IN THE COURT OF APPEAL AT KISUMU

(CORAM: NYAMWEYA, ACHODE & MATIVO, JJ.A)

CRIMINAL APPEAL NO. 88 OF 2020

BETWEEN

JULIUS MEROGINI OLENKOM.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Kisii (Ougo. J) dated 14th March 2019

in

HCCR Appeal No. 36 of 2018)

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****** JUDGMENT OF THE COURT**

1. **Julius Merogini Olenkom** the appellant was tried and convicted for the offence of defilement, contrary to **section 8(1)** as read with **8 (3)** of the **Sexual Offences Act, (SOA)** and sentenced to twenty (20) years imprisonment, in the Principal Magistrate's court at Kilgoris. He was unsuccessful in his first appeal to the High Court at Kisii where, in a judgment dated 14th March 2019, ***Ougo J.*** upheld the conviction and sentence precipitating this second appeal in the Court of Appeal.

2. The backdrop of this appeal is that the appellant was charged with the offence of defilement contrary to **section**

8(1) as read with section **8 (3)** of the **SOA**. The particulars of the offence

are that, on 10th September 2016, in Transmara West District within Narok County, the appellant intentionally caused his penis to penetrate the vagina of E.S.O, a girl aged 13 years. In the alternative charge of indecent act with the child contrary to section **11(1)** of the **SOA,** it was alleged that on the same date and in the same place as the main charge, he intentionally touched the vagina of E.S.O, a child aged 13 years.

3. A synopsis of the prosecution's case as presented by five witnesses is that the appellant is the husband to the minor's sister. On 10th September 2016, E.S.O. (PW2), was in her sister's home. The appellant took E.S.O's sister to hospital and when he returned home, he sent E.S.O to his son's house to fetch some maize. He then followed her there, pulled her into the house, removed her clothes and defiled her. Subsequently,

   E.S.O. reported the matter to one, Christine and her aunt. She was later taken to Trans-mara Sub-county hospital.

4. Samuel Sankey Tarus (PW1), a clinician, examined E.S.O at Trans-mara Sub-county hospital, where she presented with a complaint of having been defiled by a person known to her approximately two hours before the examination. Upon examination, PW1 observed that E.S.O.'s genitalia had a whitish discharge and a broken hymen. A vaginal swab revealed the presence of spermatozoa and epithelial cells. PW1 concluded that E.S.O. had been defiled. On 11th

September

2016, he did an age assessment test for E.S.O. and found that she was 13 years old, based on her birth history and her molar tooth and bone development.

5. William Olerarime, PW3, testified that on the material day, he was called by one Johana Ngombei and asked to go home urgently as the appellant had been arrested. He went home and found E.S.O. covered in dust all over her body. He took her to the hospital.

6. PC Nicolas Ngeno, PW4, was the officer who received the report from E.S.O.on the material day. E.S.O.reported that she had been defiled by her brother-in-law, the appellant. PW4 arrested him and later took the minor for age assessment. He produced her clothes in evidence.

7. Margaret Matishoi, PW5 came upon E.S.O. while she was crying. Upon enquiry, E.S.O. told her that she had been defiled by the appellant. PW5 then advised E.S.O. to go and report to the village men. The women folk examined the minor and noted traces of semen in her private parts. She was taken to hospital.

8. At the close of the prosecution case, the court found that the appellant had a case to answer and placed him on his defence. The appellant opted to give an unsworn defence and called three witnesses. His testimony was that on 10th September 2016, he beat E.S.O.over her relationship with a certain boy in

his homestead and told her to leave. On 11th September 2016, he was involved in a dispute with another man. He later learnt that a certain woman had told the girl to say that he had caressed her.

9. Wilson Meraa DW2, a farmer at Poroko who knew the appellant, told the court that he met him on 10th September 2016 on his way to attend to a certain case. He learnt later that the appellant had been arrested and stated that the appellant had not done such a thing before.

10. Daudi Ole Gisharo DW3, was an uncle to the appellant. He testified that the appellant told him that the girl had alleged that he made sexual advances towards her, but it was not true. He asserted that the appellant is innocent.

11. E.T., DW4, the appellant's son supported his father's testimony that he had assaulted E.S.O. and told her to take her bad habits back to her home, because she was sleeping around with boys. She left and DW4 also left to go and herd the cattle.

12. Upon considering the evidence, ***Hon Oanda***, the learned Principal Magistrate, found that the appellant was guilty as charged. He convicted him and sentenced him to twenty (20) years imprisonment on 7th March 2018.

13. Aggrieved by the conviction and sentence, the appellant filed an appeal in the High Court on the grounds that: the

prosecution failed to prove its case; the minor's age was not assessed; and, the defence was not accorded due consideration. In a judgment dated 14th March 2019, ***Ougo J.*** considered the appeal before her and found that it had no merit. The learned Judge dismissed the appeal and upheld the conviction and sentence of the lower court.

14. Maintaining his vigour, the appellant filed the instant appeal against the judgment. The grounds enumerated in his undated memorandum of appeal are that:

    i. *His constitutional right to legal representation enshrined in Article 50(2)(g)(h) of the Constitution was grossly violated.*
    ii. *The ingredients of the offence of defilement were not proved to the required standard of law.*
    iii. *The sentence meted upon him was manifestly harsh and excessive.*
    iv. *His defence was not considered.*

15. The appellant filed his undated submissions in person and urged that before the hearing commenced, he informed the trial court that he was not ready to proceed. That although he had been supplied with witness statements, he was ill-prepared to proceed with the matter as he was old and illiterate. He cited the case of **Republic vs Chengo & 2 Others [2017 eKLR** where the court dealing with the right to fair hearing under **Article 50** held that:

"the right to legal representation under the said article is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict."

16. On penetration, the appellant submitted that E.S.O. did not say that he inserted his penis into her vagina. He questioned the fact that PW3 and PW4 testified that E.S.O.'s clothes were covered in dust, yet the minor alleged that the incident happened inside the house. He stated that DNA or semen samples were not collected from him to determine that he penetrated the minor. Further, that PW4 was clear that r had a whitish discharge and a broken hymen, but no bleeding. It is his submission that penetration was not proved to the required standard in law.

17. The appellant urged that the age of E.S.O.was also not proved, as PW4 who accompanied the minor to the hospital was not her parent and could not tell her age, while the age assessment test carried out was not adequate to prove her age.

18. The appellant went on to allege that his right to fair hearing was violated by the trial court's failure to consider his defence despite being supported by DW2 and DW4. Further, that the sentence meted upon him, although lawful, was manifestly harsh and excessive in the circumstances. He urged the Court to reduce the sentence to the period already served and added that he is remorseful and has been rehabilitated.

19. Mr. Kebaso Mike, learned Prosecution Counsel, filed submissions dated 29th August 2025 on behalf of the State and urged that the E.S.O.'s age was confirmed by a formal age assessment carried out by a government medical officer. The medical report placed the victim's age at 13 years based on dental and skeletal development. A finding that was not challenged by the appellant in the trial court.

20. On penetration, counsel urged that E.S.O.testified that the appellant undressed her, lay on top of her and inserted his penis into her vagina. That the evidence of PW1 who testified that he examined the minor two hours after the incident and noted a broken hymen, a whitish discharge and the presence of spermatozoa and epithelial cells and concluded that the complainant had been defiled. That his testimony corroborated the E.S.O.'s evidence.

21. Counsel asserted that there was proper identification as E.S.O. knew the appellant as her brother-in-law, and her evidence was corroborated by PW3 and PW5 who interacted with her immediately after the incident.

22. Counsel urged that the appellant's defence in which he stated that he merely assaulted the minor for indiscipline and that the charge was fabricated was considered and found to be an afterthought. That it was rightly dismissed.

23. Counsel contended that the Court cannot disturb a sentence unless it is shown to be illegal, grossly disproportionate, or arrived at in violation of fair norms. He relied on the Supreme Court decision in **R vs Joshua Gichuki Mwangi, Petition No. E018 of 2023**, where the Court reiterated that mandatory minimum sentences serve the public interest in deterrence, uniformity, and protection of vulnerable victims, while still leaving room for upward discretion in aggravated cases.

24. The appeal came before us for plenary hearing on 2nd September 2025. The appellant, who appeared in person, joined the Court virtually from Migori prison, and relied on his filed submissions, adding that he had been in prison for 9 years and all he wanted was to go home. Mr. Njeru, the learned Senior Assistant Director of Public Prosecutions, was present for the respondent. He too relied on their filed submissions and urged us to refer to the Supreme Court decision in **R vs Joshua Gichuki Mwangi (supra)**and find that the High Court having made no error in sentencing, this Court lacks the discretion to interfere with the sentence. That the appellant should count himself lucky for having received the bare minimum sentence.

25. We have considered the record of appeal, the grounds of appeal and rival submissions. As the second appellate Court, our mandated is limited to points of law only as stipulated in **section 361** of the **Criminal Procedure Code,** and we

bear in

mind that severity of sentence is a matter of fact and not law. In **David Njoroge Macharia vs R. [2011] eKLR**, this Court reiterated this mandate as follows:-

> ***"Only matters of law fall for consideration and the Court will not normally interfere with concurrent findings of fact by the two lower courts unless such findings are based on no evidence or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong –vs- Republic [1984] KLR 213)."***

26. Before we delve into the grounds raised by the appellant, we considered his assertion that his right under **Article 50(2)** was trampled on since he had no legal representation during the trial, and he was old and illiterate. We note that the appellant is raising this issue for the first time on second appeal. There was no deliberation on the issue on first appeal and this Court cannot be invited to pronounce itself on it at this juncture.

27. We call to mind this Court's decision in **Katana & another vs Republic (Criminal Appeal No. 8 of 2019) [2022] KECA 1160 (KLR)** where it held as follows:

> ***"The issue of a violation of the right to a fair trial was not raised by the appellants in their appeal before the High Court, and therefore***

could not be the basis for vitiating the High Court's decision."

28. The issues that properly fall for our consideration are whether the prosecution proved the elements of defilement beyond reasonable doubt, and whether the sentence meted upon the appellant is appropriate.

29. The appellant was charged under **Section 8(1)** as read with

Section 8(3) of the **SOA** which provides as follows:

> ***"8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***8 (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

30. Therefore, for the prosecution to secure a conviction under the aforementioned sections, it must prove the elements of the defilement beyond reasonable doubt. This Court in **John Mutua Munyoki vs Republic [2017] KECA 376 (KLR)** enumerated these elements as follows:

> ***"Under the Sexual Offences Act the main elements of the offence of defilement are as follows:***
>
> ***(i) The victim must be a minor, and***
>
> ***(ii) There must be penetration of the genital organ and such penetration need not be***

complete or absolute. Partial penetration will suffice."

31. The complainant's age was assessed by PW1 on 11th September 2016 and based on her birth history, her molar tooth and bone development he determined that she was 13 years old. It is settled law that the age of a victim can be proved in various ways including medical evidence as was stated by this Court in **Edwin Nyambogo Onsongo vs. Republic [2016] eKLR** 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 guardians 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"***

We therefore find that the two courts below correctly held that the prosecution proved the age of the minor beyond reasonable doubt.

32. On the question of penetration, the minor illustrated the manner in which she was defiled. Her verbatim evidence was as follows:

"On 10th September 2016 my in-law was taking my

sister to hospital…… He told me to go to the son's

house to get maize. He followed me there. He came, pulled me into the house and had sex with me. I cried out. That happened in the son's house.....He removed all my clothes. He slept on top of me. He entered his penis into me. I started to cry. Nobody came to my rescue."

33. PW1 examined the minor, two hours after the incident and the vaginal swab he did on her established that there was spermatozoa epithelial cells. His conclusion was that the minor had been defiled.

34. The Evidence Act stipulates the way the evidence of a victim of the sexual offence should be treated. This is found in **Section 124** of the **Evidence Act** which provides that:

> ***Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> > ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings,***

the court is satisfied that the alleged victim is telling the truth.

35. In the same breath, this Court has also pronounced itself on how such evidence should be treated. In **MK vs Republic [2017] eKLR** this Court, relied with approval on the decision of the Supreme Court of Uganda in **Bassita v Uganda S.C Criminal Appeal No. 35 of 1995** where it was held that:

> ***"Usually the sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt,"***

36. In the present case, E.S.O. narrated in detail how the appellant undressed and defiled her. Her evidence was corroborated by PW1 who examined her two hours after the incident. An evaluation of the record avails us no basis to fault the finding of the two courts below that the prosecution proved that the minor was defiled.

37. The appellant's defence was a denial that he defiled E.S.O.. He led evidence in an attempt to demonstrate that E.S.O. was with another boy in the compound and that the appellant beat

her for that reason. His testimony was supported by DW4, his son who stated that E.S.O. was in the habit of *"sleeping with boys"*. He however, clarified that E.S.O. did not sleep with any boy on the material day. On the other hand, E.S.O. consistently stated that the appellant is the one who defiled her. She told this to PW1, PW4, and PW5.

38. Having considered the two pieces of evidence, we are convinced that the trial Court and High Court arrived at the correct conclusion that the appellant and no one else defiled E.S.O.on the date in question. The minor knew her assailant prior to the attack. Identification was therefore by recognition. This Court's decision in **Reuben Taabu Anjononi & 2 Others vs Republic [1980] eKLR** is relevant for the following holding:

> ***"……recognition of assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of an assailant in one form or another…."***

39. Next, the appellant assailed the two courts below for not considering his defence. We note that the record indicates that the trial court considered his defence and rendered itself thus:

> *"18. The trial court did consider the defence raised. The appellant's defence is that he beat up PW2 and asked her to go home. That he beat her up because PW2 had a habit of bringing boys home. This defence in my view was an afterthought. I*

would agree with the observations of the trial court that if that was PW2's

habit then the appellant would have ensured that the person to discipline her is his wife who is the victim's sister and why discipline her after he had taken the wife to hospital. His witnesses' evidence was merely that he could not have done it and that the allegations were false. His son testified that the girl was beaten by the appellant that she used to sleep with boys, but she did not sleep with anyone on the fateful day. His defence against the prosecution's strong case cannot stand. There is no law that requires that the appellant had to be medically examined."

40. In our view, the defence was well analyzed by the two courts below. They considered the appellant's defence and correctly found that it did not debunk the strong prosecution case.

41. Turning to the sentence, the appellant urged that it was harsh in the circumstances while the respondent argued that it was appropriate. The respondent referred us to the Supreme Court decision in **R vs Joshua Gichuki Mwangi: (supra)** to emphasis its legality.

42. Sentencing as prescribed under **Section 8** of the **SOA** is now settled. The Supreme Court finally laid to rest the ghost of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** that wrought confusion in its wake, in the application of minimum and mandatory sentences. The apex Court held in **Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR)** that:

"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 the floor 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 recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably, nor in similar circumstances as they refer to two very different set of meanings and circumstances.

57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the Sexual Offences Act, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a

number of

issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities."

43. This decision is binding on us under the doctrine of *stares decisis*. In the present case, the appellant was convicted under **Section 8(3)** of the **SOA**. The statutory minimum sentence under the subsection is twenty (20) years imprisonment, leaving no room for us to interfere and reduce it.

44. Consequently, upon considering the record, the grounds of appeal and the rival submissions, we find that this appeal is bereft of merit and is therefore dismissed in its entirety.

Dated and delivered at Kisumu this 24th day of April, 2026.

P. NYAMWEYA

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is
a true copy of the original

DEPUTY REGISTRAR