



REPUBLIC OF KENYA



**Kangogo v Republic (Criminal Appeal E011 of 2025)  
[2026] KEHC 6382 (KLR) (8 May 2026) (Judgment)**

Neutral citation: [2026] KEHC 6382 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ITEN  
CRIMINAL APPEAL E011 OF 2025  
JRA WANANDA, J  
MAY 8, 2026**

**BETWEEN**

**KELVIN KIPROTICH KANGOGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal against the Judgment and sentence delivered by Hon. V. Karanja – PM on 19/03/2025  
in Iten Senior Principal Magistrate’s Court Criminal (Sexual Offences) Case No. E046 of 2024)*

**JUDGMENT**

1. The Appellant was charged in the case referred to above with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. It was alleged that the Appellant, on 9/11/2024, at [particulars withheld] village, Keiyo South sub-County, within Elgeyo Marakwet, intentionally and unlawfully caused his penis to penetrate the vagina of BC, a girl aged 12 years. He also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006 by unlawfully and indecently causing his penis to come into contact with the same girl.
2. The Appellant pleaded not guilty to the charges and the case then proceeded to full trial in which the Prosecution called 4 witnesses. At the close of the trial, the Court convicted him on the main charge and sentenced him to serve 20 years’ imprisonment.
3. Dissatisfied with the decision, the Appellant filed this Appeal by way of the undated Memorandum of Appeal filed on 9/04/2025, on the grounds reproduced verbatim as follows:
  - i. That the trial Magistrate erred in law and fact when he convicted and sentenced the Appellant while some of the ingredients of the alleged offence were not proved more so the penetration was not properly established since the medical doctors confirmed the medical examination was



inconclusive therefore could not corroborate the penetration ingredient of the alleged offence fact he gave evidence that the complainant's genitalia was normal and intact as she was a virgin.

- ii. That the trial Magistrate erred in law and fact by not making a finding that this case was fabricated against him on the reason that he had a misunderstanding with the mother of the complainant about her sheep that had strayed into Appellants shamba and destroyed his beans. The case was not resolved and I received a message from her male friend that she will deal with me through unspecified consequence which I came to learn very late it is this case.
- iii. That the trial Magistrate erred in law and fact by convicting and sentencing him when the prosecution witness (police) had not exhibited any soiled clothes the complainant was wearing to prove their case but went ahead to imprison him to 20 years imprisonment with this omission.
- iv. That the trial Court erred in law and fact by committing a procedural impropriety in not offering Appellant an opportunity to offer mitigation statement indicating mitigation was not considered as was awarded the minimum mandatory prescribed sentence of a 20 years' imprisonment. Generally, the principles of sentencing were not applied in my case limiting my right under articles 25 (c) of COK. This also denied me the benefit of a less severe sentence under Article 50(2)(p) of COK of one third of the prescribed sentence 20 years in accordance to the judiciary sentence policy guidelines 2023.
- v. That the trial Magistrate erred in law and facts when it indicated she relied on the evidence of PW1 under Section 124 of the *evidence act* without adhering with the requirements of that provision on the reason she was not credible and unreliable witness. She claimed we were in the company of two boys aged 10 and 14 years but were not able to hear her screams while she claimed they were waiting for her at a distance of 100 meters.
- vi. That the trial Magistrate erred in matters of law and fact in not adequately considering the general defence and defence of alibi when reaching the decision to convict and sentence him to 20 years. She did not comply with Section 169 of the criminal procedure code.
- vii. That the trial Magistrate erred in law and fact by meting out a harsh and excessive sentence in the absence of aggravating circumstances. The Appellant does not exactly fault the trial Court for imposing a mandatory sentence as it is lawful and constitutional but he ought to have benefited from discretionary lenient sentence from mitigation that he did not offer. *The Constitution* also guarantees him under 50(2)(p) of COK for a less severe sentence. Reliance is on case of James Waweru Mwangi v Republic Criminal Appeal No. 36 of 2023.
- viii. That the trial Magistrate erred in matters of law and fact by not making an adverse finding that crucial witnesses were not presented in Court for instance the two boys who were alleged to have been present at the material time of incident were not presented as witnesses and a neighbour. The evidence of the neighbour and two appears to have been adverse to the prosecution case hence their exclusion.
- ix. That the trial Magistrate erred in law and fact by failing to perform her obligatory duty imposed on her under section 333(2) of CPC. The period of five (5) months he spent in the pre-trial custody was never accounted for in his sentence of 20 years as required in the provision of law indicated above.
- x. That the Appellant prays that when the record of appeal becomes available more grounds will be adduced during the appeal hearing. The additional ground I would like the Court to consider is that the conviction and sentence were founded using a defective charge sheet.



4. I will now recount the testimonies and evidence presented before the trial Court.
5. PW1 was the complainant, a minor. She testified that she was a 12 years old class 7 primary school pupil and referred to her Certificate of Birth. She stated that she was herding sheep in the forest on 9/11/2024 when at 11.00 am, the Appellant (a neighbour) appeared alleging that some children had uprooted his beans, the minor pointed out to him where the children had gone but he turned on the minor and ordered her to kneel down and raise her hands or he would cut her with a panga. The minor testified that the Appellant began to remove his trousers and she thus ran away but fell down, the Appellant caught up with her and removed her pant from behind and did tabia mbaya (bad manners), and he threatened to kill her if he failed. She stated that the matter was later reported to the Chief. She then testified that the Appellant removed his front private parts and tried to it in her but she closed her legs to prevent him from doing so, and that she screamed as the Appellant tried to remove her clothes. She stated further that she was lying on the back and the Appellant lay on her from the back and had removed her pant to the knees, but she closed her legs. She testified that she was then taken to hospital for treatment.
6. PW2 was JK, the minor's mother. She, too, testified that the minor was 12 years old and produced the Certificate of Birth. She then testified that the minor had on 9/11/2024 at around 11.45 am gone to the forest about 2 km away to herd sheep and cows. She stated that she received a phone call from the area Assistant Chief, informing her that the minor had been chased by the Appellant. She stated that upon returning home at around 6.00 pm, the minor confirmed that the Appellant had indeed chased her away, but the minor, later in the night, told her that the Appellant had chased her away but she fell down and the Appellant removed her pants and had sex with her from behind. She testified that she then took the minor to the hospital in the morning, and later reported the matter and she was given a P3 Form. She stated the Appellant is a neighbour.
7. PW3 was Police Corporal Evans Maore attached at the Kaptagat Police Station. He stated that he was the Investigating Officer in the matter having taken over from the earlier Officer who had since been transferred. He testified that the matter was reported to the Station by the minor and PW2 (her mother) on 10/11/2024, and was recorded by the said initial Investigating Officer. He stated the minor was then referred to hospital, statements were recorded and a P3 Form issued, and the Appellant was later arrested and charged.
8. PW4 was Philemon Kitony, a Clinical Officer at the Iten County Referral Hospital. who produced the P3 Form. He testified that the minor was brought to the facility on 11/11/2024 with a history of defilement having been referred from the Kaptagat Health Centre. He stated that on examination, the minor's labia majora and minora and the vagina were found to be intact, the hymen was torn but it was not recent, as it was beyond 2 weeks, and there was whitish discharge. He stated that the laboratory results were normal, few pus cells and numerous epithelial cells. He then stated that he conducted a diagnosis which found the existence of a urinary tract infection (UTI) and established that the torn hymen was due to irritation caused by the UTI and that there was no penetration. He then produced the P3 Form and the Post-Care Rape (PCR) Forms.
9. As aforesaid, after the Prosecution closed its case, the Court found the Appellant with a case to answer and placed him on his defence. He then gave sworn testimony in his defence.
10. The Appellant testified as DW1. He basically denied committing the offence, and claimed that the minor's mother had forced her to mention his name.
11. As further aforesaid, by the Judgment delivered on 19/03/2024, the trial Court found the Appellant guilty, convicted him, and sentenced him to serve 20 years imprisonment.



12. The Appeal was then canvassed by of written Submissions. The Appellant’s Submissions is undated but was filed on 13/10/2025, while the State’s Submissions is dated 6/09/2025.

### **Appellant’s Submissions**

13. The Appellant submitted that the Prosecution failed to prove its case. Regarding “penetration”, he cited the minor’s testimony that she closed her legs when the assailant attempted to penetrate her. He also pointed out the Clinical Officer’s testimony that he did not establish any penetration, and faulted the trial Magistrate for accusing the Clinical Officer, in her Judgment, of trying to aid the Appellant, without declaring the Clinical Officer a hostile witness and/or subjecting him to cross-examination. On “identification”, he submitted that the minor made reference to “Kelvin and a neighbour”, but she did not disclose that “neighbour’s” role in the crime, and thus the identity of the perpetrator was in doubt. He averred that the minor was coached and her testimony was a result of vengeance. He cited the fact that the Appellant had accused the minor of feeding cows on his crop and the ensuing commotion as a possible reason for the vengeance and his implication. He then claimed that the minor’s mother, through her boyfriend, had issued threats to him after the commotion. He also asserted that the Prosecution did not produce the clothes the minor was wearing at the time of the alleged incident which were, in his view, relevant considering that the minor stated that she was lying on her back, which means that the clothes must have been soiled. He also pointed out that no spermatozoa or blood or any injury on the minor was found during testing, and that the alleged panga was also not produced. He claimed that the trial Court was dismissive of his defence and ignored it.
14. Regarding “sentence”, he submitted that his mitigation was not considered and it is this omission that led to the harsh, excessive and mandatory sentence imposed. Going back to the issue of “penetration”, he appreciated that the P3 Form has an entry indicating that there was “partial penetration” but claimed that the portion was an alteration added later. He thus suspected that the Clinical Officer must have been coerced to make the alteration. He also termed a contradiction the minor’s testimony that she was lying on her back but “tabia mbaya” was done to her from the back, describing it as illogical. He also wondered how the boys who had allegedly run away and were thus not far, and also the alleged “neighbour”, failed to hear the minor’s screams. Returning to the issue of “sentence”, he abandoned his made claim in the Memorandum of Appeal that the 5 months period he spent in custody was not factored as required under the proviso to Section 333(2) of the Criminal Procedure Code (CPC). He acknowledged that indeed the trial Court did factor that period. In conclusion, he pointed out that the minor’s second name as captured in the Charge Sheet was different from the one in the Certificate of Birth produced. He described this as an ambiguity and termed the Charge Sheet as being fatally defective, and offending the provisions of Section 382 of the CPC.

### **Respondent’s Submissions**

15. Prosecution Counsel Felix Namasake, in his Submissions, basically listed the ingredients of the offence of defilement as stated in the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013, and urged that they were all proved. Regarding the issue of “age”, he submitted that the same was proved by way of the Certificate of Birth produced. Regarding “identification”, he pointed out that the incident is alleged to have occurred at around 11.00 am and the minor’s testimony that she knew the Appellant as “Kelvin”, a neighbour, testimony corroborated by PW2 (her mother), and thus termed the same as identification by recognition. In respect to “penetration”, Counsel referred to the proviso to Section 124 of the *Evidence Act* which exempts evidence of the victim in sexual offences where it is the sole evidence, from strict compliance with the rule that in criminal cases, the evidence of a victim must be corroborated by other material evidence. She thus cited the minor’s testimony that she tried to run but fell down and the Appellant caught up with her, removed her pant, and



did to her “tabia mbaya”. He also observed that in the P3 Form, it is indicated that there was “partial penetration”. Counsel also observed that in the Judgment, the trial Court expressly pronounced that she found the Appellant’s defence of frame-up to be an afterthought which was never raised during cross-examination. On the issue of sentence, he cited the case of Bernard Kimani Gacheru v Republic [2002] eKLR on the principle that sentencing is basically a preserve of the trial Court. He also pointed out that Section 8(3) of the Sexual Offences Act under which the Appellant was charged provides for a prison sentence of up to 25 years, and thus submitted that the sentence of 20 years imprisonment meted out after mitigation was proper and within the parameters of law. Regarding Section 333(2) of the CPC, she pointed out that the trial Magistrate complied with it as she ordered that the sentence run with effect from the date of arrest

## Determination

16. 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 v Republic* [1972] E.A 32).
17. Before I proceed further, I have observed, from my own perusal of the proceedings, that the minor said to have ben defiled and who testified as PW1, stated that she was 12 years old. Despite that age, she does not seem to have been subjected to a voir dire examination before testifying, as required under Section 19 of the Oaths and Statutory Declarations Act. She stated, in her testimony, that on the date of testifying, namely, 22/01/2025, she was 12 years old. The Certificate of Birth produced in evidence, on its part, indicates that she was born on 14/05/2012, which means that at the date of testifying she was about 13 years and 4 months in age. The trial Magistrate did not also give a reason why she did not conduct the voir dire examination. In view thereof, and although neither of the parties raised it, I will include this omission to conduct the voir dire examination as an issue for determination.
18. The issues that arise for determination herein are therefore the following:
  - a. Whether the charge sheet was fatally defective.
  - b. Whether the failure to conduct a voir dire examination before the minor-alleged victim testified vitiated the trial and conviction of the Appellant.
  - c. Whether the defilement charge against the Appellant was proved beyond reasonable doubt.
  - d. Whether the sentence of 20 years imprisonment was justified.
19. On the issue of the charge sheet, the Appellant alleged that it was defective because, although both the Charge Sheet and the Certificate of Birth produced in evidence indicate the victim’s first name as “B.....”, the charge sheet referred to her second name as “C.....”, while the Certificate of Birth indicates her second name as “J.....”. In his view therefore, the Charge Sheet is fatally defective because it refers to the name of the victim as “BC” while the Certificate of Birth referred to her as “BJ”.
20. In regard to charge sheets, Section 134 of the Criminal Procedure Code provides that:

“Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the Appellant person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”



21. The above position was amplified by Kimaru J (as he then was), in the case of *Kipkurui Arap Sigilani v Republic*, (2004) 2 KLR, 480, in which he stated that:

“The principle of the law governing charge sheets is that an Appellant should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the Appellant may be able to plead to specific charge that he can understand. It will also enable the Appellant to prepare his defence.”

22. Applying the test above, I am satisfied that the particulars of the offence were clearly spelt out, and these included the section of the law creating the offence, the date of the offence, the place of the offence, the act constituting the offence and the name of the victim. In the circumstances, my view is that even if there were any contradictions in the name of the victim, which I do not find in any event, the same was not material, and could not honestly have occasioned any injustice or vitiate the conviction. The Appellant knew very well which minor the case was about from inception. The fact that he ably cross-examined the witnesses, and at no time raised any issue over identity of the victim is sufficient proof that the discrepancies in the minor’s second name, if any, in no way prejudice his ability to prepare and execute his defence, and did not at all occasion him any injustice. I thus reject that ground of Appeal.
23. Regarding the voir dire examination, which phrase refers to a preliminary examination conducted to determine the competence of a child witness of “tender years”, the Court of Appeal, in the case of *Maripett Loonkomok v Republic* [2016] KECA 520 (KLR), stated as follows:

“Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the Court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the Court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. .... Voir dire, a latin phrase (verum dicere) for saying “what is true”, “what is objectively accurate or honest” has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as “a trial within a trial”, a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror .....

24. In respect to the phrase “child of tender years”, the term is not defined, but is generally agreed that, for purposes of voir dire examination, it refers to a child of less than 14 years in age. This was also reiterated by the Court of Appeal in the same case of *Maripett Loonkomok v Republic* (supra) as follows:

“The question therefore is, who is a child of tender years? The *Sexual Offences Act* and the *Oaths and Statutory Declarations Act* are silent on this question. However way back in 1959 in the celebrated case of *Kibageny Arap Kolil v R* (1959) EA 82, the Court of Appeal for Eastern Africa held that the phrase “a child of tender years” meant a child under the age of 14 years. The only statutory definition of a “child of tender years” is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in *Patrick Kathurima v R*, Criminal Appeal No. 137 of 2014 and in *Samuel Warui Karimi v R* Criminal Appeal No. 16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. ....”



25. It is therefore generally agreed that failure to conduct a voir dire examination is not per se always fatal to the Prosecution case. While it is a requirement to assess the competence of a child to understand the meaning of taking an oath and of telling the truth, an omission by the Court to do so does not automatically vitiate a conviction if there is other evidence that sufficiently corroborates or supports the charge. This principle was similarly reiterated by the Court of Appeal in the same Maripett Loonkomok v Republic (supra) case in which it found and held as follows:

“We turn to consider the effect of failure by the trial Court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate what has been said many times before that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014.

.....

It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child’s intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;

“In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge ... the Court may still be able to uphold the conviction.”

See Athumani Ali Mwinyi v R Cr. Appeal No.11 of 2015

On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct voir dire examination. The complainant’s evidence was cogent; she was cross-examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the Appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant’s evidence the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence, especially the medical evidence which corroborated the fact of defilement.”

26. The impact of failure to conduct a voir dire examination must therefore depend on the peculiar facts of the case at hand. In this case, perusing the record, I find that the minor, despite her age, ably demonstrated an understanding of the meaning of taking an oath and the duty to speak the truth. In my view, it will be an injustice to vitiate the whole trial on basis of the mere failure to conduct a voir dire examination. I also note that the Appellant did not raise the omission as a ground of Appeal. Further, the minor being 13 years and about 4 months, she was only a few months shy of the magic age of 14, thus the impact, if any, was minimal. In the circumstances, my finding is that, in this case, the omission cannot per se vitiate the conviction as there is no indication that it caused the Appellant any injustice.
27. On whether the charge was proved beyond reasonable doubt, it is trite law that for the offence of defilement to be established, 3 ingredients must be proved, namely, age of the victim, penetration and positive identification of the offender. In respect thereto, Section 8(1) and 8(3) of the [Sexual Offences Act](#) provide as follows:

“ 8.



- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  - (2) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
28. In this case, the charge sheet indicated the minor’s age as at the date of the offence (9/11/2024) as 12 years old. The minor and her mother confirmed that age of 12 years at the date that they testified on 22/01/2025. On the other hand, the minor’s Certificate of Birth produced in evidence indicated that she was born on 14/05/2012. The offence having been alleged to have been committed on 9/11/2024, it would mean that going by the Certificate of Birth, which would inevitably be the more reliable evidence, the minor was about 12 years and 6 months at the date of the offence, thus below 15 years. I am therefore satisfied that the minor’s age of being below 15 years old was sufficiently proved.
29. On the issue of “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.”
30. 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 complainant 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 of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl’s organ.”
31. In this case, the minor narrated how she was herding sheep in the forest on 9/11/2024 when at around 11.00 am, the Appellant (a neighbour) appeared alleging that some children had uprooted his beans, the minor pointed out to him where the children had gone but he turned on the minor and ordered her to kneel down and raise her hands and threatened to cut her with a panga. The minor narrated how the Appellant began to remove his trousers and she thus tried to run away but fell down, the Appellant caught up with her and removed her pant from behind and did to her *tabia mbaya* (bad manners), and he threatened to kill her. She testified that the Appellant removed his front private parts and tried “to put it in her” but she closed her legs to prevent him from doing so, and that she screamed as he tried to remove her clothes. She stated that the Appellant lay on her from the back and had removed her pant to the knees, but she closed her legs. PW2, the minor’s mother, testified that indeed this is the narration that the minor gave her when she reported the incident to her.
32. Medical evidence was then provided by PW4, the Clinical Officer who produced the P3 Form, and testified that the minor was brought to the facility on 11/11/2024, two days after her alleged defilement. He stated that on examination, the minor’s labia majora and minora and the vagina were found to be intact, and although the hymen was torn, it was not recent, as it was beyond 2 weeks. He also found a whitish discharge, and stated that laboratory results were normal. He then stated that he found the existence of a urinary tract infection (UTI) and established that the torn hymen was due to irritation caused by the UTI. He then stated that he did not find any evidence of penetration. The P3 Form prepared and produced by the same Clinical Officer also indicates that no spermatozoa was found.



33. There was however the contradiction that in the same P3 Form, which he is the same person who authored and produced, the same Clinical Officer, in his own words, expressly stated that there was “partial penetration”. The entry he made at Section D of the Form is that “examination findings show a case of defilement. Partial penetration with no full length.” In dealing with this unexplained contradiction, the trial Magistrate found and held as follows:

“ 10. On the issue of penetration, PW4 Philomena Kitony, the clinical officer, stated that on examination ..... He made a conclusion of a case of defilement, partial penetration with no full length .....

11. Surprisingly when the clinical officer gave evidence in chief, he gave contradictory findings from the above as follows: He made a diagnosis of UTI, the torn hymen was due to irritation, there was no penetration. On being cross-examined by the accused person, he stated that there was no penile penetration and she did not have injuries.

12. His conduct in dealing with this matter is wanting and should he have wanted to aid the accused person, he would not have produced the medical documents which clearly establishes that there was partial penetration. Other than the medical reports the Court looked at the demeanour and conduct of the complainant during the trial and it believed in her truthfulness as the per the provisions of Section 124 of the *Evidence Act*”

34. The trial Magistrate, on the strength of the finding of “partial penetration” indicated in the P3 Form, and the Court of Appeal holding in *Mark Oiruri Mose v R* (supra), that “partial penetration” is sufficient in proving “penetration” in cases of defilement, found that penetration was proved.

35. Considering the state of evidence as captured above record, I cannot fault the trial Magistrate for reaching the above findings. She saw and heard the witnesses and thus had the advantage of studying their demeanour. As a finder of facts, she believed the minor and disbelieved the Clinical Officer as her discretion allowed her to do. The Clinical Officer not having explained the contradiction in his testimony with the statements he made in the P3 Form, the trial Magistrate was right to make the observations she made about the Clinical Officer’s credibility. In view of the above, the trial Magistrate cannot be faulted for finding that the element of “penetration” was sufficiently corroborated and thus proved. Her finding that the Clinical Officer also tried to aid the Appellant by misleading the Court cannot also be faulted. I thus also overrule this ground of Appeal

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

“ 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”.

37. In this case, the minor identified the Appellant as a neighbour who lived in the same neighbourhood and referred to him by his name. From the testimony of the witnesses, the complainant also gave the Appellant’s name to all the people she narrated the account to. I also note that in his defence, the



Appellant basically admitted knowing the minor and her family. In fact, the Appellant, in his defence, alleged that he had been framed by the Appellant's parents because of a dispute.

38. 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" as was stated in the case of *Reuben Tabu Anjononi & 2 Others v Republic* [1980] eKLR, in which 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."

39. The Appellant has contended that the minor, in her testimony, indicated that the accused was accompanied by a second person. According to him, the identity of this second person was not disclosed and thus creating doubt on the identity of the assailant. I right away dismiss this contention as far-fetched. It is clear that the observation is borne out of the trial Magistrate's recording of the minor's reference to the Appellant as "Kelvin and a neighbour". Reading the testimony in full context, it is clear that the minor, in describing the Appellant, meant that his name is "Kelvin, who is also a neighbour". She did not therefore at all refer to two different people, but one and the same person, namely, the Appellant.
40. In light of the foregoing, I am also satisfied that the trial Magistrate correctly found that the Appellant had been positively identified.
41. As aforesaid, in his defence, the Appellant alleged that he was framed by the minor's family because of local disagreements. As correctly observed by the trial Magistrate, this was clearly an afterthought as it was never even raised during cross-examination.
42. The primary testimony against the Appellant was that given by the minor (PW1). That the law requires corroboration of testimony by minors where such minor is the 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 corroboration if the trial Court believes that the minor-victim told the truth and recorded its reasons. The Section and the proviso are premised 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.”

43. From the foregoing, it is clear that the proviso to Section 124 of the *Evidence Act* allowed the trial Magistrate to convict on the sole evidence of the minor being the victim of the sexual offence as she was satisfied that the victim was being truthful. I therefore find no reason to fault the trial Magistrate for reaching the finding that the minor’s testimony was sufficiently corroborated by the rest of the witnesses, and also by the P3 Form.

44. On the issue of “sentence”, the limits within which an appellate Court can interfere were restated by the Court of Appeal in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR, as follows:

“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”.

45. In applying the above guidelines, I reiterate that Section 8(3) of the *Sexual Offences Act* provides as follows:

“(2) 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.”

46. In view of the above, it is clear that the sentence imposed by the trial Court, although the minimum prescribed, was within the law. The trial Court did not anywhere also state that it was imposing the sentence because it was the minimum mandatory prescribed. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory minimum sentences should be discouraged and that Courts should retain the discretion to depart therefrom where circumstances allow. In this regard, the Supreme Court in the case of *Francis Karioko Muruatetu and Another v Republic* [2017] eKLR, while dealing with a case of murder, stated as follows:

“(66) It is not in dispute that article 26(3) of *the Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of *the Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account



due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.”

47. On the strength of the Muruatetu decision and reasoning, the High Court and even the Court of Appeal routinely reviewed mandatory minimum sentences imposed for different offences other than murder, including for sexual offences and robbery with violence. Examples are the Court of Appeal decisions in the case of Dismas Wafula Kilwake v Republic [2018] eKLR, the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), and also the case of Joshua Gichuki Mwangi v Republic [2022] eKLR. I may also mention the oft-cited decision of Odunga J (as he then was), in the case of Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR).
48. However, by the 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 Court made it clear that Muruatetu only applied to murder cases, and not to any other type of case, not even sexual offences.
49. Recently, the Supreme Court reiterated the above 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 setting aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside the mandatory minimum sentence of 20 years imprisonment imposed on an Appellant for a defilement offence, the Supreme Court stated, inter alia, as follows:
  - “ 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.  
.....”
50. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will be acting ultra vires were it to set aside the sentence of 20 years imprisonment imposed herein, on the sole basis that the same, being a minimum sentence stipulated by statute, is unconstitutional. As clearly spelt out by the Supreme Court, Muruatetu is not applicable to cases under the *Sexual Offences Act*.
51. My above observation does not however mean that I cannot determine the issue whether the sentence deserves the invoking of this Court’s powers of Revision for being manifestly excessive or harsh, which I now proceed to do.
52. The Supreme Court, in the same Muruatetu case, also guided that, in re-sentencing by the High Court, 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.



53. The sentence meted out on an offender must therefore be commensurate to the blameworthiness of the offender and before settling on a sentence, the Court must consider the facts and the circumstances of the case in its entirety. In restating the above principles, the Court of Appeal in the case of *Thomas Mwambu Wenyi v Republic* (2017) eKLR quoted the decision of the Supreme Court of India made in the case of *Alister Anthony Pereira v State of Maharashtra* where it was held as follows:

“70. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The Courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the Court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

71. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence

As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The Court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

54. Similarly, in the case of *Daniel Kipkosgei Letting v Republic* [2021] eKLR, the Court of Appeal stated 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. ....”

55. Applying the above principles to the facts of this case, I note that the Appellant was given the opportunity to mitigate, and he made representations thereon. I also consider that sexual offences, especially defilement are treated as serious offences under Kenyan law and the society at large, and are thus always severely punished. It was therefore upon the trial Court to impose a sentence that is proportionate to the offence committed. In this case, the Appellant preyed on a young 12-year-old girl and violently stole her innocence. This is totally unacceptable. The minor will definitely be traumatised for the rest of her life by the ordeal. I also do not find any “mitigating factors” that would justify the extension of any sympathy to the Appellant who has not even shown any remorse. Considering the above circumstances, I agree that the Appellant merited a stiff sentence and I find that the 20 years prison term was proportionate and justified. For the said reasons, I find no reason to interfere with the sentence.

### **Final Order**

56. In the end, the Appeal fails in its entirety, and it is hereby accordingly dismissed

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MAY 2026**



.....

**WANANDA JOHN R. ANURO**

**JUDGE**

Delivered in the presence of:

Appellant (present virtually from Eldoret Main Prison)

Ms. Muriithi for the State

Court Assistant: Brian Kimathi

