AO v Republic (Criminal Appeal E060 of 2023)
[2025] KEHC 547 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEHC 547 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E060 OF 2023

AC BETT, J

JANUARY 24, 2025

BETWEEN

AO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence from the decision of Hon. E. Wasike (PM) in Butere SPMC.S.O. No. E003 of 2022 delivered on 8th day of November 2023)

JUDGMENT

Background

1. The Appellant AO was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. It was said that on 17th March 2021 at (particulars withheld) within Kakamega County, he intentionally caused his penis to penetrate the vagina of A.K. a child aged 14 years.

2. After a full hearing of the case, the Appellant who also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, was convicted of the offence of defilement. He was then sentenced to serve twenty (20) years imprisonment.

3. Being aggrieved with the conviction and sentence, the Appellant lodged a petition of appeal whereby he faulted the learned trial Magistrate for the conviction and the sentence. The Appellant, set down his grounds of appeal as follows:-

    1. That, the learned trial Magistrate grossly erred in law and facts by presiding over a trial that seriously violated the dictates of article 50 (2) of *the Constitution*.

2. That, the learned trial Magistrate grossly erred in law and facts by convicting the Appellant in a case above evidence of pregnancy existed without moving the provisions of Section 36 of the Sexual Offence *Act No. 2 of 2008*.

3. That, the trial court erroneously convicted the Appellant by failing to interrogate prosecution evidence and witnesses potential exculpating to the Appellant to find that this was a systematic planned and implemented strategy to implicate the Appellant with the crime.

4. That, the trial court grossly misdirected himself in law and fact by overlooking the decision in Opoya case and Philip Mueke Maingi and five (5) others -vs- Rep. in believing that the 20 years was a mandatory minimum sentence under Section 8(1) (3) of the Sexual

5. That, the learned trial Magistrate erred in law and facts by failing to observe that the effect of the 20 years imprisonment sentence can be achieved by less severe punishment.

6. That, the learned trial Magistrate erred in law and facts by shifting the burden of proof to me and there upon misevaluating my plausible defence of Alibi.

7. That, in all manner and circumstances the sentence imposed is harsh, excessive and not considerable of the period of time spent in remand custody.

8. That, more grounds to be adduced, convicts be quashed sentence of 20 years be set aside and I be at liberty and in alternative any other relief pursuant to article 50 (2) (p) of *the Constitution*.

4. The duty of the appellate court in a first appeal was set out in the case of Okeno -vs- Republic [1972] EA 132 where the Court of Appeal of Eastern Africa stated as follows:-

> "The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. uwala -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."

Summary of Evidence

5. The Prosecution called four witnesses in support of their case. PW1 was the minor who stated that she was aged 15 years old and that the Appellant had been her boyfriend since the year 2020. She testified that she had sex with the Appellant several times at his house. According to her, the Appellant used to call her over to his place whenever he was working at her uncle's place. PW1 testified that as a result of the sexual activities, she conceived and the pregnancy was discovered by her mother upon her class teacher's prompting. By then, the pregnancy was five (5) months. PW1 stated that she gave birth to a baby girl on 12th December 2021. Cross-examined by the Appellant, PW1 reiterated that they had sex severally at the Appellant's work place and at his house; with and without protection. She stated that even after she fell pregnant, they continued to have sex and that she had no other boyfriend but used to sleep with the Appellant only.

6. PW2 was PW1's mother who stated that PW1 was aged 14 years going to 15 years. She testified that sometime in September 2021, she discovered that PW1 was pregnant. PW1 disclosed that she used to have sex with the Appellant who was a casual worker at her brother-in-law's house. PW2 stated that she made a report to the Chief who advised her to wait until PW1 gave birth which she did on 12th

December 2021. She was then sent to the Children Officer who referred her to Butere Police Station and thereafter, the Appellant was summoned, interrogated and charged.

7. The Clinical Officer testified as PW3 and produced the P3 form, Treatment Book and Notification of Birth dated 12th December 2021. The Clinical Officer testified that she made the conclusion that PW1 had been defiled because of the torn hymen and the fact that she had a sucking infant.

8. The last witness (mistakenly referred to as PW3 instead of PW4), was the Investigating Officer whose evidence was that he received the complaint of defilement from the Complainant and her mother and upon undertaking the necessary investigations, arrested and charged the Appellant. The witness produced the Complainant's Birth Certificate that confirmed that she was born on 6th March 2007. On cross-examination, the Investigating Officer said that it is the Complainant who reported that the Appellant had defiled her.

9. In defence, the Appellant said that on 17th March 2021 he was at home sleeping. He further testified that on 14th May 2021, he received a call from someone who needed a farm hand and proceeded to work there until December 2021 when he heard that the Complainant had been defiled. He testified that the minor was defiled by a friend of his who ran away so he ended up being arrested instead despite not having committed the offence.

10. DW2 was the Appellant's father who testified that on 17th March 2021 the Appellant went and told him that his would be employer wanted to hire him as a casual labourer. DW2 said that the Appellant left after a few days and in January 2022, he heard that the Appellant had been arrested.

The Appellant's Submissions

11. The Appellant submitted that he should not have been convicted as he himself was attaining the age of eighteen (18) years at the time of the arrest. It was his submissions that his relationship with the complainant was that of young people experiencing love at a tender age. He contended that the Complainant's admission that he was her boyfriend was a testament of the nature of their relationship. The Appellant relied on the case of Gillick -vs- West Norfolk and Wisbeck – Area Health Authority [1985] 3 ALL ER 402.

12. The Appellant further submitted that since justice cuts both ways, greater consideration ought to have been given to him because he was a young person. He submitted that he should have ben placed on Probation in view of his age at the time of committing the offence. He relied on the case of Edwin Wachira *& 9 others -vs- Republic Petition No. 97 of 2022*. It was also the Appellant's submissions that the mandatory nature of the sentence under Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006 is unconstitutional.

The Respondent's Submissions

13. The Respondent submitted that the Prosecution had pursued its case beyond reasonable doubt and that the sentence was neither harsh nor excessive. The Respondent further submitted that there was no infringement of Article 50 (2) of *the Constitution* as the Appellant was accorded a fair trial by all legal standards.

Analysis and Determination

14. I have carefully evaluated and reviewed the evidence on record. I have also considered the petition of appeal and the parties' respective submissions. I find that the following are the issues for determination:-

i. Whether the Appellant's rights under Article 50 (2) of *the Constitution* were violated.

ii. Whether the Prosecution proved its case against the Appellant beyond reasonable doubt.

iii. Whether the sentence imposed on the Appellant was harsh and excessive in the circumstances.

Whether the Appellant's rights under Article 50 (2) of *the Constitution* were violated

15. Article 50 (2) of *the Constitution* provides as follows:-

> " Every accused person has the right to a fair trial, which includes the right—
>
> (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
>
> (i) to remain silent, and not to testify during the proceedings;
>
> (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

16. It has been held by the Supreme Court of Kenya that the right to legal representation, although critical in criminal proceedings, is not absolute. In the case of Republic v. Karisa Chengo & 2 others [2017] eKLR, the said court set out the parameters that should be considered by the court in determining whether the legal representation at the expense of the State should be considered. The factors to be taken into consideration include the seriousness of the offence and the attendant sentence, the literacy of the accused, whether or not the accused is a minor, the complexity of the charges facing the accused, and the ability of the accused to hire Counsel.

17. In the case of Meshack Juma Wafula v. Republic [2019] eKLR, the Court of Appeal cited the case of Pett v. Greyhound Racing Association (1968) 2 ALL E.R. 545 (P.549) where Lord Denning said:-

> " It is not every man who has the ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness on the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross examine witnesses. We see it every day a magistrate says to a man; you can ask any questions you like; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for that task."

18. Having re-evaluated the proceedings of the primary case, I find that at no point prior to the trial or during the trial, did the Appellant state that he could not follow the proceedings. The Appellant ably cross-examined the Complainant and the other witnesses, and also tendered his defence which was in the form of an alibi. Although there is no record of the Appellant being informed of his right to legal representation, it is my finding that he was not prejudiced by the said omission. The Appellant's constitutional rights as envisaged by Article 50 (2) of *the Constitution* was therefore not infringed.

Whether the Prosecution proved the case against the Appellant beyond reasonable doubt

19. The age of the minor was proved by the production of the Birth Certificate. In the case of Edwin Nyambogo Onsango v. Republic [2016] eKLR, the Court of Appeal held thus:-

> " ...the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a Birth Certificate, Baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof" It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See *Denis Kinywa -vs- Republic Criminal Appeal No. 19 of 2014*) and (Omar Ucher *v Republic Criminal Appeal No. 11 of 2015*). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni - vs- Uganda Criminal Appeal No. 2 of 2000.
>
> > "We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable..."

20. Rule 4 of the Sexual Offences Rules also states that:-

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

21. There was no evidence to controvert the Prosecution's evidenced by way of the Birth Certificate, that the Complainant was 14 years old at the time the offence was committed. The age of the Complainant was therefore proved beyond reasonable doubt.

22. The other element of defilement is penetration. It was the Complainant's evidence that she had sexual intercourse with the Appellant whom she described as her boyfriend, several times. She said that sometimes they used condoms and other times they had unprotected sex. As a consequence of the sex, the Complainant became pregnant. It is the court's finding that proof of penetration was adduced by the Clinical Officer who confirmed that the Complainant's hymen had been torn and that the Complainant had given birth.

23. In regard to the identity of the perpetrator, it came out clearly that the Appellant was well known to both the Complainant and her mother. He was an employee of the Complainant's uncle and they developed a romantic relationship that lasted until well after the pregnancy. It was the Complainant's mother's evidence that when she learnt of the pregnancy, she confronted the Appellant who admitted to having engaged in sex with the minor.

24. Recognition has been held to be the best form of identification. In Anjononi & others v. Republic [1989] eKLR, the Court of Appeal held that recognition is:-

> " ...more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

25. The Appellant did not dispute the Complainant's evidence. In cross-examination, he put questions to the Complainant whose answers depict a person who was familiar with the Complainant. I am satisfied that the issue of identification was proven to the required standard.

26. Having said that, I find that the evidence of the Complainant was sound and consistent. She did not waver during cross-examination at all. Although a DNA test was not carried out to determine the paternity of the child borne by the Complainant, I have no reason to doubt her evidence.

27. Section 36 of the *Sexual Offences Act* is not couched in mandatory terms. It provides as follows:-

> " Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

28. In the case of Makenzi v. Republic [2019] KEHC 1014 (KLR) the court states as follows:-

> " 24. Section 36 of the *Sexual Offences Act* is in permissive terms. It gives the court discretion to direct the taking of samples for forensics. There is, therefore, no obligation on the part of the trial court to direct that such samples be taken, since such directions could only be made at the discretion of the court in circumstances where the court deems it fit.
>
> 25. There are several court decisions where section 36 was considered. In George Muchika Lumbasi v Republic [2016] eKLR, it was stated that section 36 of the *Sexual Offences Act* does not make medical examination mandatory, except where the court thinks it is appropriate in the circumstances of the case to subject an accused person to such examination. In Evans Wamalwa Simiyu v Republic [2016] eKLR and Edwin Maiyo Kandie vs. Republic [2019] eKLR the court stated similarly.
>
> 26. The law has been settled that, despite section 36 of the *Sexual Offences Act*, sexual assault is proved, not by medical examination, but by evidence adduced at the trial. The evidence of the victim and that of corroborative witnesses or circumstantial evidence is usually enough to establish sexual offences such as rape and defilement."

29. The case before the court was a defilement case, not a paternity case. A defilement case rests on evidence and not the presence of pregnancy as was held in Williamson Sowa Mbwanga v. Republic [2016] eKLR where the court stated that:-

> " ...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM."

30. I have reviewed the evidence adduced by the prosecution witnesses. I have also considered the alibi defence tendered by the Appellant. The alibi defence was never raised by the Appellant during cross-examination of the prosecution's evidence. It was also not corroborated by DW2, who was the Appellant's father. In fact, DW2's evidence buttressed the prosecution's case because he testified that the Appellant left home for the workplace shortly after 17th March 2021. From the evidence, it is most likely that the baby borne by the Complainant was conceived in March 2021 since it was born on 12th December 2021.

31. In any event, the Appellant's alibi defence does not meet the test of an alibi defence as enunciated by the Court of Appeal in the case of Erick Otieno Meda v. Republic [2019] eKLR where it stated:-

> " The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:
>
> (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
>
> (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
>
> (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
>
> (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail."

32. The alibi put forward by the Appellant lacked credibility due to material contradictions on the dates. Furthermore, the prosecution tendered a strong case with cogent evidence to prove that the Appellant committed the offence. The alibi defence did not shake the prosecution's case at all.

33. In the end, I find that the conviction was safe and therefore uphold the same.

34. With respect to the sentence, the Appellant faults the mandatory nature of the sentence under Section 8 (3) of the *Sexual Offences Act*. He cites the case of Eliud Waweru Wambui v. Republic [2019] eKLR where the court calls for an amendment to the Act to align it with those of other jurisdictions. His submissions are not helpful to his case since the Complainant was aged 14 years at the time of the offence.

35. In his submissions, the Appellant raises the issue of his age and says he was attaining the age of 18 years at the time of the arrest. Being cognizant of the fact that the Appellant was unrepresented at the hearing, I have perused the record of the lower court and have come upon a pre-bail report dated 12th April 2022 which indicates that the Appellant was aged 18 years old at the time. That being so, the Appellant would have been 17 years old at the time he committed the offence, a mere three (3) years older than the Complainant. At the time of the pre-bail report, the Appellant had not yet been issued with a national Identity card. This lends credence to the assertion by the Appellant that he was under 18 years old and therefore a child as defined in Section 2 of the *Children Act*, Cap 141 Laws of Kenya at the time of the offence.

36. The fact that the Appellant was a child at the time he committed the offence does not absolve him from criminal liability however. Section 14 of the Penal Code stipulates:-

> "(1) A person under the age of eight years is not criminally responsible for any act or omission.
>
> (2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.
>
> (3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge."

37. The import of Section 14 of the Penal Code is that a male person above the age of 12 years is deemed to be capable of having carnal knowledge or engaging in a sexual act, and is criminally responsible for unlawfully engaging in the sexual act. In the premises, the Appellant though under 18 years at the time it was proven that he committed the act of defilement of a minor, was criminally liable for the offence.

38. Since the Appellant had attained the majority age at the time he was arraigned, then the provisions of Section 143 (1) of the *Children Act* were not applicable to him. In any event, there was nothing to bar the State from bringing the charges of defilement against him since he was deemed as able to have carnal knowledge. In the case of CKW v. Attorney General & Another [2014] eKLR, the court dealt with the issue of charging one minor with the offence of defilement and leaving out his counterpart and held as follows:-

> "57. In Kenya, there is no express or implied requirement that when two children are involved in sexual penetration with each other, both of them should be charged with the offence of defilement.
>
> 58. However, there is no legal bar to the prosecution preferring criminal charges against both the children. In effect, if the prosecution had reasonable cause to charge both minors, they could do so."

39. From the evidence of the Complainant, she and the Appellant were clearly in a romantic relationship. She testified that the Appellant would call her to his house and they would engage in sex either there or in her uncle's house and that their sexual engagements continued even after she conceived since they were friends for a long time.

40. What the court has deduced from the trial court record is that there was a three-year difference between the Complainant and the Appellant, who was a school dropout and under eighteen years old at the time.

41. If the Appellant had been arrested and charged immediately after the offence, he would still have been a minor. However, according to PW2, they opted to follow up the case after the Complainant delivered despite having lodged the complaint earlier. By the time the Appellant was charged, he was now an adult aged 18 years old. The Appellant could not therefore be treated as a minor or dealt with as prescribed under Section 238 and 239 of the *Children Act*. The manner in which minor offenders

should be handled was elucidated by the Court of Appeal in the case of Mabi v. Republic [2018] eKLR where it held:-

> " Regarding the age of the appellant, serious doubts were raised from the beginning of the trial as to whether the appellant was above 18 years when he committed the offence. If the appellant was under the age of 18 years, he was then a child in terms of section 2 of the *Children Act* which defines a "child" to mean any human being under the age of 18 years. When the appellant was first arraigned in court, he was in school uniform, and that was noted by the trial magistrate. During the trial, the appellant's advocate told the court that the appellant was born on February 5, 1996; although no documentary evidence was availed to prove that allegation. However, as pointed out earlier, the appellant told the trial magistrate that as at the date of the trial he was 17 years old and was in form four at [particulars withheld] Secondary School. To ensure a fair trial and obviate the possibility of dealing with a child offender as an adult, the trial court ought to have ordered that the appellant's age be assessed by a doctor. Alternatively, the trial court ought to have made due inquiry as to the appellant's age, in accordance with section 143(1) of the *Children Act*... Here was a young person who was presented to court in school uniform, he told the investigating officer and the trial court that he was a minor; that he was a student; and without any inquiry as to his age, the trial court proceeded with the trial on the presumption that he was an adult. In the circumstances, we are satisfied that the lower courts' finding that the appellant was not a minor, in the absence of any inquiry to his age, might have occasioned a miscarriage of justice.
>
> Had the trial court found that the appellant was a minor but had defiled the complainant, who was also a minor, it would have dealt with him in any of the ways prescribed under section 191(1) of the *Children Act*. Such ways include discharging the offender under section 35(1) of the Penal Code. Section 190(1) of the *Children Act* expressly provides that no child shall be ordered to imprisonment or to be placed in a detention camp"

42. Section 238 of the *Children Act* provides:-

> " (1) No court shall order the imprisonment of a child.
>
> (2) Notwithstanding the nature of any offence punishable by death, no court shall impose the death penalty on a child on a finding of guilty for such an offence.
>
> (3) A Children's Court shall not make any order to send a child under the age of twelve years to a rehabilitation school.
>
> (4) The performance of community service under an order of the Court shall be in accordance with the *Community Service Orders Act* (Cap. 93)."

43. Section 239 of the *Children Act* sets out the method of dealing with children in conflict with the law as follows:-

> " (1) Where a child is tried for an offence, and the Court is satisfied as to their guilt, the Court may deal with the case in one or more of the following ways—
>
> (a) discharge the child under section 35(1) of the Penal Code (Cap. 63);

(b) discharge the child on his or her entering into a recognisance, with or without sureties;

(c) make a probation order against the offender under the provisions of the *Probation of Offenders Act*;

(d) commit the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake the care of the offender;

(e) if the child is between twelve years and fifteen years of age, order that the child be sent to a rehabilitation institution suitable to the child's needs and circumstances;

(f) order the child to pay a fine, compensation or costs, or any or all of them, having regard to the means of the child's parents or guardian;

(g) in the case of a child who has attained the age of sixteen years, deal with the child in accordance with the *Borstal Institutions Act*;

(h) place the child under the care of a qualified counsellor or psychologist;

(i) order that the child be placed in an educational institution or vocational training programme;

(j) order that the child be placed in a probation hostel under the provisions of the *Probation of Offenders Act*;

(k) make a community service order;

(l) make a restorative justice order;

(m) make a supervision order;

(n) make any other orders of diversion provided for in this Part; or

(o) deal with the child in any other lawful manner as may be provided under any written law.

(2) A child against whom a community service order has been made may, having regard to the child's age and development, be required to perform the service without remuneration, or for the benefit of the community, under the supervision or control of an organisation or institution identified by the probation officer.

(3) In addition, or as an alternative, to the orders prescribed in subsection (2), the Court may impose on a child such other sanctions as the Court may consider just.

(4) Any community service performed by a child shall be for a maximum period of fifty hours, and shall be completed within a period not exceeding six months.

(5) If a child fails to comply with any condition imposed on diversion, the Court shall make such orders as it considers fit, including an order directing that the child to be subjected to an alternative level of diversion.

(6) The orders imposed on a child upon a finding of guilt shall be proportionate to the circumstances of the child, the nature of the offence and the public interest, and a child shall not be treated more severely than an adult would have been treated in the same circumstances."

44. The Complainant's delay in bring charges against the Appellant consequently leading to the Appellant being charged as an adult for an offence he committed as a minor is not unique. However, it presents the court with a challenge because the court cannot apply the corrective measures stipulated in Section 239 of the *Children Act*.

45. The dilemma that this scenario presents to the court is that the Appellant committed a felony when a minor but by the time of conviction he is an adult and should therefore be dealt with as an adult. This court therefore has to consider whether a person who committed the offence of defilement while a child should serve the minimum mandatory sentence for the offence.

46. I have considered the Appellant's appeal and I am guided by the case of Daniel Langat Kiprotich v. State [2018] eKLR where the court held as follows:-

> "Since the statutory scheme provides that such a child cannot be sent to prison and since the law further provides that such a child can only be sent to a Borstal institution for no more than three years, the options are limited to trial Courts even where on analysis and evidence such a Court might be persuaded that the almost-adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or her errors.
>
> A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where the offence committed was a particularly vicious or serious one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn.
>
> While these dilemmas call for a reform to our juvenile justice system to provide a more nuanced statutory scheme, I am persuaded, in following the Court of Appeal in the Dennis Cheruiyot Case and the JKK Case, that when faced with the situation such as the one we have in this case, the solution lies in section 191(1)(l) of the Children's Act: to deal with the offender in question in any other lawful manner."

47. In the case of JKK v. Republic [2013] eKLR, the Court of Appeal, faced with a situation where the Appellant was 17 years at the time he committed the offence of murder but an adult by the time of conviction, substituted the Appellant's sentence of death with 12 years imprisonment and stated thus:-

> "The purposes of the sentences provided for under the *Children Act* are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent

> life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence."

48. Similarly, in the case of R v. Dennis Kirui Cheruiyot [2014] eKLR, the Court of Appeal also reduced the sentence imposed on the offender for murder to ten (10) years taking into consideration the fact that he committed the offence when still a minor.

49. In both the above cases, the Court of Appeal opted to apply the provisions of Section 191 (1) (l`) of the *Children Act* No. 8 of 2001 (now repealed) on the premise that if a child was found guilty, he was supposed to be sentenced according to the provisions of part XIII of the *Children Act* which detailed how a court should punish a child offender.

50. In subsequent decisions made by the High Court in various jurisdictions, the Courts have adopted the same position. See Daniel Langat Kiprotich v. State (supra) and RKS v. Republic [2018) eKLR. In the case of SCN v. Republic [2018] eKLR, the Appellant who was 17 years when he committed the offence of defilement had been sentenced to life imprisonment. The sentence was reduced to 10 years on appeal.

51. In Amos Kipchirchir Cheruiyot [2020] KEHC 487 (KLR), Justice Mumbua T. Matheka, upon taking into consideration the fact that the Appellant who had been convicted for two counts of the offence of defilement was a minor when the offence was committed, took account the pre-sentence report on the record and the fact that the Appellant had spent two years in custody. She set aside the sentence of life imprisonment and substituted it with an order of probation supervision for three (3) years.

52. Despite the lacuna in the statutes regarding how to sentence minor offenders who have attained the age of majority at the time of conviction, the courts have in exercise of their discretion, and with reference to the *Children Act*, applied the provisions of Section 239 (1) (o) of the Act (formerly Section 191 (1) (l) which grants the courts power to deal with the child offender in any other lawful manner as may be provided under written law.

53. In deciding what punishment to impose on the offender, the court is guided by Section 239 (6) of the *Children Act* which stipulates that the orders imposed must be proportionate to the circumstances of the child, the nature of the offence, and the public interest.

54. Whereas it is not in doubt that the Appellant committed a serious offence which calls for a mandatory minimum sentence of fifteen (15) years, having considered the circumstances of the case, I am satisfied that there are sufficient reasons to review the sentence.

55. I have considered the record, the mitigation by the Appellant and the entire circumstances of the case. I find it appropriate to order for a pre-sentence report to guide the court on the appropriate sentence.

56. Consequently, I make the following orders:-

    1. The conviction of the Appellant for the offence of defilement was proved beyond reasonable doubt and is thereby upheld.

    2. The Probation Officer do file a pre-sentence report within fourteen (14) days to assist the court in making its ruling on sentence.

    3. The matter be mentioned on March 10, 2025 for further directions.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF JANUARY 2025.

A. C. BETT

JUDGE

In the presence of:

Appellant in person

Ms. Chala for Respondent

Court Assistant: Polycap