offered no mitigation; he denied committing the offence. The court rightly found that the appellant offered no mitigation and was not remorseful. Sadly, the appellant decided to make his own daughter both a daughter and the mother's co-wife. The child born of the minor complainant now has the complaint as a mother and a sister. This scenario makes the case one that should be frowned upon.

59. The question that will determine whether the sentence of 40 years is harsh or not is the age of the minor, the heinousness of the crime, the vulnerability of the complainant, the effect of the crime, the degree of culpability, harm, aggravating factors, and mitigating factors. The sentencing guidelines, 2023 provide as follows:

4.5.1 In determining the appropriate sentence, courts must assess a number of issues starting with the degree of both culpability and harm.

4.5.2 The assessment of culpability will be based on evidence of the crime provided through testimony where a trial has been conducted, or, where a plea is entered, through the prosecution summary of facts. Aggravating and mitigating features surrounding the offence may be advanced by the prosecution and the accused person (or his/her representative).

4.5.3 Where an offence is committed by more than one offender a court shall ascertain the culpability of each of the offenders involved and render individual sentences commensurate to their involvement in the offence.

4.5.4 The assessment of harm may be based on testimony, or the summary of facts presented and also by a victim impact statement where that has been obtained.

4.5.5 Mitigating factors refers to any fact or circumstance that lessens the severity or culpability of a criminal act and can also include the personal circumstances of the offender

60. The victim was a minor who was suffering from mental disability, hence suffering from multiple disabilities. The appellant was the person who was standing in a position of trust, and the offence was in breach or abuse of a position of trust. The harm was so high that the minor became pregnant, and a mother with mental disability and a minor is raising a boy who is now in a more vulnerable position. There were no mitigating circumstances. The appellant did not plead guilty and went through the trial, including DNA tests. The appellant thus deserved the highest sentence available. In Kilwake v Republic [2019] KECA 5 (KLR), the court of appeal [DK Musinga, K M'Inoti & AK Murgor, JJA] addressed the question of factors to be considered as follows:

> The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence, to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer

of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

61. The next question will be the age of the complainant so that the court can consider the effect of the sentence. The medical evidence and birth certificate showed that the minor was 17 years. The appellant was the father. He tried to show that the minor was 18 in 2019. He has personal knowledge of the minor's age as 17 years. In any case, the same minor was suffering from mental incapacity. Section 111 of the *evidence act* provides as follows:

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

62. The state was under duty to prove that the complainant was under age, otherwise the sentence as an adult comes in. The age of the minor is specifically within the knowledge of the father, the appellant herein. If he wished to controvert the evidence by the state that the minor was over 18, then the burden to do so was with him. The minor was 29 weeks pregnant in November, getting the pregnancy to be in April/May. The minor was barely 17 years. The appellant failed to prove that the minor was born on 5.5.2000, as alleged. The date provided by the statement of 5.5.2001, therefore, suffices. The court finds that the minor was provided to be 17 years. Therefore, the question of being liable to life imprisonment arises.

63. The appellant was thus liable for a life sentence. What does liable to life sentence mean? in Charo Ngumbao Gugudu v Republic [2011] KECA 387 (KLR), the court of appeal [GICHERU, C.J., O'KUBASU & WAKI, JJ.A, addressed the question of liable to life imprisonment as follows:

Section 234 of the Penal Code under which the appellant was charged and convicted, provided:

"Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life with or without corporal punishment".

From the foregoing, it is clear that maximum sentence under that section was life imprisonment with or without corporal punishment. It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged.

64. Therefore, the only positive aspect working for the appellant is that there was no evidence of excessive force, and he was a first offender. A life sentence could still have sufficed. However, the court below did not err in giving a slightly more lenient sentence. The appeal on the sentence is therefore dismissed.

65. Nevertheless, the court notes that the court was silent on the commencement date of the sentence. The court is obligated to take into account days in custody. Section 333(2) of the Criminal Procedure Code provides as follows:

> Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

66. The appellant was arrested on 10.11.2019 and remained in custody until 27.12.2019, when he was released on bond. He was a free man until 27.11.2023, when he was convicted. Therefore, the 40 years should be less than the 48 days from 10.11.2019, the date of arrest to 27.12.2019, the date of release on bond.

Determination

67. In the circumstances, I make the following orders: -

a. The Appeal on both conviction and sentence is not merited and is accordingly dismissed.

b. The sentence of 40 years should commence on the date of arrest, 10.11.2019, and exclude the period between 27.12.2019 and the date of conviction on 27.11.2023.

c. 14 days Right of appeal, explained.

d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF JANUARY THE YEAR OF OUR LORD 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