SWM v Republic (Criminal Appeal E026 of 2025)
[2026] KEHC 4032 (KLR) (18 March 2026) (Judgment)

Neutral citation: [2026] KEHC 4032 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E026 OF 2025

DKN MAGARE, J

MARCH 18, 2026

BETWEEN

SWM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment of the trial court, Hon. N.W. Wanja, Resident Magistrate in Othaya SO No. 6 of 2020. The Appellant was charged with defilement contrary to Section 8(1) & (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 22.2.2019, around 11.00 am at [Particulars Withheld], Mahiga East location within Nyeri South Sub-county of Nyeri County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of YWG, a child aged 10 years.

2. The first count was subsequently amended to gang rape. However, the charge is not the subject of this appeal.

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 were that the Appellant, on 22.2.2019, around 11.00 am at [Particulars Withheld], Mahiga East location within Nyeri South Sub-county of Nyeri County, intentionally touched the vagina of YWG, a child aged 10 years.

4. There was also Count II, where the Appellant was charged with sexual assault contrary to section 5(1) (a) (2) of the *Sexual Offences Act*. The particulars were that on 22.2.2019, at about 11.00 am at [Particulars Withheld], Mahiga location, Nyeri South Sub-county of Nyeri County, the Appellant unlawfully used his fingers to penetrate the vagina of YWG, a child aged 10 years.

5. The Appellant was arraigned and he denied the charges. A plea of not guilty was consequently recorded. The trial court considered the case and rendered judgment on 27.3.2023. The Court found

the Appellant guilty on the alternative charge and convicted him of the offence of committing an indecent act with a minor. The Appellant was also sentenced to serve 10 years' imprisonment.

6. The Appellant, aggrieved, lodged this appeal. The Petition of Appeal dated 16.4.2025 raised the following grounds:

   a. The learned trial magistrate erred in finding that the elements of defilement were proved beyond reasonable doubt.

   b. The learned trial magistrate erred in law and fact in failing to recognize that the evidence of the prosecution was inconsistent and contradictory.

   c. The learned trial magistrate erred in law and fact in allowing the introduction of evidence of some other offences not before the court.

   d. The learned trial magistrate erred in law and fact in failing to appreciate that no forensic medical evidence was produced before the court and the medical report was produced without calling the maker, contrary to the law.

   e. The learned trial magistrate erred in law and fact in failing to take into account the Appellant's defence.

7. The state served a notice of enhancement praying for enhancement of the sentence to 40 years. The appeal was ordered to proceed by way of written submissions.

Evidence

8. At trial, PW1 was the minor. She testified that her father was DGX and her mother was MYX. On 22.2.2019, around 11.00 am, she was alone in the house, watching TV. The door was open. Her grandparents, with whom she lived, were away attending a burial. The Appellant popped in with another person. The Appellant was a neighbour. The other person, a man, placed a leso on the minor's face.

9. The Appellant removed her clothes. She had a skin-tight dress and panties. The Appellant, Simo, removed all her clothes. He warned that he would kill her if she reports. The other man was unknown to her. The Appellant inserted a hard object into her vagina. She could not scream as her face was covered. She felt pain. It was for a minute, and the Appellant and his counterpart left. She reported to her grandmother on 26.2.20219.

10. They went to Kamoko Health Centre and then Othaya Hospital. On cross-examination, it was her case that she was in Class 5. She had not gone to school on the date of the incident. She had permission from school because she had tonsils. Her parents stayed in Nairobi and only came to visit. She went to church the following Sunday and to school on Monday. The Appellant carried on the business of a car wash. She was lying on the seat watching TV at the time of the incident. She did not know what had been inserted into her private part. It had never happened to her before. She reported to her grandmother on 26.2.2019 and not 22.3.2019. She felt pain below the abdomen.

11. PW2 was JWG. She was the grandmother and stayed with PW1. She lived with PW1 for 1 year and 9 months. PW1 was born on 15.2.2009. On 22.2.2019, she attended a burial. On 26.2.2019, PW1 went to school. She fell while doing cross country. At home, PW1 said that she was feeling pain when she went for a short call. On inquiry, PW1 said that on 22.2.2019, the Appellant came to her house with another man. The other man covered her face with a leso, and the Appellant removed all her clothes and inserted a hard thing into her private parts. He warned her of death if she ever reported. PW2

examined her private parts and noticed they had a foul smell. They reported to Kamoko Health Centre and were referred to Othaya Hospital.

12. On cross-examination, she testified that the Appellant was a relative. His father was a cousin of PW2's husband.

13. PW3 was Thomas Mwangi. He was a Clinical Officer. He proceeded with the PRC and P3 Forms. The injuries were one week old. There were lacerations on the lower part of the vagina, which were healing. There was discharge. There were pus cells. On cross-examination, it was his case that the P3 Form was filled out about 3 weeks later. The pus cells were a result of infection.

14. PW4 was No. 22449 Sgt. Silas Githiji. He was not at the police station when the incident was reported. He arrested the Appellant in the victim's absence. He was arrested at Kwa Wanjiku Shopping Centre.

15. PW5 was No. 229827, PC Njoroge Joseph. On 26.7.2020, the OCS instructed him to proceed with PW4 and arrest the Appellant. They arrested him at Kwa Wanjiku Shopping Centre, where he was seated.

16. PW6 was PC Noor Omar. He was the investigating officer in the matter. On 20.3.2019, he was at Munyange Police Station working when a woman came with a child and reported a defilement case. He took the child and grandmother to Othaya sub-county hospital. Upon investigations, the Appellant was suspected to be the person who committed the offence and therefore charged with the offence.

17. The Appellant also testified on oath as DW1 after the court found him with a case to answer. He testified that he was arrested on 26.7.2020 at Kwa Wanjiku Shopping Centre. They did not explain why they were arresting him. PW1 was known to him as a neighbour. He had a car wash. He used to help PW1's grandfather with water for irrigating his tree nursery. On 22.1.2019, he was in Mahiga operating his car wash. He did not commit the offence. They were lies. He was at work. PW1 was in school that day. He saw her coming from school. He had differences with PW2. Within the year, he was never informed that police were looking for him.

Submissions

18. The Appellant filed submissions. He submitted that the evidence by the Respondent was inconsistent and contradictory. PW2 was not credible. PW1 was doubtful. He cited Kimani v Republic (1979) KLR 282 and Philip Nzaka Watu v Republic (2016) eKLR to support his case on inconsistencies and contradictions respectively.

19. The Appellant also submitted that the crucial elements of the crime were not proved beyond a reasonable doubt. He relied inter alia on George Kionji v Republic, Nyeri Criminal Appeal No. 270 of 2012. It was further submitted that the trial court shifted the burden of proof to the Appellant. On this, he cited R.T. Bhatt v. Republic (1975) 1 EA 332-335.

20. The state filed notice of enhancement and sought 40 years' imprisonment. This court cannot trace the appellant's submissions.

Analysis

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

firsthand. The Court of Appeal for Eastern Africa in Pandya vs Republic [1957] EA 336 held as follows:

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

22. On a first appeal, the appellant is entitled to a fresh and exhaustive reevaluation of the evidence on record, with the appellate court drawing its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses. In the case of Okeno v Republic [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.

23. The first appellate court is entitled to consider the evidence in the trial court as a whole as being submitted afresh to be subjected to exhaustive examination to guide the court towards its own decision on the evidence. In Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated as follows:

    1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.

    2. 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; 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.

24. The legal burden of proof is on the prosecution and remains constant throughout. According to established principles, the burden of proof rests upon the prosecution to prove the guilt of an accused person beyond a 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.

25. Brennan J, addressed the standard of proof required in Criminal cases in the case of Re Winship 397 US 358 {1970}, at page 36164 that:

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

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

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

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

28. Courts dealing with criminal matters must always remain mindful of the high standard of proof required and the serious consequences that a conviction imposes on an accused. The caution has regard to the nature of criminal offences, whose consequences extend beyond the individual to society at large. A conviction and sentence as a sexual offender carry a lifelong stigma for the accused. It also leaves indelible scars on the victim. Conviction must thus be justified based on indisputable evidence given to the required standards. This is what the former Chief Justice Mohamed of Namibia had in mind in addressing sexual offences in S v Chapman 1997 (2) SA CR 3 (A) at 55:

> 'Rape is a serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and

the integrity of every person are basic to the ethos of *the constitution* and to any defensible civilization.

29. The Appellant was convicted of the offence of committing an indecent act with a minor contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The said section provides as follows:

    1. Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

30. An indecent act under section 2 of the *Sexual Offences Act* is defined as follows:

    Indecent act means any unlawful intentional act which causes—

    (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

    (b) Exposure or display of any pornographic material to any person against his or her will.

31. The issue for this court's determination is whether the prosecution proved the offence of committing an indecent act with a minor as against the Appellant beyond reasonable doubt.

32. Proof beyond reasonable doubt does not impose a standard of proof beyond the shadow of a doubt. Where the evidence tendered is so strong as to leave only a remote possibility in favour of the accused person, which can be dismissed with the sentence of course it is possible, but not in the least probable, then it can be said in law that the case is proved beyond reasonable doubt. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

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

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

33. At trial, the court conducted voire dire and established that the minor had proper understanding of the significance of oath.

34. The material testimony of the minor as to the charges before the trial court was that on the material day, the Appellant, in the company of another man unknown to her, came into her grandmother's house, where she was seated watching TV. The other man covered her face with a leso, which he kept in place. The Appellant removed all her clothes and inserted a hard thing into her private parts. She did not know exactly what the hard thing was. This was for about 1 minute.

35. She continued that she felt pain. It was her evidence that thereafter the appellant and the other man left. The insertion of the hard thing must be proved to have been caused by the act of the Appellant. The most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington

vs. DPP [1935] A.C 462 pp 481 comes in handy in describing the legal burden of proof in criminal matters, that;

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

36. 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.

37. The powers of this Court are circumscribed by Section 382 of the Criminal Procedure Code, which permits a first appellate court to confirm, reverse, or vary any finding, sentence, or order of the trial court. Within these limits, the court is duty-bound to subject the evidence to a fresh and exhaustive examination, reassess the credibility of witnesses, and weigh conflicting testimony to draw its own independent conclusions. Throughout this process, the legal burden of proof remains constant, resting squarely on the prosecution to establish the appellant's guilt beyond reasonable doubt. It is only by carefully scrutinizing the evidence in its entirety, while remaining faithful to the statutory framework, that the court can ensure the appellant receives a full and fair re-evaluation of the case. The section reads as follows:

> 382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

38. Courts in criminal cases should consider the standard of proof and the effect of a conviction on the accused person. In this case, the Appellant was sent in for 10 years. This must be a serious offense

that requires the clearest view of the evidence to justify keeping the Appellant behind bars for life. Proof beyond reasonable doubt was the standard, also based on the nature of criminal offences, whose punishment went beyond the effect on the individual to the state. Conviction and sentence as a sexual offender were a badge that a convict could only deserve based on solid evidence.

39. Returning to the offence, the Appellant was convicted, after the evidence on penile penetration had been ruled out in the main charge. Could the same evidence stand in the alternative charge as far as the circumstances of this particular case are concerned? The evidence of PW3 and that of the minor were corroborative. The minor's testimony was that a hard thing penetrated her genitalia. PW3 established that PW1's vagina had pus cells consistent with an indecent act by touching. The minor saw the Appellant as he entered the house. She also knew him; he was a neighbour and a relative.

40. I do not find any inconsistencies or contradictions that go to the root of the offence as alleged in the record of appeal. The Respondent tendered overwhelming evidence implicating the Appellant, and the trial court correctly returned a verdict of guilty on the alternative charge. Courts have held that minor contradictions in the glare of overwhelming evidence to establish the guilt of the Accused person cannot go to the root of disproving guilt. In Dickson Elia 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.

41. The next question is whether the appellant's defence was considered. The charge related to the events of 22.02.2019 at 1100 hours at [Particulars Withheld]. In his defence, the Appellant testified that he was arrested on 26.07.2020, that is, one year, 5 months, and 4 days. He did not know why he was arrested. He stated he had not met the complainant or her family, and that he came to see the minor in court, though she is known to him and a neighbor in Mahiga. He stated that on 22.10.2019, he was working in Mahiga, where he had a car wash. He stated that he did not know that police were looking for him. This kind of evidence places the appellant in a position to commit the crime.

42. The evidence tendered is not an alibi, as the car wash was in the neighborhood. The question of being asked for money is irrelevant to the matter. The minor did not ask for money, and no questions were put to her. No questions regarding the request for money were directed to PW1. PW3 maintained that fingers were inserted into the minor's vagina. This resulted in infection. The history given was that two men went into the house, and one of them penetrated the minor with his fingers.

43. It is irrelevant to determine who, between the two men, fingered the child. They had a common intention. The minor positively identified the appellant as the person who inserted a hard object into her vagina. The minor was not shaken at all. Like the court below, I find that the appellant was recognized by the complainant. In the case of Reuben Taabu Anjononi, Benjamin Akisa Anjononi and Monya Anjononi v Republic [1980] KECA 23 (KLR), the court of appeal [Madan, Law & Potter JJ A] posited as follows:

> The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one, where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. 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).

44. I find and hold that the appellant was properly recognized. The defence given does not in any way exonerate the appellant. He admitted that he is unknown to the child. The child's evidence was not shaken at all. The next question is whether the court should enhance the sentence.

45. This matter had a chequered history. It first proceeded in a miscellaneous application. Submissions were filed in the same file until I came and noted the anomaly. I issued fresh leave to the appellant and transferred documents from the miscellaneous file to the appeal file. One of the documents was the notice of enhancement filed on 13.02.2026 and dated the same day.

46. The appellant was charged and convicted of the offence of an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006. The minor was attacked at her home and subjected to indignity. Article 28 of *the Constitution* provides as follows:

> Every person has inherent dignity and the right to have that dignity respected and protected.

47. Attaching a minor and subjecting her to indignity and then threatening to kill her are aggravating factors. The appellant was in the presence of another person. Two adults assisted each other to have a minor penetrated. The minor was 10 years old.

48. Section 11 of the *Sexual Offences Act* provides as follows:

(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years

48. The incident act herein was not only with a minor but a child of tender years. The act also included penetration and lacerations. The sentencing guidelines 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.

4.5. 6 Convicted offenders should be expressly provided with the opportunity to present submissions in mitigation.

4.5.7 A list of aggravating and mitigating circumstances – which is not exhaustive – is contained within the GATS along with those specific to murder, manslaughter, and wildlife cases, in Part V.

4.5.8 Having heard all relevant submissions and considered any reports advanced by either prosecution or defence, or the probation or children's officer (where applicable), and any victim impact statement, the court should:

i. Decide as to whether a custodial or a non-custodial sentence should be imposed in line with these guidelines.

ii. In the case of sexual offences, before the terms of a custodial sentence are determined, the court must have recourse to relevant probation reports as required in sections 39 (2) and (4) of the *Sexual Offences Act* No.3 of 2006 that contain provisions about post-penal supervision of dangerous sexual offenders.

49. The appellant mitigated that he is a young man of 27 years and is remorseful, who had recently started a young family. He prayed for the least sentence. He had parents, according to the social enquiry, one of whom is blind due to lifestyle diseases. It appears the appellant was being shielded by the mother from the sentiments. These were sentiments echoed by the area administration.

50. It must be remembered that sentencing is discretionary. The discretion to sentence permits balanced and fair sentencing, a hallmark of enlightened criminal justice, and proper consideration of the individual circumstances of each accused person is essential for substantive justice. In State vs. Tom, State v. Bruce (1990) SA 802 (A), Smalberger, JA, writing for the majority of Supreme Court of South Africa, made the following pertinent observations about sentencing in general and mandatory sentences in particular:

> The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court ... That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law... A mandatory sentence runs counter to these principles. (I use the term mandatory sentence in the sense of a sentence prescribed by the legislature which leaves the court with no discretion at all -either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence... Harsh and inequitable results inevitably flow from such a situation. Consequently, judicial policy is opposed to mandatory sentences...as they are detrimental to the proper administration of justice and the image and standing of the courts.

51. Having noted that the offence is a sexual offence, the victim was a child of tender years. I also note the circumstances of the appellant's family. However, given the mitigation and the fact that the appellant was with another person when the offence occurred, a second person, 10 years is too lenient. I shall enhance the sentence to 20 years.

52. The one error I have noted is that the court did not indicate when the sentence is to start. The Appellant was arrested on 26.07.2020. He was granted a bond of Ksh 100,000/=. He was released on bond on

3.08.2020. This is a period of 8 days. He was convicted on 07.03.2023. The law under Section 333(2) of the Criminal Procedure Code provides as follows:

> Subject to the provisions of Section 38 of the Penal Code, 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 a prior sentence, such sentence shall take into account the period spent in custody.

53. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody. The Court of Appeal in Ahamad Abolfathi Mohammed & Another vs Republic [2018]eKLR stated as follows as regards time spent in custody:

> The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. Taking into account the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012.

54. This is buttressed in the Judiciary Sentencing Policy Guidelines, 2023, as follows:

> The proviso to Section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.

55. The Applicant remained in for only 8 days. Therefore, Section 333(2) of the Criminal Procedure Code requires, nay obligates, the court to take into account the period spent in custody pending trial during sentencing. It is clear that the time spent in custody was not taken into account. The period spent in custody must be considered when calculating the imposed sentence. Therefore, the 20-year sentence shall commence on 26.07.2020, the date of arrest, excluding the period between 3.08.2020 and 07.03.2023, when the appellant was on bond.

Determination

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

a. The appeal is dismissed. The sentence is, however, enhanced to 20 years. The 20-year sentence shall commence on 26.07.2020, the date of arrest, excluding the period between 3.08.2020 and 07.03.2023, when the appellant was on bond.

b. Right of appeal 14 days.

c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF MARCH, 2026. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Pro Se for the Appellant

Mr. Kihara for the Respondent

PC Muthengi at Mwea Prison

Court Assistant – Michael/Martin