**Njuguna v Republic (Criminal Appeal 02 of 2018)**
**[2025] KECA 850 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 850 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CRIMINAL APPEAL 02 OF 2018**

**MA WARSAME, JM MATIVO & PM GACHOKA, JJA**

**MAY 9, 2025**

**BETWEEN**

**SAMUEL MUYA NJUGUNA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Naivasha (C. Meoli, J.) dated 3rd May 2018 in Criminal Appeal No. 62 OF 2016)***

## JUDGMENT

1. Samuel Muya Njuguna, (the appellant), was on 7th September 2015, charged before the Chief Magistrates' Court at Naivasha with the offence of defilement contrary to Section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* (the Act) in Criminal Case No. 52 of 2015. The accusation against him was that between 21st and 23rd August 2015, he defiled DMG, a boy aged 11 years at the time and place detailed in the charge sheet. He faced an alternative count of committing an indecent act with the said child.

2. The complainant's evidence was that on 21st August 2015, at 10.00 am, while he was grazing cattle alone near Mogas Petrol Station within Mai Mahiu, the appellant approached him, threw him into a quarry, removed his trouser, applied Vaseline oil on his penis and the complainant's anus and he forcefully sodomized him. It was also his evidence that after the encounter, the appellant threatened him with death if he dared to divulge the encounter to anyone. The complainant also testified that on 22nd August 2015, the appellant found him grazing in the same area, he pulled him into a maize plantation, he applied Vaseline oil on his penis and the complainant's anus and defiled him. He experienced excruciating pain and shouted but no one came to his aid. After this encounter, the complainant experienced a lot of pain, he could not sit comfortably, so that evening he went home and slept. There was a third incident on 23rd August 2015 when the appellant again found the complainant grazing

cattle. He threw him into a pit latrine which was under construction and defiled him. The complainant cried loudly prompting the appellant to ran away leaving him in the pit. His cries attracted a lady passerby who came and rescued him and escorted him to his home.

3. After these encounters, the complainant became withdrawn, he was not feeding and only reported to his mother his three days ordeal after the pain increased. The complainant was able to describe the assailant properly. The incident was reported at the Mai Mahiu Police Station where they were issued with a P3 form, and the boy was taken to the Naivasha District Hospital where the P3 form was completed. During his cross-examination, he explained how the appellant committed an unnatural act with a goat to demonstrate to him that it was not painful. It was also his evidence that the appellant bit his buttocks as he forced himself into his anus. He insisted that on those three occasions, he would shout, and it was only during the third incident, that a lady passerby came to his rescue.

4. PW2 is the complainant's mother. Her evidence was that the boy had lost appetite, was withdrawn, and she thought he was in pain since he had been circumcised a month before, and that, it was only after inquiring that the boy disclosed his ordeal, and that, she had to take him to a rehabilitation centre because she was unable to manage him after the ordeal. She produced the birth certificate showing that the complainant was born on 14th October 2003. She also produced the Post Rape Care Report and the P3 form.

5. The Clinical Officer, (PW4), testified that the complainant had a bite at the back, painful defecation and a fecal matter at the anal region which was secondary to penetration.

6. In his defence, the appellant denied committing the offence. He also denied knowing the complainant or his mother and insisted that he used to graze cattle in the area in question alone.

7. After analyzing the evidence, the trial magistrate was persuaded that the offence of defilement contrary to Section 8 (1) and (2) had been proved, he convicted the appellant and sentenced him to serve life imprisonment. The alternative count was dismissed.

8. The appellant's first appeal to the High Court against conviction and sentence was dismissed by Meoli, J. for being devoid of merit in a judgment delivered on 3rd May 2016 in HCCR Appeal No. 62 of 2016, the subject of this appeal. The appellant is now before us in this second appeal in his quest for justice seeking to overturn the High Court decision. His grounds of appeal are that penetration was not proved, the charge sheet was defective, his rights to a fair trial were violated because he was not given a chance to call witnesses after an alternative charge was added to the main charge, that he was not supplied with witness statements during the trial and that the investigations and the medical evidence did not meet the required threshold.

9. In his undated supplementary grounds of appeal, the appellant faults the learned judge for failing to find that the sentence imposed on him is against the spirit of Article 50 (p) & (q) of *the Constitution*, that the learned judge erred in upholding the sentence of life imprisonment, yet age and penetration were not proved and that the learned judge failed to consider his defence. The appellant prays that his appeal be allowed, and that both his conviction and sentence be set aside.

10. In his written submissions in support of this appeal, the appellant argues that the sentence imposed upon him is mandatory in nature, and therefore, in passing it, the trial court did not exercise its discretion, nor did the court consider the provisions of Sections 216 and 329 of the *Criminal Procedure Code*. In support of this contestation, the appellant cited the High Court decision in Maingi & 5 Others vs. Director of Public Prosecutions & Ano. [2022] KEHC 13118 (KLR) and the constitutional imperative that all laws in place as at the promulgation of the 2010 Constitution should be construed with such modifications and alterations so as to conform with *the Constitution*. He also cited the

South African decision in S vs. Malgas (2) SA 1222 SCA 1235 in support of the proposition that courts are now free to depart from mandatory/minimum prescribed sentences. It was his submission that minimum/maximum sentences are not in tandem with international instruments such as the International Covenant of Civil and Political Rights, 1996. He argued that such sentences do not accord with the right to dignity as provided under Article 28 of the Constitution as was appreciated by the Supreme Court in Muruatetu & Ano. vs. Republic, Petition No. 15 & 16 of 2020. The appellant also cited several decisions of this Court among them Dismus Wafula Kwake vs Republic [2019] eKLR, Eliud Waweru Wambui vs. R [2018] eKLR and Yawa Nyale vs. R [2018] eKLR in support of the requirement for courts to align legislations with *the Constitution*.

11. The appellant also referred this Court to R vs. Scott [2005] NSWCCA 152 in support of the proposition that sentence must reflect the seriousness of the offence committed and a reasonable proportionality between the sentence passed in the circumstances of the case. He also cited several other decisions among them the High Court decision in Julius Kitsao Mayeso vs. R [2020] KEHC 6180 (KLR) in support of his plea to this Court to consider a lesser severe sentence.

12. The appellant maintained that the offence of defilement was not proved because the complainant's age, an essential ingredient of the offence was not proved. He maintained that the complainant's age was in doubt because the charge sheet and the P3 form shows that he was 11 years, the complainant said he was 11 years while PW2's evidence was that the complainant was 12 years as at the time of the offence. She produced a birth certificate showing that he was born on 14th October 2003. It was his submission that the Clinical Officers evidence could not assist on the question of age because he could not be cross–examined on the said issue because he was not the maker of the P3 form, and in any event, his evidence was not compelling.

13. He also maintained that penetration was not proved to the required standard and claimed that PWI's evidence on penetration was not credible. He submitted that it was a grave misdirection for the court to rely on the testimony of the Clinical Officer because her evidence did not establish that the complainant was defiled. He relied on the case of Arthur Mshillah Manga vs. R [2016] which underscored the need for the findings in the medical report to show that there was penetration.

14. It was also the appellant's submission that his defence was not considered. In support of this contestation, he relied on Victor Mwendwa Mulinge vs. R [2014] KECA 710 (KLR) in support of the holding that the burden of proving the falsity of an accused person's defence lies with the prosecution. He maintained that his defence that the complainant's mother framed him cannot be wished away.

15. In opposing the appeal, the respondent filed written submissions dated 2nd May 2024. Regarding the assertion that penetration was not proved, the respondent maintained that the evidence tendered in support of penetration was overwhelming. He specifically referred to the testimony of PW1, PW2 and PW4 and argued that both the trial court and the first appellate court after evaluating the evidence were satisfied that penetration was proved to the required standard.

16. Addressing the question whether the appellant was properly identified as the offender, the respondent maintained that the evidence tendered by PW1 and PW2 clearly identified the appellant as the assailant and it is this evidence which led to his arrest. In particular, the respondent argued that PW1 knew the appellant by name and that the offence took place during the day on three consecutive days. Further, the respondent submitted that the learned magistrate rightly concluded that the complainant knew the appellant before the incident and that he used to graze in the same place.

17. Regarding the complainant's age, it was the respondent's position that from the evidence presented before the trial court, the two courts below rightly found that PW1 was aged 11 years.

18. Regarding the contestation that an alternative count was added, yet the appellant was not granted the opportunity to recall the witnesses, the respondent maintained that the appellant was only convicted on the main count, therefore, he suffered no prejudice, and in any event, the trial court considered the issue and held that the omission did not vitiate the trial.

19. Lastly, regarding the appellant's argument that he was not supplied with witnesses statements, the respondent submitted that the 1st Appellate Court considered the said issue and was satisfied that the appellant's request for the proceedings was granted by the trial Court, and he never raised it again before the trial court, and he only raised it before the 1st appellate court, which considered the complaint and after going through the record held that the appellant's claim was allowed by the trial court and after the statements were supplied to him, he never raised the issue again during his trial.

20. This is a second appeal, therefore, our jurisdiction is limited to considering matters of law as stipulated by Section 361 of the *Criminal Procedure Code*. A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at by the two courts below unless such findings are based on no evidence or are based on a misapprehension of the evidence or the courts below are demonstrably shown to have acted on wrong principles in arriving at its findings. (See David Njoroge Macharia vs. Republic [2011] eKLR). This Court in Karani vs. R [2010] 1 KLR 73 held that:

> "By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

21. First, we will address the question whether the appellant was positively identified as the offender. Positive identification of an accused person is an essential element of any offence and a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony, such as the witness's intelligence, his capacity for observation, reasoning and memory, and his ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.

22. Addressing the question whether the appellant was properly identified as the offender, the trial magistrate had this to say:

> "Victim stated (sic) offence was committed during day time. He saw his assailant very well. He knew accused prior as a shepherd. He used to graze around the scene..."

23. Determining the same issue, the learned judge at paragraph 13 of the impugned judgment stated that the victim had 3 encounters with the appellant and that the appellant was a herdsman in the same locality. We have independently re-evaluated the evidence and the concurrent findings of the two courts below. We find no reason to doubt the honesty of PW1 and his capacity to observe and remember his assailant. As the facts disclose, the appellant used to graze cattle in the same locality. There is evidence that the appellant was previously known to PW1. The defilement took place in broad day

light and there is nothing to suggest that the complainant's capacity to observe was hindered in any manner. The complainant's evidence is fortified by the fact that the assault was not a one-time incident. Conversely, there is credible evidence that the appellant defiled the complainant on three consecutive days in broad day light. During these three occasions, the complainant had a proper opportunity to observe his assailant, who in any event, as stated above, was already known to him. To suggest otherwise, in our view, would be a grave misdirection and an impermissible disregard of clear and uncontroverted evidence. No court of law can knowingly ignore clear direct evidence. In any case, as decided cases suggest, we are obligated to pay homage to concurrent findings of fact arrived at by the two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. We find no reason to depart from the concurrent finding by the two courts below on the issue under consideration, therefore, this ground of appeal fails.

24. Next, is the issue whether penetration, a key ingredient of the offence of defilement was proved to the required standard. The appellant faults the two courts below for finding that penetration was proved. He questions the evidence tendered by the Clinical Officer and casts doubts on its veracity. In determining this issue, the learned Magistrate had this to day:

> "It is a finding of this court that victim was penetrated in his anal region. Although no injuries noted, he stated that the appellant used some lubricant for smooth penetration.... The victim had even changed his walking style."

25. The learned judge after evaluating the entire record was more emphatic that:

> " The evidence of PW1 on penetration is compelling, and is supported by the mother's testimony regarding the changes she noted, leading her to question the young boy closely. PW1 gave consistent evidence on the three incidents of defilement while out in the field where the appellant was found on the date of arrest. He gave reasons why he did not report to his mother, who nonetheless noted that PW1 had become withdrawn, had trouble sitting had become incontinent (sic)".

26. Section 2 of the *Sexual Offences Act* defines "penetration" as partial or complete insertion of the genital organs of a person into the genital organs of another person. The Act defines genital organs to "include the whole or part of male or female genital organs and for the purposes of this Act includes the anus." It is important to mention that the presence of spermatozoa is not a requirement nor is it necessary that the assailant completes the intercourse by ejaculating.

27. PW1 gave a detailed account of the three incidences he was defiled. He graphically explained how the appellant used Vaseline Oil as a lubricant as a precursor to performing this beastly act. The complaint narrated how he screamed during the first and second incidences. Unfortunately, no one came to his rescue. During the third episode, his screams attracted a lady passerby who came and pulled him out of the pit and escorted him to his home. His own mother corroborated this testimony when she testified that the boy had become withdrawn, had stopped eating and could not sit comfortably. PW4 who produced the P3 form stated that the findings after the complainant's medical examination were consistent with penetration. We see no reason to doubt the concurrent findings by the two courts below on this issue. This ground of appeal fails.

28. We now turn to the other element of the offence of defilement, which is the age of the complainant. The complainant's mother produced a birth certificate showing that PW1 was born on 14th October 2003. The charge sheet stated that the complainant was aged 11 years and that the offence took place between 21st and 23rd August 2015. A simple calculation shows that at the time of the defilement, the

complainant was aged 11 years and 10 months. Therefore, he was slightly above the age of 11 years stated in Section 8 (2) of the *Sexual Offences Act* which provides for a mandatory life sentence where the victim is aged 11 years or less. We shall revert to this issue of age later while addressing our mind to the question whether the sentence imposed upon the appellant was proper owing to the complainant's actual age as at the date of the commission of the offence.

29. The other ground urged by the appellant is that his defence was not considered. However, this ground was not raised before the High Court, and therefore the first appellate court did not have the opportunity to address its mind to this ground. This Court has had occasion to consider the effect of raising an issue on appeal for the first time in, among other cases, Kenya Commercial Bank Ltd vs. James Osede [1982] eKLR where Hancox, JA had this to say: "...that where the right of appeal is statutory, it is to be confined to points of law raised before and decided by the trial judge."

30. The appellant challenged his sentence and cited authorities to the effect that mandatory/minimum sentences are unconstitutional. This argument is attractive. However, that is how far it goes. The Supreme Court has since clarified that the Muruatetu decision does not apply to offences under the *Sexual Offences Act*.

31. The appellant also argued that the he was not afforded the opportunity to recall witnesses after the alternative charge was introduced. Addressing this complaint, the High Court stated that the appellant was only convicted on the main court and therefore, he suffered no prejudice. We entirely agree with this finding.

32. The appellant maintained that he was not supplied with witness statements. As the record shows, the appellant's request for the proceedings to be supplied to him was allowed by the trial Court. The appellant never raised this issue again before the trial court, yet he participated in the proceedings and even cross-examined the witnesses. He only raised this issue before the 1st appellate court, which considered the complaint and after going through the record held that the appellant's claim was allowed by the trial court and after that the statements were supplied to him, and he never raised the issue again during his trial. We find no reason to depart from this finding by the trial judge.

33. Regarding sentence, as stated earlier, the complainant was aged 11 years and 10 months as at the time of the offence. Section 8 (2) of the *Sexual Offences Act* provides a mandatory life sentence if the child is aged 11 years and below. In this case, the victim was aged 11 years and 10 months. The next category of punishments is provided in Section 8 (3) which provides that a person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than twenty years. The third category is provided under section 8 (4) which provides that if the child is aged between 16 and 18 years, the accused shall be liable upon conviction to imprisonment for a term of not less than 15 years.

34. A casual reading of the above provisions may raise pertinent questions such what happens if the victim, like in the instant case has surpassed 11 years and has not yet attained 12 years, or if the child's age is above 15 but below 16. The question begging for an answer is whether there exists a lacuna in the law. Simple as the issue appears, there are conflicting decisions by this Court on this issue. For example, in Alfayo Gombe Okello vs. Republic [2010] KECA 319 (KLR), this Court (Gicheru CJ, Bosire & Waki JJ.A.) stated:

> "It seems to us that there is an obvious lacuna in the Act as there is no provision for punishment where the child is between the age of fifteen and sixteen years. Section 8 (4) caters for the ages of sixteen to eighteen years. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of

the child as at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find."

35. Faced with the same question, this Court (Makhandia, Ouko & M'inoti JJ.A.) in Hadson Ali Mwachongo vs. Republic [2016] eKLR stated:

> " Before we conclude this judgment, it is necessary to say a word on computation of the age of the victim. The *Sexual Offences Act* provides for punishment for defilement in a graduated scale. The younger the victim, the severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is imprisonment for life. Defilement of a child of 12 years to 15 years attracts 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment.
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> Rarely will the age of the victim be exact, say exactly 8 years, 10 years, 13 years etc., as at the date of defilement. It will be a few days or months above or below the prescribed age. The question then arises, is a victim who is, for example, 11 years and six months old at the time of defilement to be treated as 11 years old, or as more than 11 years old? If the victim is treated as more than 11 years old, to what term is the offender to be sentenced since the victim has not attained 12 years for which a sentence is prescribed? In the same vein, in the present appeal where the victim was aged 15 years and a couple of months old, but was not yet 16 years old, is the appellant to be sentenced as if the victim was exactly 15 years or as if she was 16 years old?
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> On the face of it, an attractive argument is that there is doubt as to the age of the victim and that the benefit of the doubt ought to be given to the accused person, so that the less severe sentence is imposed. Thus, where the victim is say, 15 years and 2 months, she would be treated as 16 years so that the accused person is sentenced to 15 years imprisonment, as though the victim was aged between 16 and 18 years, instead of 20 years for a victim of 15 years.
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> Indeed, in Alfayo Gombe Okello vs. Republic, (supra), this Court went about the issue as follows:
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> "The evidence of the mother was that she (the victim) was born in 1992. No month or date is mentioned. If she was born between January and July 1992, she would obviously have been above 15 years of age but below sixteen when the offence was committed. It seems to us that there is an obvious lacuna in the Act as there is no provision for punishment where the child is between the age of fifteen and sixteen years. Section 8 (4) caters for the ages of sixteen to eighteen years. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child as at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find."
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> We are of a different mind for the following reasons. Section 2 of the *Interpretation and General Provisions Act* defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus, a person who is, for example, 10 years and 6 months is deemed to be10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year. Back to the *Sexual Offences Act*, a victim who is days or months above 11 years will be treated as 11 years old so long as he or she has not attained 12 years of age. On the same reasoning, the victim in this case who was 15 years, 6 months and 13 days old must be treated to be 15 rather than 16 years old.

> We have come to the conclusion that the trial court did not err in convicting and sentencing the appellant as it did and that the first appellate court did not err either in upholding the conviction and sentence. This appeal is accordingly dismissed." (Emphasis added).

36. The preliminary point in addressing this question is interpreting the impacted provisions of the law. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The Court must prioritize the legislative intent behind the law. This means that the courts will consider the purpose and goals the legislature intended to achieve, rather than just the literal meaning. The court will strive to interpret the phrase in a way that best fulfills the overall legislative intent. Talking about the legislative intent, it is important to bear in mind that the preamble to the *Sexual Offences Act* which reads:

> " An Act of Parliament to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes."

37. Clearly, from the above preamble, the goal of the Act is to prevent and protect all persons from harm from unlawful sexual acts. Therefore, any thought that the Sections 8 (2) (3) and (4) leaves out any categories of children must be approached with the correct meaning of the preamble and intention of the statute in mind. This is because preambles to statutes are generally understood as guiding the interpretation and application of the statute itself. They serve as an introductory statement, explaining the reasons, purpose, and scope of the legislation, thus helping courts understand the broader context and intent of the drafters. While the preamble does not create independent rights, it can illuminate the spirit and values underlying the statute, especially in constitutional and statutory interpretations. The preamble is in essence introductory — but its traditional purpose is to reflect the intentions of the drafters, and to explain the reasons, purpose, object or scope of the Act, and to recite any facts that may be relevant. (See Winckel, Anne, "The Contextual Role of a Preamble in Statutory Interpretation" [1999] 23 (1) Melbourne University Law Review 184, at 185).

38. The touchstone of interpretation is the intention of the legislature. The legislature may reveal its intentions directly, for example by explaining in a preamble or a purpose statement. It is also important to bear in mind the context within which the words appear. As the Supreme Court of India stated in Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. & Others [1987] 1 SCC 424 :

> " Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

39. The key words in section 8 (2) is the phrase "less than 11 years." The court must bear in mind that legislation must conform to *the Constitution* in both its content and its application. Also, the Court must strive to ensure that its interpretation of the legislation leads to a fair and just outcome, which must align with the values and principles enshrined in *the Constitution* and the purpose of the statute. This involves considering the legislative intent, the purpose of the legislation, and the context in which the words are used. Therefore, interpreting the phrase "less than" requires this Court to typically focus on the specific context where the phrase appears because the meaning of the said expression cannot be

divorced from the surrounding text and the legal context. In essence, this Court must strive to give the words "less than" a meaning that is consistent with the purpose of the law, while also considering the broader legal framework and established precedents.

40. As was held by the High Court in Law Society of Kenya vs. Kenya Revenue Authority & Ano. [2017] eKLR, it is also important for a court to bear in mind important principles which apply to the construction of statues such as

    (a) presumption against "absurdity" – meaning that a court should avoid a construction that produces an absurd result;

    (b) the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces "unworkable or impracticable" result;

    (c) presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" result and

    (d) the presumption against artificial result – meaning that a court should find against a construction that produces "artificial" result and, lastly,

    (e) the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to "public interest," " economic", "social" and "political" or "otherwise."

41. The court as an independent arbiter has fidelity to the law and must be guided by the letter and spirit of the law, and it should give life to the intention of the lawmaker instead of stifling it. Bearing in mind the principles of statutory interpretation discussed above, and the conflicting decisions from this Court cited above, the preamble to the Act and the context within which Sections 8 (2), (3) and (4) of the Act appear, we now narrow our determination to our understanding of sub-section (2) which is the relevant provision in this case. It reads:

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

42. In Hadson Ali Mwachongo vs. Republic (supra), the Court premised its finding on the definition of a calendar year in Section 2 of the *Interpretation and General Provisions Act* while in Alfayo Gombe Okello vs. Republic (Supra) the Court took the view that there was a lacuna in the law and preferred an interpretation that ensures that the accused person gets a lesser severe punishment.

43. A legal lacuna exists where an appropriate legal rule to be applied by a court to the situation before it is not evident, is uncertain, unclear or does not exist. A lacuna can arise when a statute is silent on a particular issue, or when there is a gap between different legal provisions. The court's primary duty is not to create new law, but to interpret and apply existing legal principles in a way that addresses the gap, where it exists. This involves analyzing the existing legal framework, the relevant statutes, case law, and legal doctrines to understand the context and purpose of the law. The court will use established methods of legal reasoning, such as deductive reasoning, precedent, and statutory interpretation, to reach a decision that is consistent with the law. By applying these principles, the court aims to avoid a situation where the law is incomplete or ineffective.

44. We wholly agree with the principle followed in Alfayo Gombe Okello vs. Republic (Supra) that where there is an ambiguity in phraseology of sentencing the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence. This is based on the principle of favorability to the

accused (also known as the principle of "lex non distinguit ubi non distinguitur") which dictates that the law must not be interpreted to be harsher than necessary. This reasoning enjoys a constitutional underpinning, courtesy of Article 50 (2) (h) of *the Constitution* which guarantees an accused person the right to a fair trial, which includes the right to the benefit of the least severe punishment if the penalty has changed between the time of the offense and the time of sentencing. This ensures that the accused is not unfairly penalized for a change in the law or where there is a gap in the law as in the instant case.

45. However, the gravamen of the issue at hand is whether there is a gap in the sentencing provisions in section 8 (2), (3) and (4). As we search for this answer, we bear in mind that it is a well-established canon of statutory construction that "every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other relevant un-repealed statute enacted by the Legislature". (See Chotabhai vs. Union Government (Minister of Justice) 1911 AD 13 at 24.) Statutes dealing with the same subject matter, or which are in pari materia, should be construed together and harmoniously. This imperative has the effect of harmonizing conflicts and differences between statutes. This canon of interpretation derives its force from the presumption that the Legislature is consistent with itself. In other words, the Legislature knows and has in mind the existing laws when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.

46. The above reasoning was best illuminated by the Constitutional Court of South Africa in Independent Institute of Education (Pty) Limited vs. KwazuluNatal Law Society and Others [2019] ZACC 47) as follows:

> "[37] The question thus arises regarding the extent to which a court should consider other legislation when interpreting a specific legislative provision. In particular, what is the relationship between our statutory canons and a contextual approach to interpretation, which requires consideration of other legislation, and the constitutional injunction to interpret legislation so as to promote the sprit, purport and objects of the Bill of Rights.
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> (38) It is a well-established canon of statutory construction that "every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature". 13 Statutes dealing with the same subject matter, or which are in pari materia, should be construed together and harmoniously.14 This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. 15 In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.
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> "[39] This canon of statutory interpretation was expressly recognized and affirmed by this Court in Shaik. In that case it was held that the words "any person" in section 28(6) of the National Prosecuting Authority Act, despite their wide ordinary meaning, should be construed restrictively to avoid a clash with a provision in another statute.
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> 40. More recently, this Court in Ruta19 interpreted provisions of the Immigration Act20 together and in harmony with those of the *Refugees Act*.21 In a unanimous judgment, this Court noted that "[w]ell-established interpretive doctrine enjoins us to read the statutes alongside each other, so as to make sense of their provisions together."

41. This canon is consistent with a contextual approach to statutory interpretation. It is now trite that courts must properly contextualise statutory provisions when ascribing meaning to the words used therein. While maintaining that words should generally be given their ordinary grammatical meaning, this Court has long recognised that a contextual and purposive approach must be applied to statutory interpretation. Courts must have due regard to the context in which the words appear, even where "the words to be construed are clear and unambiguous".

42. This Court has taken a broad approach to contextualising legislative provisions having regard to both the internal and external context in statutory interpretation. A contextual approach requires that legislative provisions are interpreted in light of the text of the legislation as a whole (internal context). This Court has also recognised that context includes, amongst others, the mischief which the legislation aims to address, 28 the social and historical background of the legislation, and, most pertinently for the purposes of this case, other legislation (external context). That a contextual approach mandates consideration of other legislation is clearly demonstrated in Shaik. In Shaik, this Court considered context to be "all-important" in the interpretative exercise. The context to which the Court had regard included the "well-established rules of criminal procedure and evidence" and, in particular, the provisions of the Criminal Procedure Act."

47. Therefore, when interpreting a statute, courts must consider other existing laws on similar subjects to ensure a consistent and uniform legal framework. This approach aims to prevent inconsistencies and promote fairness within the legal system. The goal is to harmonize different laws to avoid conflicting interpretations and create a predictable legal landscape. Talking about other relevant laws to the issue at hand, Section 5 (2) of the *Age of Majority Act* which is entitled "Interpretation of and application to other law" provides as follows:

(2) For the purpose of this Act and any other written law, in computing the age of any person the day on which he was inborn shall be included as a whole day and he shall be deemed not to have attained such age as may be specified until the beginning of the relevant anniversary of the day of his birth.

48. Also relevant to the issue at hand is section the definition of "year" in Section 2 of the *Interpretation and General Provisions Act* which defines calendar year as follows-

> "year" means a year reckoned according to the British calendar. It is presumed that Parliament was aware of the above provisions of the law when it enacted the *Sexual Offences Act* which is a later statute. The key words in Section 8 (2) are "aged eleven years or less." As we interpret these words, we must bear in mind the purpose of the entire statute, the legislative intent and the need to adopt an interpretation that does not create disharmony with other relevant laws.

49. Under the common law, age is attained a day preceding the anniversary of a birth date. In other words, a person is legally treated as reaching an age at midnight at the start of the day before his/her birthday. In Halsbury's Laws of England, 3rd Edition, Vol 21, p. 143, paragraph 305, it is stated:

> " Full age is attained at close of the day preceding the twenty-first anniversary of birth, but, inasmuch as the law does not take cognizance of fractions of a day, a person is deemed to have attained the age of 21 at the first moment of the day preceding the twenty- first anniversary of his birth, and is therefore capable of acting as a person of full age any time on that day."

50. The Indian Supreme Court in Prabhu Dayal Sesma vs. State of Rajasthan & Ano. [1986] 4 SCC 59 categorically held that while calculating a person's age, the day of his birth must be counted as a whole day and any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birthday.

51. The provisions of the law and the decisions we have cited above are graphically clear that a child aged 11 years as contemplated under Section 8 (2) for the purposes of the law will be treated as being 11 years old and will only be 12 years a day preceding his twelfth birth day. In computing a person's age, there is nothing like a fraction of a year. Therefore, applying the provisions of the law cited above and guided by the authorities we have cited, it is our finding that the appellant was properly sentenced under Section 8 (2) and is therefore serving a lawful sentence. A contrary interpretation would be a grave misinterpretation not only of Sections 8 (2) (3) and (4) of the Act but an affront to the intention and purpose of the Act and a total disregard of the relevant laws cited above.

    Such an interpretation if entertained will not only create disharmony in the law, but will also cause absurdity. The upshot of the foregoing is that this appeal fails both on conviction and sentence and is hereby dismissed.

**DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MAY, 2025.**

**M. WARSAME**

**.....**

**JUDGE OF APPEAL**

**J. MATIVO**

**.....**

**JUDGE OF APPEAL**

**M. GACHOKA CIArb, FCIArb.**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed.

**DEPUTY REGISTRAR.**