**Kiragu v Republic (Criminal Appeal 157 of 2019)**
**[2025] KECA 949 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 949 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NYERI**

**CRIMINAL APPEAL 157 OF 2019**

**JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA**

**MAY 9, 2025**

**BETWEEN**

**HARUN MUNGETI KIRAGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal from the judgement of the High Court of Kenya at Chuka (Limo, J.) delivered on 29th October 2019 in HCCRA No. 3 of 2018)***

## JUDGMENT

1. The appellant, Harun Mungeti Kiragu, was charged before Marimanti Principal Magistrate's Court in Criminal Case (SO) No. 11 of 2017 with the offence of defilement contrary to section 8(1) as read with section 8(2) of *Sexual Offences Act* No.3 of 2006 (the Act). The particulars were that on 25th January 2017, the appellant defiled PW1, a girl aged 2½ years old. He denied committing the offence but upon trial, he was convicted and sentenced to serve life imprisonment.

2. Dissatisfied with both the conviction and sentence, the appellant preferred an appeal to the High Court on the grounds: that the learned trial magistrate erred by failing to note that no independent witness was called to testify; that the learned trial magistrate failed to observe that no high swab examination was done on PW1 to ascertain if there was some spermatozoa in her vagina; that the learned trial magistrate erred by not noting that the undergarments worn by PW1 during and after the alleged incident were not tendered in evidence; that the prosecution case was not proved beyond reasonable doubt; that the trial magistrate erred by convicting the appellant on conflicting and uncorroborated evidence; and that D.N.A test was not done to ascertain the truth.

3. According to PW1, aged 2½ years, the appellant "Abagire nthoni" (which the trial court understood to mean the accused lacked manners to her). She said that the appellant removed her pants while in his bed and that they were relatives.

4. On the material day, PW1's mother, PW2, had left PW1, an epileptic child about 3 years old, under care of her father, PW3, as she proceeded to the farm where she was a casual labourer. At about 1300 hours, PW3 decided to go and fetch water in order to wash PW1. He, as he had done before, requested the appellant, his brother, to look after PW1. Upon his return from the river, about 2½ hours later, and as he was washing PW1, PW1 complained to him that she was feeling pain. On further inquiry, PW1 disclosed that the appellant pulled her into the house and defiled her. PW3 decided to wait for the neighbours to come and sort out the issue. Although he found the appellant at home, the appellant fled soon thereafter but was later arrested by the chief.

5. On her return, PW2 found that PW3 had gone shopping at the market. PW2 noticed that PW1 was having pain while urinating and her private parts were swollen and PW1 informed her that she had been defiled by the appellant, her uncle. PW2 then carried PW1 to a neighbour, PW7, to assist her in examining PW1 and there she met the area manager, PW4 who confirmed that PW1 had been defiled. PW2 then took PW1 to Marimanti Hospital. On her return, she found that the appellant had been apprehended by members of the public who beat him up after hearing the news from PW4. PW2 reported the incident to the police and was issued with a P3 form. It was her evidence that the appellant requested her to pardon him.

6. PW7, a neighbour confirmed that on the material day, she was at her home when at about 8.00pm, PW2 and PW3 went and requested her to assist her with some money to enable them take PW1, who had been defiled by the appellant, to hospital.

7. PW5, the investigating officer narrated what the witnesses reported to her. It was her evidence that the appellant blamed the act on alcohol.

8. PW6, a clinical officer based at Marimanti Level 4 Hospital treated PW1 on 26th January 2017. PW1 was accompanied by her mother, PW2 and it was alleged that she was defiled. On examination, her vaginal walls were reddish and swollen. It was her evidence that the injuries were consistent with defilement and could have been caused by a blunt object such as a penis. However, since although the hymen was intact, penetration was partial.

9. In his sworn evidence, the appellant, aged 20 years testified that he had been framed. He said he spent that day at Gatunga market from 8.00 am to 4,00pm. Before leaving for the market, he had quarrelled with his family members over land as a result of which he had been assaulted by PW2 and PW3. He stated that PW3, who had sold his land, was keen in taking over the appellant's land and swore to kill him or have him detained. According to him, the area chief told him that he was arrested for being drunk and disorderly only later on to be charged with defilement. It was his evidence that even his father did not want him.

10. In cross examination, he stated that he left PW1 asleep at 4.00 pm and went home. Upon his arrest, he found PW2 and PW3 at home. He denied that he asked for forgiveness and also denied having defiled PW1

11. The appellant called, as his witness, DW2, DW3 and DW4, who all denied any knowledge concerning the case.

12. The learned trial magistrate assessed the evidence tendered before him and found that the prosecution's witnesses were credible and that the prosecution's case was proved beyond any reasonable doubt. The appellant's evidence was found to have been inconsistent. The appellant was convicted of the offence of defilement and sentenced to life imprisonment.

13. Dissatisfied, the appellant appealed to the High Court on the grounds: that the learned trial magistrate erred in not observing that no independent witness was called to testify as to the occurrence of the incident; that the learned trial magistrate failed to observe that the high swab examination was done for PW1 to ascertain the presence of spermatozoa in her vagina; that the learned trial magistrate failed to observe that PW1's torn undergarments, worn during the incident, were not produced as exhibits to confirm that the appellant committed the alleged offence; that the learned trial magistrate failed to find that the prosecution's case was not proved beyond reasonable doubt and that the investigations were shoddy; that the appellant was convicted on conflicting and uncorroborated evidence; and that there was no DNA test caried out to ascertain the truth.

14. In his judgement dismissing the appeal, the learned Judge found: that the age of PW1 was proved by the notification of birth, the P3 form and the evidence of the mother; that from her evidence and mannerism, PW1 was found by the trial magistrate to be truthful and credible hence, pursuant to section 124 of *Evidence Act*, even without corroboration, a charge of defilement could be sustained; that there was further evidence which was consistent with what PW1 told the trial court and that was that of PW2 found her in pain as well as the swelling of PW1's genitals; that the medical evidence also supported the evidence of PW1 that she was defiled even though penetration was partial; that in his submissions, the appellant has conceded that he was left with the minor for some time which showed that the appellant had the chance and opportunity to commit the crime; that the evidence by the appellant was not consistent; that some of the witnesses such as PW4 PW5 and PW6 were not related to the victim in any way hence the contention that there were no independent witnesses called by the prosecution had no basis; that it is a fallacy to hold that conviction in a sexual offence case can only be sustained if there are independent witnesses or if medical examination like vaginal swab, DNA etc is done; that whereas the law requires that the case must be proved beyond doubt by the evidence tendered, it does not state the type of evidence to be tendered for the conviction to be sustained; that the issue of land dispute was raised as an afterthought and was unfounded; that the evidence tendered at the trial was sufficient to support the conviction and the case was proved to the required standard; and that there was no basis disturb the sentence.

15. Dissatisfied with the decision of the first appellate court, the appellant filed the present appeal based on the following grounds:

    1. That the learned High Court Judge erred in matters of law by failing to note that the trial magistrate failed to follow the procedure of voir dire.

    2. That the learned trial Judge erred in matters of law by failing to note that the prosecution did not prove their case beyond reasonable doubt as required.

    3. That the learned Judge erred in matters of law by failing to note that the appellant was not given an opportunity to cross-examine PW1.

    4. That the learned Judge erred in matters of law by failing to note that the prosecution witnesses' evidence was contradictory, inconsistent and corroborating.

    5. That the learned Judge erred in matters of law by failing to note that the appellant was forced to continue with the case despite being sick on 28th September 2017.

    6. That the learned Judge erred in matters of law by failing to note that the appellant was beaten by the father of PW1.

    7. That the learned Judge erred in matters of law by failing to note that the medical report does not support the allegations of the witnesses.

8. That the learned Judge erred in matters of law by failing to analyse the evidence adduced before the court and come to his own conclusions.

9. That the learned Judge erred in matters of law by failing to note that the appellant's defence was not considered.

10. That the sentence meted to the appellant was unconstitutional, harsh and excessive.

16. We heard the appeal on 18th December 2024 on the Court's virtual platform. The appellant appeared in person from Kamiti Maximum Prison while learned counsel, Ms Adhi, appeared for the respondent. Both the appellant and Ms Adhi relied on their written submissions with minimal highlighting.

17. In his submissions, the appellant contended: that the prosecution's case was not proved beyond reasonable doubt; that the High Court erred by failing to carry out a detailed re- analysis and re-evaluation of the trial court's findings; that the evidence tendered was insufficient hence his conviction was unsafe and unjustified; that the trial court did not abide by the provisions of the law relating to voir dire examination; that the learned Judge failed to note that the admission of the minor's evidence was unprocedural and unreliable; that the trial court failed to give the appellant the opportunity to cross-examine the minor; that the medical evidence produced in court did not contain sufficient findings to warrant conviction for defilement; that the appellant's defence, which stood the test of time, was not investigated; and that the sentence was harsh and excessive in the circumstances.

18. On behalf of the respondent it was submitted: that the failure to conduct voir dire examination does not vitiate the prosecution's case; that this ground was not raised before the learned Judge; that it was proved that at the time of the offence PW1 was 2 ½ years; that the testimony of PW1 coupled with the medical evidence was sufficient to determine that penetration occurred; that the minor was the appellant's niece hence no possibility of mistaken identity; that the fact that the appellant went into hiding after the offence was circumstantially incriminating; that there were no contradictions in the evidence of the witnesses and if there were, then they were minor and did not affect the substance of the prosecution case; that although the record does not show that the appellant cross-examined PW1 there was record of re-examination which could only have taken place after cross-examination; that even if the appellant's contention was the position, the case did not depend only on the evidence of PW1 and even without her evidence, the case was proved; that the appellant, despite claiming that he was unwell was able to cross-examine the witnesses on the day he claimed to have been unwell; that this is a new issue that was not raised before the 1st appellate court; that in the event that the court finds that there was an error in the manner in which the trial was conducted, the Court should order for a retrial since the period spent in custody is not too long to render a retrial prejudicial to the appellant and there will be no difficulty in securing witnesses; and that the sentence was lawful and proper.

19. We have considered the submissions made in this appeal.

This being a second appeal, we derive our jurisdiction from section 361(1) of the *Criminal Procedure Code* which provides that:

> A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—
>
> a. on a matter of fact, and severity of sentence is a matter of fact; or
>
> b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.

20. That was expressly recognised in Karingo v Republic [1982] KLR 213, where the Court stated that:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

21. Applying this provision, this Court held in Karani v R [2010] 1 KLR 73 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."

22. Therefore, as restated by this Court in the case of Stephen M'Irungi & Another v Republic [1982-88] 1 KAR 360, we have:

> " loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law."

23. In accordance with the decision in Adan Muraguri Mungara v R CA Cr App No 347 of 2007, we have:

> " to pay homage to concurrent findings of fact made by 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. That would mean that the decision is bad in law, thus entitling this court to interfere."

24. Based on the foregoing, it is our view that the points of law which this Court may deal with in this appeal are: whether the prosecution proved its case beyond reasonable doubt, particularly in light of the medical evidence; whether the learned Judge erred in not considering that voir dire examination was not conducted by the trial court; whether the appellant was afforded an opportunity to cross-examine PW1; whether the High Court failed in its duty as the first appellate court; and whether the sentence was proper.

25. Based on our jurisdictional remit, we shall not deal with the issues of whether the appellant was forced to continue with the case despite being sick on 28th September 2017; and whether the appellant was beaten by the father of PW1. The reason for not doing so is that these grounds were not taken up before the first appellate court and this Court does not normally deal with issues raised for the first time before it as a second appellate court and which were not raised before the two courts below. In Alfayo Gombe Okello v Republic [2010] eKLR this Court expressed itself as follows:

> " ....the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

26. The predecessor to this Court in Alwi Abdulrehman Saggaf v Abed Ali Algeredi [1961] EA 767 held that the course of taking a point of law on appeal, which has not been argued in the court below, ought not to be allowed unless the court is satisfied that the evidence upon which it is asked to decide,

established beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:

> " The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below."

27. The appellant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of *Sexual Offences Act* No.3 of 2006. This Court in the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 held that:

> " The critical ingredients forming the offence of defilement are; age of PW1, proof of penetration and positive identification of the assailant."

28. Both the trial court and the first appellate court found that PW1 was aged 2½ years. That being a finding of fact, we cannot interfere with it even if it had been raised. As regards the evidence of penetration, the medical evidence showed that there was partial penetration even if the hymen was not broken. The Act, however, defines "penetration" as "partial or complete insertion of the genital organs of a person into the genital organs of another person" and in George Owiti Raya v Republic [2015] eKLR, it was held that:

> " It matters not whether PW1's hymen was found to be intact, suffice it that there was evidence of partial penetration."

Accordingly, penetration was, subject to our findings below, proved.

29. The appellant however took issue with the fact that PW1 was not subjected to voir dire examination and that her evidence was not subjected to cross-examination. Regarding the allegations that PW1 was not subjected to voir dire examination, it is true that the record does not show that voir dire examination was conducted. The learned trial magistrate simply stated that:

> " After examining the victim, she is too young to know the essence of an oath but she is a little open and intelligent and able to talk to tender an unsworn statement."

30. If the learned trial magistrate did no procedurally conduct voir dire examination, we would agree with the appellant that it was an error since the record of the proceedings ought to disclose the conduct of voir dire examination. Voir dire examination is not done by, for example, simply looking at the child. It is done by way of eliciting information from the child in order to understand whether the child is possessed of sufficient knowledge to give evidence and whether the child appreciates the importance of giving evidence on oath. However, the failure to conduct voir dire examination is not necessarily fatal to a conviction.

31. This Court elaborately dealt with the necessity of voir dire examination and its impact on the trial in the case Maripett Loonkomok v Republic [2016] eKLR , where it held that:

> " 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 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. 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. So long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under section 233 of the *Criminal Procedure Code*. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth...we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the *Criminal Procedure Code*, the law allows cross- examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v Msa Criminal Appeal No.373 of 2006. It is clear to us from the record that the trial Magistrate deliberately did not conduct voir dire examination for he believed, erroneously, that PW1 was not a child of tender years...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. 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."

32. In this case, although the learned trial magistrate did not conduct voir dire examination in the manner prescribed, the appellant admitted that PW1 was left in his care by his brother, PW1's father. When the father returned, he found that PW1 was defiled. There was no explanation from the appellant as to what happened between the time the father left him with PW1 and when he returned. In Bassita Hussein v Uganda, Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda held that:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's 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 it is sufficient to prove the case beyond reasonable doubt."

33. The evidence that the appellant was left to take care of PW1 and upon the return of PW3, was found to have been defiled coupled with the medical evidence in support of that fact could properly be relied upon, in the absence of any other explanation, in finding that it was the appellant who defiled PW1. We have no reason for reaching a finding contrary to the one arrived at by the two courts below on the issue of penetration.

34. On identification, the appellant was PW1's uncle. He was well known to PW1, and according to the father, PW3, this was not the first time PW1 was being left under the care of the appellant. Accordingly, there can be no issue of mistaken identity.

35. The appellant has taken issue with the fact that he was not accorded a fair hearing since he was not given the opportunity to cross-examine PW1. Although this issue was not expressly taken before the first appellate court, the appellant complains that High Court failed in its duty as the first appellate court. This Court restated in Okeno v Republic [1972] EA 32 that:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

36. Although on a second appeal, this Court is only entitled to deal with matters of law, factual evaluation becomes necessary when it is alleged that the first appellate court failed to undertake its obligation of subjecting the evidence before the trial court to a fresh scrutiny. This Court therefore held in Jonas Akuno O'kubasu v Republic [2000] eKLR that:

> " It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not

disregarding the judgement appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness, but there may be other circumstances, quite apart from manner or demeanour which may show whether a statement is credible or not which may warrant the court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen. On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles."

37. While appreciating the duty of the first appellate court to analyse and re-evaluate the evidence, this Court in the case of David Njuguna Wairimu v Republic [2010] eKLR appreciated that:

> "There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

38. The test was laid down by the predecessor to this Court in Shantilal Maneklal Rumba v R (1957) EA 570 at 573 where Briggs, Ag. VP stated:

> " We do not take this to mean that the appellate court shall write a judgement in a form appropriate to a court of first instance. It is sufficient on questions of fact if the appellate court having itself considered and evaluated the evidence, and having tested the conclusions of the court of first instance drawn from the demeanor of the witnesses against the whole of their evidence, is satisfied that there was evidence upon which the court of first instance could properly and reasonably find as it did. If the conclusions of the appellate court are already expressed in terms such as these, that, in itself, is no indication that the appellate court has failed to make a critical evaluation of the evidence."

39. In this case, the record, unfortunately, does not expressly indicate if PW1 was cross-examined. Peculiarly, the record indicates after the examination in chief:

Re-examined by prosecution counsel None.

40. In the case of Sula v Uganda [2001] 2. EA, the Supreme Court of Uganda observed as follows on child witnesses:

> "Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence."

41. This Court in Nicholas Mutula Wambua v Republic Criminal Appeal No. 373 of 2006 (Mombasa) stated that:

> " The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross- examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross- examined...It would appear that misconception arises from

a view that because accused persons are not cross- examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined. That thinking is expressed in Section 208 of the CPC which governs hearing of Criminal proceedings in the Magistrate's courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him. Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The trial courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission."

42. That case was cited in H.O.W v Republic [2014] eKLR where it was held that:

> " The first such matters and which is the main one is on point of procedure which in law, we feel fundamentally prejudiced the entire case and the appellant. This is that PW1, J.S. who was a minor was taken through voir dire examination and this was proper in law for whatever evidence was given on age, she was not above twelve
>
> (12) years in age. The learned trial Magistrate found as a result of voir dire examination that she did not know the normal duty of telling the truth and its normal consequences. She was ordered to give unsworn statement and she did so. That evidence seriously implicated the appellant, but at the end of it, for some reasons unrecorded, it was not subjected to cross-examination by the appellant who was present in court. There was no indication or any record to show that the appellant was afforded an opportunity to cross-examine this witness and no reasons were recorded as to why that procedure was not done. Unfortunately, the appellant was unrepresented and clearlycould not apprehend his right to cross- examine the witness. He clearly relied on the trial court which had a duty to invite him, at the end of the witnesses' evidence in chief to cross-examine the witness, which invitation did not come forth in respect of this witness. We can find no reason for this serious omission except that we think perhaps the court erroneously felt that as an accused person who gives unsworn evidence is not to be cross- examined so would any witness who gives unsworn evidence not be cross- examined. Of course, that was a misapprehension of the law. An accused person who chooses to give unsworn statement in his defence does so as a result of the provisions of the *Criminal Procedure Code* which protect him from being cross-examined if he chooses to give unsworn statement in his defence. It must be appreciated that the accused person cannot in law be charged with the offence of perjury in respect of a statement he gives in defence of himself in a criminal case brought against him. That protection is not available to a witness in a criminal case. Section 208 of the *Criminal Procedure Code* is clear on this aspect."

43. Whereas we deprecate the disturbing manner in which the proceedings were recorded, we are mindful of the fact that re- examination only takes place after cross-examination. The record indicates that the prosecution, upon being asked if it had any question, stated that it had none. This was in re-examination. Denial of the right to cross-examine is a point of law and can be properly taken up in a second appeal. However, a finding whether or not an opportunity to cross examine was afforded, is factual. If the issue had been taken up before the first appellate court, we would have had the benefit

of that court's finding. Without that benefit and in light of the record which is not clear whether or not the appellant was accorded an opportunity to cross-examine PW1, we are not able to find for the appellant, this being his appeal.

44. As regards the complaint that his defence was not considered, the High Court found that:

> " The Appellant has claimed that he was framed because of land dispute but no evidence in that regard was tendered. All the defence witnesses called had nothing useful to aid the Appellant in his defence. This court finds the issue of a land dispute was raised as an afterthought and it is clearly unfounded."

45. We agree. If there had been animosity between the appellant and PW3, PW1 would not have been left in his custody. Further, there was evidence that even after the act, PW3 attempted to shield the appellant by trying to sort out the matter. That is not the act of a person who wanted to kill him or have him detained. Nothing turns on that issue.

46. The appellant has complained about the sentence. We are alive to the fact that in a second appeal, this Court has no jurisdiction to delve into allegation of severity of a sentence. However, there is a limited jurisdiction to interfere with the sentence, even on a second appeal, where it is alleged that the sentence imposed is illegal or where the circumstances contemplated by this Court in this Court in Robert Mutungi Muumbi v Republic [2015] eKLR are shown to exist. In that case it was stated that:

> " Section 361(1)(a) of the *Criminal Procedure Code* restricts the right of appeal to this Court from the High Court in the exercise of its appellate jurisdiction to questions of law only and declares that severity of sentence is a question of fact. However, it is appreciated under section 361(2) of the Code that this Court can set aside or vary the decision of the trial court or the first appellate court on sentence if it is a wrong decision on a question of law. Consistent with those provisions, this Court has held that save in cases where the courts below have acted on a wrong principle or have overlooked some material factors, it will not interfere with their exercise of discretion on sentencing."

47. The appellant was charged under section 8(1) as read with section 8(2) of *Sexual Offences Act* with the offence of defilement. In evidence, it was revealed that the appellant was PW1's uncle. Section 20(1) of the *Sexual Offences Act*provides that:

> Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:
>
> > Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

48. The evidence in question disclosed the commission of the offence of incest in which event the appellant was "liable to imprisonment for life". The predecessor to this Court (as per Sir Clement DeLestang V.P) in Opoya v Uganda [1967] EA 752 at page 754 expressed itself, on the phrase "liable to"" in sentencing, thus:

> " It seems to us beyond argument that the words 'shall be liable to' do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty

which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."

49. In sentencing the appellant, the learned magistrate stated that:

> " Section 8(2) of the *Sexual Offences Act* provide for a minimum sentence to this offence, that is life sentence. I accordingly and in full consideration sentence the accused to life imprisonment."

50. The evidence, as we have stated, disclosed the commission of an offence of incest. The 1st appellate court failed to notice this error. We agree with the appellant that, as regards this fact, the learned Judge did not properly re-evaluate the evidence and this error entitles us to interfere pursuant section 179 of the *Criminal Procedure Code* which states that:

1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

51. That section permits the court to convict and sentence an accused of a cognate offence. Black's Law Dictionary 9th Edition page 1186 defines a cognate offence as:-

> A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.

52. This Court in in Robert Mutungi Muumbi v Republic [2015] eKLR expressed itself, on the issue, as hereunder:

> " As is apparently clear, section 179 of the *Criminal Procedure Code* empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species."

53. According to the Court:

> " To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171 and WACHIRA S/O NJENGA V. REGINA (1954) EA 398).

Spry, J. explained the essence of the first consideration as follows in ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294, while construing the provision of the Tanzania *Criminal Procedure Code* equivalent to section 179 of the Kenya *Criminal Procedure Code*:

> "Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence."
>
> That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial.
>
> The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See REPUBLIC V. CHEYA & ANOTHER [1973] EA
>
> 500). In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the *Criminal Procedure Code* even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied." [Underlining ours].

54. In the premises, we set aside the appellant's conviction for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* and substitute therefor a conviction for the offence of incest contrary to section 20(1) of the *Sexual Offences Act*.

55. On sentence, we are mindful of the fact that the section provides for a maximum sentence of life imprisonment where the victim is less than 18 years. However, in Charo Ngumbao Gugudu v Republic [2011] eKLR, this Court held that:

> "It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence."

56. In this appeal, the prosecution stated that the appellant was a first offender. He was 20 years old.

57. Similarly, in Felix Nthiwa Munyao v R Nairobi Court of Appeal Criminal Appeal No. 187 of 2000, this Court expressed itself as follows:

> "As we have said, the maximum sentence provided under Section 205 of the Code is life imprisonment. We will repeat what the Court said in the case of Gedion Kenga Maita vs. Republic Criminal Appeal No. 35 of 1997 (unreported). There, the Court stated:
>
> > '...We are not saying that a court has no power to impose a sentence of life: a court can do so depending on the circumstances of a particular case which circumstances must include the circumstances under which the offence itself was committed, the circumstances of the accused person such as whether he is a first offender, how long he has been in prison awaiting trial and things of that nature.'
>
> In the present case, the learned Judge wrote very elaborate notes on the sentence he imposed on the appellant. He took into account the fact that the attack on the deceased was brutal and vicious: that was correct and the learned Judge was right in doing so. He also took into account the fact that the vicious and brutal attack was on a wife in the presence of their very young daughter. Once again, that was correct and the Judge was entitled to take it into account. The attack, said the Judge. Was an act of domestic violence and the courts must do their part to discourage it. That was also correct and the Judge was perfectly entitled to consider it. These were matters on one side of the scale aggravating the crime committed by the appellant. But a court is also under a duty to take into account the matters in favour of an accused person. In this case, the appellant was, admittedly, a first offender.
>
> The learned Judge does not mention this factor at all in his elaborate notes on sentence. This was, however, a factor which the learned Judge was bound to take into account in favour of the appellant. Again, the appellant was arrested on 27th/28th December, 1998 and by the time the Judge sentenced him on 29th June, 2000, he had been in prison for nearly one and half years. The learned Judge did not mention this factor in his notes on the sentence. We think he was bound by the law to consider the two factors which were in favour of the appellant and weigh them against those which supported a severe penalty. Sentence is essentially a discretionary matter for the trial court but in exercising that discretion, the trial court must take into account all the relevant factors and leave out all irrelevant ones. An appeal court, which ours is, is only entitled to interfere with the exercise of discretion where it is shown that the court whose exercise of discretion is impugned, has either not taken into account a relevant factor, or taken into account an irrelevant factor or that short of these the exercise of the discretion is plainly wrong. Etyang, J appear not to have taken into account the fact that the appellant was a first offender and that he had been in custody for over one year before he was sentenced. The learned Judge's failure to take these factors into account gives us the right to interfere with the sentence he imposed on the appellant. We accordingly set aside the sentence of life imprisonment imposed on a man of some thirty-eight years and substitute it with a sentence of fifteen (15) years imprisonment to run from the date when the appellant was first sentenced by the superior court."

58. In the circumstances, we are also constrained to interfere with the sentence. Accordingly, we quash the life sentence imposed upon the appellant and substitute therefor a sentence of 20 years. Although the record reveals that he was admitted to bond of Kshs 1,000,000 with a surety of similar amount, but there is no record that he was released on bond. Pursuant to section 333(2) of the *Criminal Procedure Code* the sentence will run from 14th September 2017 which was the date of his arrest.

It is so ordered.

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

**J. LESIIT**

**.....**

**JUDGE OF APPEAL**

**ALI-ARONI**

**.....**

**JUDGE OF APPEAL**

**G. V. ODUNGA**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**