REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. E002 OF 2023

JACOB KIBUNGEI MAIYO….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Appeal against the Judgment of Hon. E. Kigen-PM, delivered on 13/01/2023 in Eldoret Chief Magistrate's Court Criminal - Sexual Offences – Case No. E040 of 2018*)

JUDGMENT

1. The Appellant was charged in the said criminal case with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act, 2006**. The particulars were that on diverse dates between the 8th and 10th of February 2018 at **[……...]** Village in Kapseret South Sub-County, within Uasin Gishu County, he unlawfully caused his penis to penetrate the vagina of **MC**, a girl aged 3½ years. The Appellant also faced the alternative offence of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. It was alleged that on the same date, time and place, he unlawfully and indecently caused his penis to come into contact with the vagina of the same girl aged 3 ½ years.

2. The Appellant pleaded not guilty to the charges, and the case proceeded to full trial, in which the Prosecution called 4 witnesses. At the close of the Prosecution case, the trial Court found the Appellant as having a case to answer, and put him on his defence. He then gave an unsworn statement and called no other witnesses.

3. By the said Judgment delivered on 13/01/2023, the Appellant was convicted on the main charge, and sentenced to life imprisonment. Dissatisfied with the decision, the Appellant filed this Appeal on 20/01/2023 against both conviction and sentence. He listed the following 7 grounds that:

i) The Learned trial Magistrate erred in both law and facts in failing to consider the discrepancies on age assessment of the victim were an afterthought.

ii) The Learned trial Magistrate erred in both law and facts by basing her judgment in medical report that was not conclusive and did not satisfy the provisions of the law.

iii) **That the learned Magistrate erred both in law and fact by failing to observe that the witness's evidence was full of inconsistencies and was uncorroborated.**

iv) **That the learned trial Magistrate erred in both law and facts by failing to invoke the findings of Petition No. E017 of 2021 at Machakos by Justice Odunga on maximum-minimum mandatory sexual offences sentences and Courts' discretion on determining cases on individual mitigation circumstances.**

v) **That the learned Magistrate failed both in law and facts when she failed to grant the Appellant herein a fair trial.**

vi) **That the trial learned Magistrate erred in both law and facts when she shifted the burden of proof to the Appellant person instead of the prosecution.**

vii) **That more grounds to be adduced at the hearing of the appeal.**

4. I will now recount the testimonies and/or evidence of the witnesses before the trial Court.

5. **PW1** was **Dr. Taban Tokosan** from the **Moi Teaching and Referral Hospital** (**MTRH**) who produced the P3 Form on behalf of **Dr. Temet** after satisfying the Court that she had worked with **Dr. Temet** for 1 year and was conversant with her handwriting and signature. **PW1** testified that according to the P3 Form, the minor, **MC**, reported that her step-grandfather had defiled her several times and threatened to harm her if she disclosed the same to anyone. She testified that examination revealed that the minor had redness on her labia minora and labia majora, and also oedema and old scars at the posterior fourchette, that urinalysis done revealed pus cells, and high vaginal swab showed the presence of epithelial cells. She stated that the minor was 10 years old and stated that she was defiled by one "**Jacob"** on 6/02/2018 at 4.00 pm., and that the assailant had threatened to kill her if she disclosed the incident to anyone. **PW1** testified further that the minor was anxious during the examination, and that what was used to defile her minor was a blunt object. She testified further that there were healed tears at position 6 o'clock of the hymen, and at the posterior fourchette, and that the findings were consistent with defilement.

6. **PW2** was the minor (victim) **MJ**. Due to her age, she was taken through a ***voire dire*** examination upon which the trial Magistrate found that she understood the effect of taking an oath and directed that she affirms, which she then did. She testified that she was a PP2 pupil at a Primary School but did not know her age although she alluded that she was born around February 2018. She testified the Appellant in the dock as "**Jacob"**, whom she stated,

threatened to chop her into pieces and throw her remains to River Sosiani. She testified that the Appellant removed his clothes and also hers after taking her to his house, and inserted "his ***dudu"***, namely, "the thing he uses to urinate" into "her thing that she uses to urinate". She reiterated that the Appellant was known to her, as he used to stay near their house, and stated that he defiled her twice. In cross-examination, she stated that the Appellant removed her panty and defiled her twice in the house, at around 4.00 pm, and that she cried, and one "**July"** came. She stated further that the Appellant pulled her through a barbed wire fence, and she sustained some injuries as a result.

7. **PW3** was **JJ**, also a minor. Due to her age, she, too, was taken through a ***voire dire*** examination and the trial Magistrate, upon satisfying herself that the witness understood the effect of taking an oath, directed that she, too, affirms, which she then did by affirming. **PW3** then stated that she was born on 3/12/2007 and referred to her Certificate of Birth. She testified that on 6/2/2018 she arrived home where she lived with her mother and **PW2** at about 4.00 p.m. She stated that when was removing her uniform, the Appellant appeared and removed her panty, laid her down, closed her eyes, then unzipped his penis and inserted it into her vagina. She stated that she did not scream as the Appellant threatened to kill her and dump her body at River Sosiani, and that he left after the act. She testified that later, her step-mother took her to **MTRH**, and thereafter to Yamumbi Police Post where they reported the matter. In the end, she stated that the Appellant, whom she referred to as "**Jacob"**, was known to her, as he was a neighbour. In cross-examination, she stated that the Appellant removed her panty, dragged her, and used a rag to close her mouth, and as such, she could not scream. In re-examination, she reiterated that the Appellant threatened to kill her if she dared to scream.

8. **PW4** was **Police Constable Moffatt Adhola** attached to Yamumbi Police Station, the Investigating Officer in this matter. He stated that the matter was recorded as OB/12/2/2018, after being reported by **PW1's** mother, who stated that she had been informed on 10/07/2018 that **PW1**, a pupil aged 3 ½ years, and who was staying with her grandmother in Kipkenyo, "had something wrong with her", and that upon **PW1** being taken to hospital, they were informed that she had been defiled. **PW4** testified that the mother then identified the perpetrator as one **MM**, and informed him that **PW1** had also disclosed that the acts had taken place on several occasions.

9. At this juncture, the Prosecutor informed the Court that she had realized that the Certificate of Birth referred to by **PW1** and marked was a wrong one. He thus paid for time to obtain

the correct Certificate, and should he fail to do so, to instead, arrange for an age assessment test to be conducted on **PW1**, and then recall **PW1** to testify on it. The application was allowed but cross-examination of **PW4** proceeded nonetheless, in the meantime.

10. In cross-examination, **PW4** agreed that he was neither he was the arresting nor the investigating officer, since the relevant officer or officers had since been transferred.

11. **PW4**, when he returned in respect to the issue of **PW1's** Certificate of Birth or Age Assessment, reiterated that he took over the matter as Investigating Officer from his colleague, Officer **Samson Bowen**, who had since been transferred. He also stated that **PW1's** mother had been at large for a long time, and he had failed to trace her as she had parted ways with **PW1's** father. With this turn of events, the Prosecutor closed her case.

12. As aforesaid, at the close of the Prosecution case, the trial Court found the Appellant as having a case to answer and put him on his defence. The Appellant then, in his defence, gave unsworn statement, and did not call any other witness.

13. The Appellant, then testifying as **DW1**, denied committing the offence. He stated that he had been living with **PW1's** mother after her husband chased her way, which situation made the husband bitter, and as a result, threatened the Appellant with "dire consequences". He therefore claimed that **PW1's** mother's husband had framed him for the charge herein.

14. As aforesaid, the trial Magistrate found the Appellant guilty of the main offence, and sentenced him to life imprisonment.

15. The Appeal was then canvassed by way of written Submissions. Both parties' Submissions are dated 3/06/2025.

Appellant's Submissions

16. The Appellant filed handwritten Submissions in which he urged that the Prosecution witness's evidence was contradictory, and that the Prosecution evidence was a negation of his right to a fair trial under **Article 50** of the **Constitution**. He also contended that the evidence on record and the information provided in the Charge Sheet were different in that the name of the complainant in the Charge Sheet and the name given by the Investigation Officer (**PW4**), and that appearing in the P3 Form differed. He also submitted that in the P3 Form, the indicated history of the victim was that she was defiled by her step-grandfather

which, in his view, negated **PW2's** testimony that the assailant was one "**Jacob**", a neighbour. He also observed that in cross-examination, **PW2** referred to one "**Joseph**". He faulted the trial Court for failing to note that the investigations were fundamentally flawed so as to render the Prosecution case unsafe. He cited the case of **Okeno vs Republic (1972) EA 32**, and urged that there were discrepancies among the witnesses and the investigating officer's failure to visit the scene. He also observed that the perpetrator was identified by the complainant as "**Michael Maiyo"** which was not his name. He also averred that while **PW1** claimed that she was pulled through a barbed wire, the P3 Form indicated that she was in fairly good condition, and no injuries were noted on her body, and further, she was also walking normally. In his his view therefore, there was no evidence of penetration. He also contended that the trial Court failed to consider his defence, and was biased towards him.

Respondent's Submissions

17. **Prosecution Counsel Ms. Claire Muriithi**, in responding to the Appellant's averment that his right to fair trial was infringed, cited the provisions of **Article 50(2)** of the **Constitution** and pointed out that the Appellant never raised any such issue at the trial. On the issue of an accused person being assigned an Advocate by the State, she submitted the same is not absolute, and is only a requirement where substantial injustice may occur, and that in this case, the Appellant was not charged with a capital offence attracting the death penalty, which is the only situation that necessitates mandatory assignment of legal representation. She urged that even though the trial Court did not inform the Appellant of his right to legal representation, such failure was not fatal or prejudicial to the Appellant's case as the record shows that he understood the charges brought against him, he competently cross-examined the Prosecution witnesses, and put up an appropriate defence.

18. On proof of the defilement charge, Counsel listed the ingredients of the offence, as restated in the case of **George Opondo Olunga v Republic [2016] eKLR**. In respect to the ingredient of "***age***", she urged that the age of a victim can be proven in several ways, and cited the Ugandan Court of Appeal case of **Francis Omuroni Vs Uganda, Criminal Appeal No. 2 of 2000**. She submitted that in this case, **PW1**, the doctor, produced the P3 Form which gave the estimated age of the complainant as 3 ½ years. She however agreed that no Certificate of Birth or Baptismal Card was produced in prove the complainant's age, and no Age Assessment report was produced despite the trial Court allowing the same to be conducted. She however urged that this omission does not mean that the complainant's age was not proven, since observation and common sense assisted the Court in determining that the complainant was a minor, with the estimated age of 3 ½ years. Regarding "***penetration***",

Counsel submitted that **PW2's** testimony was corroborated by that of **PW1**, who presented the medical evidence. On the issue of "***identification***", she cited the Court of Appeal the case of **Peter Mwanzia vs The Republic [2008] eKLR**, and urged that the Appellant was a person known to the complainant as he was a neighbour, and that therefore, identification of the Appellant was not only by way of dock identification, but also by recognition. Regarding the defence, she termed it a mere denial incapable of dispelling the overwhelming evidence tendered by the Prosecution. In respect to sentence, she cited **Section 8(2)** of the **Sexual Offences Act**, and urged that the issue of minimum and mandatory' sentences has since been settled in the recent decision by the Supreme Court in the case **Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR)**.

Determination

19. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions, bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses. (See **Okeno vs. Republic [1972] E.A 32)**.

20. Before I proceed further, I must say that it is not clear to me what the role of **PW3** as a witness was in the case. This is because her testimony was that she, too, was a victim of a similar but separate offence allegedly committed by the same Appellant. This case was not however about **PW3's** defilement, but about **PW1's**. **PW3's** defilement was therefore a separate case, which I believe was prosecuted separately.

21. In respect to the issues that arise for determination in this matter, the same are evidently the following:

a) **Whether the defilement charge against the Appellant was proved beyond reasonable doubt.**

b) **Whether the sentence of life imprisonment imposed against the Appellant was justified.**

22. In answering the question whether the defilement charge against the Appellant was proved, I must restate that for the offence of defilement to be established, 3 ingredients must be proved, namely, the age of the victim, penetration and positive identification of the offender (see the case of **George Opondo Olunga v Republic [2016] eKLR)**, and also the case of **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013**.

23. In a charge of defilement, the age of the victim is important for two reasons: **(i)** defilement is a sexual offence against a child; and **(ii)** age of the child is also used as an aggravating factor for purposes of determining the sentence to be imposed, the younger the child the more severe the sentence.

24. In respect to the mode of proving the age of a minor who is a victim of a sexual offence, the Court of Appeal, in the case of **Peter v Republic [2024] KECA 1124 [KLR]**, stated as follows:

> **"28. From the foregoing, it remains settled that the age of the victim can be proved not only by way of documentary evidence such as birth certificate, baptism card or an age assessment report, but also by way of oral evidence of the child who is considered sufficiently intelligent or even the evidence of the parents or guardians."**

25. Similarly, the Court of Appeal, in the case of **Edwin Nyambogo Onsongo v Republic [2016] eKLR**, stated that:

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

26. Further, in the Ugandan case of **Francis Omuroni v Uganda, Court of Appeal; Criminal Appeal No. 2 of 2000**, the following was stated:

> "**In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense ..."**

27. Section 8(1) and **8(2)** of the **Sexual Offences Act**, under which the Appellant was charged then provide as follows, respectively:

> **"8. (1) A person who commits an act which causes penetration with a <u>child</u> is guilty of an offence termed defilement."**
>
> **"8. (2) A person who commits an offence of defilement with a child aged <u>eleven years or less</u> shall upon conviction be sentenced to imprisonment for life."**

28. In this case, the Charge Sheet indicates the victim's age as 3 ½ years, and date of defilement as "***between 8th and 10th February 2018***". The P3 Form produced by the doctor (**PW1**) also estimated the victim's age at 3 ½ years old. No Certificate of Birth, or any other document such as a Baptismal Certificate, or even an Age Assessment Report was however produced. The victim (**PW2**), on her part, is recorded to have stated that she was born in February 2018, which is illogical since that is the same date of the alleged defilement. Either **PW1** did not understand the question put to her or she was misquoted by the trial Magistrate. I also notice that the doctor, **PW1**, is recorded to have stated that the minor was 10 years old although this is contradicted by the same P3 Form she was reading from. The victim's mother, who could have assisted in ascertaining the victim's age, is said to have become untraceable after she parted ways with the victim's father. Under these circumstances, the trial Magistrate, in her own assessment, upon observing the minor, made the conclusion that, obviously, the victim could not have been older than 11 years but was above 3 ½ years.

29. I agree with the trial Magistrate's finding that the victim's age was proved. This is because for purposes of **Section 8(1)**, in respect to age of the victim, the major fact that the Prosecution needs to prove is that the victim was less than 18 years old, and thus a minor. Certainly, in this case, the age of the victim having been estimated at 3 ½ years, and the victim having been described as a PP2 pupil, even without a Certificate of Birth or any other such formal document, the trial Magistrate cannot be faulted, after observing the victim, that she could not have been above 18 years of age. That the vitim was a minor should therefore not be an issue.

30. It is then at sentencing that the issue of the age-category, below 18 years, that the minor belonged would become relevant. In this case, what was to be proved for purposes of sentencing, was that the minor was "***eleven years or less*".** Again, I do not imagine that anyone could fail to notice the obvious difference between a child of 11 years and one of 3 ½ years. The difference is too huge that I do not honestly believe the Appellant would challenge the finding that the child was obviously less than 11 years old. Even from a perusal of the ***voire dire*** examination, and even her manner of testifying, one easily

concludes that she was a child of tender age, nowhere near the age of "***eleven years***". She was obviously way below the age of 11 years.

31. For the above reasons, I decline to fault the trial Magistrate on her finding that the age of the victim was proved.

32. In respect to "***penetration***", **Section 2(1**) of the **Sexual Offences Act**, defines the term as:

> **"The partial or complete insertion of the genital organs of a person into the genital organ of another person."**

33. In regard thereto, the Court of Appeal, in the case of **Mark Oiruri Mose v R (2013 eKLR,** guided as follows:

> **"….. In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence if 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**."

34. In this case, **PW4** the minor-victim, testified that the Appellant removed his clothes and also hers after taking her to his house, and inserted "his ***dudu"***, namely, "***the thing he uses to urinate***" into "***her thing that she uses to urinate***", and that the Appellant defiled her twice. In cross-examination, she stated that the Appellant removed her panty and defiled her at around 4.00 pm, and that she cried. She stated further that the Appellant pulled her through a barbed wire fence, and she sustained some injuries as a result. Reading through the minor's testimony, I find her to have been quite cogent and firm, and her testimony was also not shaken or contradicted in cross-examination. To me, she sounded to be a credible and believable witness.

35. I must also say that in a charge of defilement, the victim's testimony may require to be corroborated. In this case however, the victim-minor, having given sworn testimony, the need for corroboration may not even arise. In that regard, I cite the case of **Oloo v R (2009) KLR**, in which the Court of Appeal stated the following:

> **"In our view, corroboration of evidence of a child of tender years is only necessary where such a child gives child unsworn evidence. (See Johnson Muiruri v Republic (1983) KLR) …..**

> **…….. in law evidence of a child given on oath after *voire dire* examination requires no corroboration in law but the court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration of it".**

36. In any event, in this case, corroboration on penetration was provided by the medical evidence supplied by **PW1**, **Dr. Taban Tokosan**, who produced the P3 Form on behalf of her unavailable colleague. She testified that according to the P3 Form, the minor reported that her step-grandfather had defiled her several times and threatened to harm her if she disclosed the same to anyone. **PW1** stated that examination revealed that the minor had redness on her labia minora and labia majora, and also oedema and old scars at the posterior fourchette, that urinalysis conducted revealed pus cells, and high vaginal swab showed the presence of epithelial cells. She testified further that the minor was anxious during the examination, that what was used to defile the minor was a blunt object, and that she had healed tears at position 6 o'clock of the hymen, and at the posterior fourchette. In the end, the P3 Form concludes that the findings were consistent with defilement.

37. Regarding **PW2's** use of the terms "***the thing he uses to urinate***" and "***her thing that she uses to urinate***", the Court of Appeal, in the case of **Muganga Chilejo Saha v Republic [2017] eKLR**, acknowledged that these are acceptable descriptions of defilement especially where penetration is established. In accepting that in Kenya, the society has adopted such terms as euphemism to mean the phrases generally used by children, and even adults, to describe sexual acts, the Court of Appeal stated as follows:

> **"Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like,** *"alinifanyia tabia mbaya***",** *(IE V R, Kapenguria H.C Cr. Case No. 11 of 2016)*, *"he pricked me with a thorn from the front part of this body."*, *(Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015)*, *"he used his thing for peeing"*, *(David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015)*, **"he inserted his** *"dudu"* **into my** *"mapaja"*, *(Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016)*, *"he used his munyunyu"*, *(Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011)*, **as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are**

> **inappropriate, technical and unlikely to be used by them in their testimony. See** *A M V R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015***, among several others. Trial courts should record as nearly as possible what the child says happened to him or her. (emphasis added).”**

38. In view of the foregoing matters, there being no evidence, medical or otherwise, to the contrary, I have no material before me to justify departing from the medical evidence produced by the doctor. Accordingly, I find no good grounds to fault the trial Magistrate for reaching the finding that there was sufficient corroboration of the victim’s testimony that penetration did occur in this case, and that she was defiled.

39. On the issue of “***identification***”, the Court of Appeal in the case of **Cleophas Wamunga v Republic [1989] eKLR** stated the following:

> “**Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the Appellant which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.**

40. In this case, the P3 Form indicated that the minor was defiled by a person known to her, and who it then referred to as her “step-grandfather”. The minor **PW2**, on her part, testified that the Appellant was a person known to her as he used to stay close to their house, and she referred to him by his name of “**Jacob**”. The Appellant, in his defence, disclosed that he had been living with the minor’s mother after her husband chased her way, which matter made the husband become bitter, and as a result, threatened the Appellant with “dire consequences”. He therefore claimed that it is the jilted husband who framed him for the charge herein. The Appellant therefore basically admitted knowing the minor’s family. Whatever the nature of their acquittance, it is evident that the two were closely known to each other.

41. The Appellant correctly pointed out that the Charge Sheet indicates his name as “***Jacob Kibungei Maiyo***”, but in some portions of the proceedings, the minor is recorded to have referred to her assailant as “***Joseph***”, and the Investigating Officer, **PW4**, is also recorded to have referred to the assailant as “***Michael Maiyo***”. In the Appellant’s view, these

discrepancies amounted to contradictions and inconsistencies that should be interpreted in his favour.

42. In respect to contradiction and inconsistencies in testimonies, the Court of Appeal, in the case of **Philip Nzaka Watu v Republic [2016] eKLR** guided that:

> **"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing in the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.**
>
> **In *Dickson Elai Nsamba Shapwata & Another v The Republic*, CR APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:**
>
> > ***"In evaluating discrepancies, contradictions and omissions, it is undesirable for a Court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."***

43. Applying the above test, I do not find the slight discrepancies in the name of the assailant, to amount to material contradictions that could dispel the Prosecution evidence. The few discrepancies pointed out were isolated and a one-off". The record, read as a whole, and read in proper context, is clear that the name of the assailant was alleged to be "***Jacob Kimaiyo***". I therefore find this to be a case of "***recognition***", rather than identification of a stranger. Such evidence of "***recognition***" is clearly more reliable and believable in "***identification***". In respect thereto, in the case of **Reuben Tabu Anjononi & 2 Others v Republic [1980] eKLR**, the Court of Appeal guided as follows:

> **"……. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of**

the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* **(unreported).**

We consider that in the present case the recognition of the appellants by Wanyoni and Joice to whom they were previously well known personally, the first appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyoni reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three appellants to the police as the robbers who had robbed him.

We are satisfied that there was no mistake as to the identity of the three appellants and they were properly found guilty of the offence with which they were charged in count 1."

44. In light of the foregoing, I am also satisfied that the trial Magistrate correctly found that the Appellant had been positively identified. This ground of Appeal therefore also fails.

45. As aforesaid, corroboration of the testimony of a minor may be required in some circumstances. That the law requires corroboration of testimony by minors as sole or single witnesses is clear from **Section 124** of the **Evidence Act**. However, there is the proviso to that very Section to the effect that, in cases of sexual offences, there need not be such corroboration if the trial Court believed that the minor-victim told the truth and recorded its reasons. The section and the proviso provide as follows:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the Appellant shall not be liable to be convicted on such evidence unless it is corroborated by other 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 Appellant person, if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

46. From the foregoing, it is clear that the proviso to **Section 124** of the **Evidence Act** allows the Court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the Prosecution need not call all witnesses who may have information on a fact. Although, in this case, there were no other eye-witness to the incident, and the trial Court therefore relied on single witness evidence, save for the corroborating medical evidence on penetration, the trial Magistrate having believed the minor, he cannot be faulted.

47. Regarding the sentence of life imprisonment, the applicable principles in re-considering sentence at the appeal stage, were restated by the Court of Appeal in the case of **Bernard Kimani Gacheru v Republic [2002] eKLR**, in the following terms:

> **"It is now settled law, following several authorities by this Court and the high Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, the 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 the wrong material, or acted on the 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".**

48. As earlier observed **Section 8(2)** of the **Sexual Offences Act** provides as follows:

> **"A person who commits an offence of defilement with a child aged eleven years or less <u>shall upon conviction be sentenced to imprisonment for life</u>."**

49. **Section 8(2)** above therefore prescribes only one mandatory sentence - life imprisonment. Nevertheless, the current jurisprudence is to the effect that strict adherence to mandatory or minimum sentences is discouraged and Courts retain the discretion to depart therefrom, where merited. This was the guidance given by the Supreme Court in the famous case of **Francis Karioko Muruatetu and Another vs Republic [2017] eKLR**.

50. However, another angle arising is that by the subsequent clarification made by the same Supreme Court in its subsequent directions given in **Muruatetu & Another v Republic;**

Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Supreme Court made it clear that **Muruatetu** only applied to murder cases, and not to any other type of case, not even sexual offences. The Supreme Court reiterated these directions when dealing with an Appeal emanating under the **Sexual Offence Act**. This was in the case of **Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment)**, in which the Supreme Court set aside the decision of the Court of Appeal which had applied the **Muruatetu** reasoning in setting aside a mandatory minimum prison sentence of 20 years imposed by the High Court.

51. In respect to the life sentence, there has also been emerging jurisprudence questioning its constitutionality. In regard thereto, I cite the Court of Appeal case of **Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) 7 July 2023) (Judgment)**, which dealt with a case of a sentence of life imprisonment imposed on an Appellant for the defilement of a 4 years old child. Upon setting aside the sentence of life imprisonment, the Court of Appeal substituted the same with a prison sentence of 40 years. However, on further appeal, the Supreme Court faulted the Court of Appeal for abrogating itself jurisdiction to determine the issue of constitutionality of the life sentence yet that issue had neither been canvassed at the Court of Appeal nor at the High Court, and thus usurping the role of the Legislature by purporting to declare the life sentence as unconstitutional, which the Supreme Court then swiftly reinstated. This was in the case of **Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment) [2025] KESC 16 (KLR)**, in which the Supreme Court held as follows:

> **"70. Our findings hereinabove effectively lead us to the conclusion that the Judgement of the Court of Appeal delivered on 7th July 2023 is one for setting aside. The Court of Appeal did not have jurisdiction to interfere with the sentence imposed by the trial Court and affirmed by the first appellate Court. Consequently, the life imprisonment sentence remains lawful and in line with Section 8 of the *Sexual Offences Act*."**

52. There is also the Supreme Court case of **Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR) (11 April 2025) (Judgment)**, delivered concurrently with **Manyeso (supra)**. In the **Ayako** case, like in the **Manyeso** case, the Supreme Court similarly reinstated the life sentence imposed on the Appellant by the Magistrate's Court in respect to a conviction for defilement of a minor, and which the Court of Appeal had set aside on the ground that life sentence is unconstitutional, and had substituted it with a prison sentence of

30 years. As in **Manyeso**, the Supreme Court found that the issue of constitutionality of the life sentence had not been raised or canvassed before the High Court, and the Court of Appeal could not therefore assume jurisdiction on the issue at the Court of Appeal stage.

53. In view of the decision of, and guidelines expressly set out by the Supreme Court as above, this Court will be acting ***ultra vires*** were it to set aside the life sentence imposed in this case, on the sole basis that the life sentence is unconstitutional.

54. My above observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh, which I now proceed to do.

55. In respect to sentencing, the Supreme Court, in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR),** guided that the following mitigating factors would be applicable; **(a)** age of the offender; **(b)** being a first offender; **(c)** whether the offender pleaded guilty; **(d)** character and record of the offender; **(e)** commission of the offence in response to gender-based violence; **(f)** remorsefulness of the offender; **(g)** the possibility of reform and social re-adaptation of the offender; and **(h)** any other factor that the Court considers relevant.

56. Similarly, in the case of **Daniel Kipkosgei Letting v Republic [2021] eKLR,** the Court of Appeal held as follows:

> **"……. we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ……."**

57. I also cite **Majanja J**, in the case of **Michael Kathewa Laichena & another v Republic [2018] eKLR,** in which, quoting the **Muruatetu case (supra),** he stated that:

> **"The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four-tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ……"**

58. Applying the above principles to the facts of this case, I consider that the offence of defilement is treated as a heinous and serious crime under Kenyan law and the society at large, and is always severely punished. It is also relevant to note that, in this case, the trial Magistrate found the age of the victim to have been slightly above the 3 ½ years alleged in the charge sheet but still a child of tender age. The victim was therefore such a vulnerable soul who required protection from all, including from the Appellant, a neighbour or her mother's lover, aged almost 50 years old, whom she must have trusted. I do not have to be a psychologist to discern that the minor will suffer lifelong trauma resulting from the repeated acts of defilement, and will forever be reminded that her chastity and innocence were robbed from her at such an early age. Her whole family must also be silently grappling with untold trauma caused to them by the act. Taking all these factors into account, it cannot be denied that the offence merited a stiff and deterrent sentence. It is also not in dispute that the Appellant was given the opportunity to mitigate, which he did, and which the trial Magistrate stated that she had considered. In my view, considering its gravity of the offence committed, the sentence of 40 years was appropriate, commensurate and proportionate to the offence committed.

59. My finding is therefore that the Appellant has failed to demonstrate that the trial Court, in imposing the sentence, overlooked any material factor, or took into account wrong material, or acted on wrong principles. In the circumstances, I find no grounds to fault the trial Magistrate for imposing the sentence of life imprisonment, which I hereby uphold.

Final Orders:

60. In the end, the appeal against the conviction and sentence of life imprisonment imposed on the Appellant in **Eldoret Chief Magistrates' Court (SO) Criminal Case No. 40 of 2018** fails, and the sentence and conviction are hereby upheld.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 13TH DAY OF FEBRUARY 2026

……..……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Appellant present

Ms. Muriithi for the State

Court Assistant: Brian Kimathi