Kolum v Republic (Criminal Appeal E005 of 2022)
[2025] KEHC 4877 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4877 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E005 OF 2022

JRA WANANDA, J

APRIL 25, 2025

BETWEEN

DANIEL KIPRUTO KOLUM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Judgment of Hon. R. Odenyo-SPM, delivered on 31/01/2022 and sentence read out in Eldoret Chief Magistrate's Court Criminal Court-Sexual Offences- Case No. 195 of 2019)

JUDGMENT

1. The Appellant was charged in the said case with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. It was alleged that the Appellant, on 17/7/2019, at [particulars withheld] in Turbo sub-County, within Uasin Gishu County, intentionally and unlawfully caused his penis to penetrate the vagina of RC, a girl aged 10 years.

2. He also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

3. The Appellant pleaded not guilty to the charges and the case then proceeded to full trial in which the Prosecution called 5 witnesses. At the close of the Prosecution's case, the Court found that the Appellant had a case to answer and placed him on his defence. The Appellant then gave an unsworn statement and did not call any other witnesses. By the Judgment delivered on 31/1/2022, he was convicted on the main charge and subsequently sentenced to serve 25 years' imprisonment.

4. Dissatisfied with the said decision, the Appellant instituted this Appeal on 28/2/2022, on the grounds reproduced verbatim as follows:

    i. That (I) am a first offender thus beg for leniency.

ii. That (I) am remorseful, repentant and reformed as I have learnt to take responsibility for (my) actions.

iii. That (I) am sick, a known PUD patient who finds it inconvenient to acquire medication while in custody.

iv. That (I) am a sole breadwinner to (my) family so (I) kindly pray for a sentence that can enable (me) to attend to their issue.

v. That (I) am praying for reduction of sentence by the time spent in remand custody pursuant to Section 333(2) and Section 362, 364(1) b and 365 of the CPC among other enabling laws.

vi. That (I) pray that my sentence be a less severe one.

vii. That more grounds to be adduced at the hearing thereof and determination of the appeal.

Reasons Wherefore:

I pray for this appeal to be allowed in totality, conviction maintained and the sentence be reduced to a less severe one by including the time already spent in remand or in an alternative, I be considered for non custodial sentence like probation or community service."

5. I note however that the Appellant, when he subsequently filed his final Submissions, he also contemporaneously filed Amended Grounds of Appeal. I note that the Appellant, in the Submissions, stated that the earlier grounds of Appeal should be treated as abandoned and the amended grounds be considered in its place. The new grounds preferred are as follows;

i. That the trial Court failed in ensuring the Appellant was accorded a fair trial by allowing the Prosecution to fail in its declaration obligation offending Article 50 (2) (c) & (j) where he was supplied with witness statements some moments before trial commenced.

ii. That the trial Court did not conduct a proper defence hearing where the Appellant was never allowed an opportunity to bring his three (3) alibi witnesses to prove that he did not commit the alleged offence offending his right to a fair hearing violating Article 50(2) (k) of constitution of Kenya 2010. Unfortunately (I) have noted the Court in its proceeding indicated (I) did not have witnesses.

iii. That the trial Court was biased against the Appellant in her analysis of evidence thereby arriving at a wrong decision. An instance in this case was a failure to consider another person called Mluhya as she never probed the matter being listed as a perpetrator alongside Appellant by the doctor and grandmother. This piece of evidence was in favour to the Appellant's case regarding the ingredient of identification.

iv. That the trial Court did not consider the Prosecution failed in its responsibility to prove its case beyond reasonable doubt contrary to Section 107 of the *Evidence Act* as the mention of another person (Mluhya) as a perpetrator introduced an element of doubt. The Court failed to resolve this doubt in favour of Appellant by discharging him.

v. That the failure of the trial Court to make a decision on the truthfulness and reliability of the complainant on who actually defiled her rendered the conviction untenable.

vi. That the trial Magistrate did not comply strictly with Section 124 of the *Evidence Act* when adopting the evidence of PW1 in convicting and sentencing him considering she was not credible enough to confirm she was defiled by a Mluhya which she gave history to the doctor as a perpetrator.

vii. That the medical evidence was unbelievable and inaccurate for instance that a dried stool was found one week after the incident indicating anal penetration this was misleading to the Court hence the inaccurate finding.

viii. That there was variance between the particulars of the charge and the evidence adduced in breach of Section 214 (1) of the *Criminal Procedure Code*. The witness statements in the case were all stating events of 18th July 2019. The Court made a finding that the offence happened on the 18th July 2019 and not 17th of July 2018 as per charge sheet.

ix. That the delay that took place between the alleged defilement and the examination of the complainant could not have been possible to recover any medical evidence that would sustain the charge the Appellant was facing.

x. That the trial Court did not take into account the time the Appellant spent in the pre-trial for a period of one (1) year in calculating his 25 years jail term.

xi. That the trial Court erred in matters of law and fact by imposing a harsh and excessive sentence in the circumstances of the case and a failure to consider principles of sentencing to mitigate his sentence.

6. Although the Record does not anywhere indicate that the Appellant sought and/or obtained leave to amend the grounds of Appeal, or to file a fresh set of Grounds, in the interest of justice I agree to treat the Appeal as being grounded on the Amended Grounds.

7. I will now recount the testimonies and evidence presented before the trial Court.

Prosecution evidence before the trial Court

8. PW1 was the minor-complainant(victim). She stated her age as being 9 years old. Because of this, she was taken through a voire dire examination after which the trial Magistrate recorded that she was too young to understand the effect of taking an oath and thus, the Magistrate directed that the complainant gives unsworn evidence which she then proceeded to do.

9. PW1 then reiterated that she was 9 years old and a standard 1 pupil. She was at that point referred to her child health card. She testified that on a date that she could not recall, the Appellant (whom she pointed out in Court) did "bad things" to her, and that the Appellant lives next to the road. She stated that she was going to school when she met the Appellant who approached her on the road, held her by hand and led her to a maize plantation where he undressed her, undressed himself then put his "worm" in her private parts (she pointed at her vagina). She stated that the "worm" that the Appellant inserted in her is what "boys use to urinate", that she felt pain and that the Appellant gave her Kshs 10/- after the act and told her to go home. She testified that she then went to school and informed her teacher (G) who informed the head-teacher who reported the matter to the Chief and who, in turn, instructed C of "Nyumba Kumi" (village elder) to deal with the issue. She stated that C then called PW1's father who went to the school, teacher G and the Chief then took her to Turbo where a doctor examined her and on the following day, she was taken to the Moi Teaching and Referral Hospital (MTRH) where again, she was examined. She was at this point referred to Treatment Notes and the P3 Form. She then testified that on a later day, her father accompanied her to the police station and reiterated that the Appellant did "bad things" to her 3 times, that the first time he gave her Kshs 20/- and the next time he gave her Kshs 10/-, that the Appellant used to tell her that she was a child, that she feared telling her father because she feared being caned and that all the 3 incidents were in the maize garden.

10. In cross-examination, PW1 stated that the Appellants' home was close to theirs with neighbours in between, that the incident was in the morning, the Appellant would put some things in her mouth to stop her from screaming, and that the maize in the garden was so tall that no one could see. She stated further that she usually goes to school alone, and that the Appellant would, while defiling her, put either bread or kangumu" or chapati in her mouth. She denied that she was defiled by a Luhya man and reiterated that that it was the Appellant who defiled her.

11. PW2 was GKO, who testified that she is a ECDE teacher at [.....], the complainant was her student at her school in 2017 and 2018 but had by then moved to standard 1. She testified that on 18/07/2019, she went to teach standard 1 pupils and when she released them for recess, she noticed that the complainant was unable to run and was walking with difficulties despite knowing her to be an agile pupil, that after the class, she asked the complainant to stay behind and talked to her and that this is when the complainant revealed to her that Kipruto (Appellant) had inserted his organ for urinating into hers, that it was not the first time and that previously, the Appellant had been inserting but only shallowly but on that day, he had inserted very deeply inside. PW2 stated that she informed the deputy head-teacher about the matter and summoned the complainant who repeated the same narrative, the head-teacher tried to contact the complainant's uncle but could not trace him so he called the "nyumba kumi" and asked him to look for the complainant's parents. She stated that on 19/07/2019, the Chief took them to a local dispensary where they were referred to Turbo sub-county hospital. At this point, she referred to the treatment notes issued at the hospital and stated that they were later referred to the Moi Teaching and Referral Hospital (MTRH) where a P3 Form was filled on 24/07/2019. In cross-examination, she stated that PW1 told her that the Appellant had defiled her on several occasions, all inside a maize garden.

12. PW3 was Dr. Taban Lilian Tosan from Moi Teaching and Referral Hospital (MTRH) who produced the P3 Form. She stated that PW1 reported being defiled, she had changed clothing and reported that 2 men who were her neighbours had both defiled her, one was Daniel Kipruto (Appellant) and one was Mluhya, that the Appellant always waylaid her from school, pulled her off the road and defiled her after smearing her with Vaseline jelly and he would then penetrate her through the anus and the vagina, and that the last time was on 17/7/2019. PW3 also testified that the complainant reported that on 18/07/2019 she was defiled by one Mluhya, she was injured and was walking with difficulties, and that when her teacher noticed, she revealed the matter to the teacher and who then relayed the information to the school administration. She then testified that she examined the complainant on 23/07/2029, and found that her hymen was freshly broken at 10.00 o'clock, 6.00 o'clock and 1.00 O'clock, the labia minora was red instead of pink, the vagina walls were visible meaning that it was enlarged, the anus had fresh tears at 6.00 O'clock and 12.00 O'clock, the anal region was also reddish and had dried watery stool. In her opinion, the type of weapon that caused the injury was a blunt object and she concluded that there was anal and vaginal penetration. She then produced the P3 Form.

13. PW4 was SC who stated that the complainant is her grand-daughter aged 7 years. She stated that on 17/7/2019, she was at home after the children had gone to school, when she received a call from PW1's father informing her that he had received a phone-call from the village elder informing him that the complainant had been defiled and that they agreed to meet in school. She testified further that upon reaching the school, teacher called the Chief who came and then escorted the teacher and the complainant to hospital, that on the next day, the complainant was taken back to hospital, and on the 3rd day, the teacher and PW4 took the complainant to MTRH. She testified that when she inquired from the complainant, the latter told her she had been defiled by the Appellant whom PW4 then pointed out sitting in the dock, and stated that he is a neighbour. In cross-examination, she stated that complainant told her that the Appellant had defiled her in his house and also in a maize plantation.

14. PW5 was Corporal Fabiano Muthomi formerly based at Jua Kali Police Station. He testified that on 22/07/2019, the complainant was brought to the station, accompanied by her teacher (G) and her father and they reported that she had been defiled by the Appellant on 17/07/2019 and on 18/07/2019, that on 17/7/2019, that the defilement occurred in the evening as she was coming from school and on 18/07/2019, it occurred as she was heading to school, that on 18/07/2019, her teacher noticed that she was not walking properly and upon inquiry, the complainant disclosed to her that she had been defiled by one Daniel. He stated that the complainant was first seen at a clinic and later escorted to MTRH where a P3 form was filled, that the complainants' father, EK, gave him the complainant's child health card which indicated that she was born on 19/07/2008, he later received information that the Appellant had been arrested and was at the Ndalat Chief's office where PW5 went, re-arrested him and brought him back to the Jua Kali police station where he was charged and the complainant was then brought to the station and identified the Appellant. In cross-examination, she stated that she arrested the Appellant at Ndalat where the Appellant had fled to, and that the arrest was after 1 month. He denied that the Appellant and C (complainant's mother) were rivals allegedly because both of them were selling chang'aa. He also denied that there was a land dispute between the Appellant and the complainant.

Defence evidence

15. As aforesaid, after the Prosecution closed its case, the Court found that the Appellant had a case to answer and placed him on his defence. As further stated, the Appellant then gave unsworn testimony.

16. The Appellant testified as DW1 and stated that he digs wells, that on 17/7/2019, he left his house for work at Lessos where he was to dig a well and that he worked there until 4 pm. He stated that he returned home then went to the Centre to buy supper, on the next day, he went to the same site and worked there for 3 days, on 22/07/2019 he got another job to dig a latrine and as he was there, a group of people approached, arrested him and took him to the police station where he met a child whom it was alleged he had defiled. He denied defiling the complainant and stated that he had a dispute over a boundary with the complainant's father and that it is why he fabricated the case against the Appellant.

Judgement of the trial Court

17. As aforesaid, by the Judgment delivered on 31/01/2022, the trial Court found the Appellant guilty, convicted him, and subsequently sentenced him to serve 25 years imprisonment.

Hearing of the Appeal

18. The Appeal was canvassed by of written Submissions. The Appellant filed his Submissions on 06/11/2024 while the State filed on 9/10/2023 through Prosecution Counsel Leonard Okaka.

Appellant's Submissions

19. The Appellant submitted that his right to a fair trial under Articles 50(2)(c) and (j) of *the Constitution* was violated, that the Prosecution failed in its obligations by not supplying him with the statements and other material within a reasonable time, that the statements were supplied just a few moments before the commencement of the trial and that it was a rushed process. He submitted further that the trial Court conducted a faulty defence hearing which violated the provisions of Article 50(2) (k) of *the Constitution*, that he was asked how he will present his defence and he indicated that he would give unsworn evidence and present 3 alibi witnesses, but unfortunately, the 3 witnesses did not testify, denying him a proper chance to adduce evidence, that to conceal this fact, and the trial Magistrate did not record the same.

20. He urged further that “identification” of the perpetrator was not positive thus creating doubt on the identity of the perpetrator, that the trial Magistrate was biased against the Appellant for not considering the evidence that one "Mluhya" was mentioned as the assailant, that both the doctor who was given the history that “Mluhya” was the perpetrator and the grandmother restated this fact in Court, that the trial Magistrate did not however feature this piece of evidence in his Judgment for unknown reasons, that this exculpatory evidence was in favour of the Appellant and reiterated that the trial Court was therefore biased and in breach of Article 50(1). The Appellant also submitted that the Prosecution did not prove its case beyond reasonable doubt, contrary to Section 107 of the *Evidence Act*, that the trial Court did not ensure that Section 33 of the *Sexual Offences Act* was complied with as there was mention that the complainant was defiled more than 3 times but no description or explanation of how it happened was given and that the trial Court therefore committed an irregularity by ignoring this doubt. It was the Appellant’s further submission that the trial Magistrate relied on incredible witnesses’ testimony to convict him contrary to Section 124 of the *Evidence Act* which requires the trial Court to ensure the witnesses are credible, truthful and reliable. According to him, the complainant was not such credible, truthful or reliable on who exactly defiled her.

21. He urged also that the ingredient of “penetration” was not established as the medical examination and tests done on the complainant 1 week after the alleged incident could not accurately corroborate the “penetration”, that scientifically there was no medical evidence that could be recovered 1 week after an alleged defilement incident, the indication by the medical doctor that a dried watery stool was found 5 days after the incident thus corroborating anal penetration was an inaccurate finding as the complainant had changed clothes and probably washed herself up, and that the doctor misled the Court that the dried stool was from the alleged incident when it could even have been a stool for the previous day. The Appellant also contended that the trial Court convicted him on the basis of a fatally defective charge sheet, which had a variance with the particulars of the charge and the evidence adduced thus in breach of Section 134 and 214(1) of the *Criminal Procedure Code*, that the witness statements all stated that the incident took place on 18/07/2019 yet the Court made a finding that the offence was committed on 17/07/2018 as per the charge sheet, that another defect in the charge was on age of the complainant as the charge sheet indicated the age as 10 years whereas the birth notification puts the age at the borderline of 11-12 years, the medical doctor mentioned 9 years and the grandmother stated 7 years. He protested that the trial Court did not make an independent finding on the actual age and thus failed to comply with Section 36 of the *Sexual Offences Act* by not ordering for an age assessment.

22. He submitted that the defect on the charge sheet was therefore fatal considering the alleged incident could not have taken place on 2 days, and this mistake could not be cured under Section 382 of the *Criminal Procedure Code*. The Appellant also urged that the period he spent in pre-trial custody ought to have been factored as part of the 25-years sentence, that the trial Court instead ordered that the sentence commences from the date of sentence and thus in breach of Section 333(2) of the *Criminal Procedure Code*. In the end, the he submitted that the sentence of 25 years was harsh and excessive considering the circumstances of the case, that it does not comply with principles of sentencing such as proportionality to the offending behaviour and uniformity of sentence as similar offences should attract similar penalty.

Respondent’s Submissions

23. Prosecution Counsel for the State, Mr. Okaka, in his brief Submissions, basically listed the ingredients of the offence of defilement and urged that they were all proved. Regarding the issue of “age”, he submitted that the complainant testified that she was 9 years old and that her health card showed that she was born on 19/07/2018. He cited the case of Francis Omuroni vs. Uganda, Criminal Appeal No.

2 of 2000. On the element of "penetration", he recounted the complainant's testimony and cited the case of Erick Onyango Odeng' v R [2014] eKLR on medical evidence. On the issue of "identification", he urged that it is not in dispute that the complainant and the Appellant knew each other and that the Court considered Appellant's defence and found no merit in his allegation of a frame-up over a dispute on land boundary. Regarding sentence, Counsel urged that except for period spent in remand custody, the quest for opportunity to fend for family or convenience in access to drugs should be insufficient reasons to warrant lawful interference, that conviction under Section 8(2) of the *Sexual Offences Act* invites life imprisonment and that the mitigation, victim's age and seriousness of the offence were considered in sentencing the Appellant to 25 years imprisonment. He urged that the Prosecution thinks that the sentence, though far less severe than what was provided for, is proportionate in the circumstances.

24. Since Mr. Okaka's Submissions is dated 1/10/2024, it is very likely that he never saw the Appellant's Amended Grounds of Appeal and Submissions, all bearing the latter date of 4/11/2024. Of course, when fixing a date for the Judgment, I had not noticed that the Respondent had belatedly filed the "Amended Grounds of Appeal", albeit without leave. He also did not bring it to my attention. Upon this discovery, I agonized on whether I should postpone this Judgment and grant Mr. Okaka a chance to respond thereto perhaps by filing Supplementary Submissions.

25. However, upon carefully considering the matter holistically, I formed the view that the Prosecution will not be too adversely prejudiced if I were to proceed to interrogate the Appellant's new Grounds of Appeal and determine the same without the benefit of the Prosecution's input. I will therefore proceed to finalize and deliver the Judgment despite these unfortunate circumstances brought about by the Appellant, perhaps on the excuse of being an unrepresented layman unfamiliar with legal procedures.

Determination

26. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See Okeno vs. Republic [1972] E.A 32).

27. The issues that arise for determination are evidently the following:

    a. Whether the trial, including the charge sheet, were marred with irregularities and defects, and offended statutory and Constitutional safeguards.

    b. Whether the defilement charge against the Appellant was proved beyond reasonable doubt.

    c. Whether the sentence of 25 years imprisonment was justified.

28. I now proceed to analyze and determine the said issues.

a. Whether the trial, including the charge sheet, were marred with irregularities and defects, and offended statutory and Constitutional safeguards.

29. The Appellant faulted the trial Court for failing, in violation of his rights under Article 50(2)(c) & (j) to ensure that he was accorded a fair trial in that he was supplied with witness statements only moments before the trial commenced. In interrogating this grievance, I reproduce the following relevant portion of the proceedings of 3/09/2019 on which date only the complainant testified:

> "Gacau: I have 4 witnesses
>
> Accused: I have not been given statements

Court: Accused to be supplied with statements. Hearing to proceed at 2.00 pm and accused confirms that he can proceed if given statements

Hon. R. Odenyo

Senior Principal Magistrate

11:40 am"

30. The record then indicates that the trial then commenced at 3.00 pm when PW1 testified.

31. The record does not indicate that the Appellant alleged that he had still not been served with the statements when the trial commenced at 3.00 pm. The presumption is therefore that he was immediately served after the Court directed so in the morning. The record also reflects that the Appellant had confirmed to the Court that he would be ready to proceed if so served that morning. In view thereof, I do not think that the Appellant was prejudiced in any way. As aforesaid, only the complainant testified on that date and whom the Appellant sufficiently cross-examined. The rest of the witnesses testified on subsequent dates and the Appellant never again, during the entire trial, raise any issue about late service of statements and never asked for recall of the complainant. Raising this issue at Appeal reeks of bad faith on his part and sounds like an afterthought. For these reasons, I dismiss that limb of appeal.

32. The Appellant also claims that the trial Court did not allow him the opportunity to call his 3 alibi witnesses thus violating his right to a fair hearing under Article 50(2)(k) of *the Constitution*. I also dismiss this grievance since, as correctly appreciated by the Appellant himself, the record indicates that after the trial Court delivered its Ruling on 8/12/2019 on case to answer, the trial Magistrate explained to the Appellant his options under Section 211 of the *Criminal Procedure Code* and the Appellant's response is recorded as follows:

"Accused: Unsworn statement. No witness"

33. The above being the state of the record, I cannot engage in speculation as the record does not reflect that at any time, the Appellant asked to avail any witnesses or that he was denied an opportunity to do so. This ground of Appeal therefore also fails.

34. The Appellant further argued that there was variance between the particulars of the charge and the evidence adduced, thus in breach of Section 214(1) of the *Criminal Procedure Code*. He pointed out that the witnesses referred to the date of the offence as 18/07/2019 while the charge sheet indicated 17/07/2019. This is indeed be a valid observation that the trial Magistrate does not seem to have noticed as he said nothing about it. Indeed, a perusal of the record reveals that the complainant (PW1) testified that she could not recall the date of the act, PW2 (teacher) stated that it was on 18/072019, PW3 (doctor) stated that the complainant told her that the Appellant defiled her regularly and that the last date was on 17/07/2019 while the alleged "Mluhya" defiled her on 18/07/2019. PW4 (grandmother) referred to 17/07/2019 while PW5 (Investigating Officer) testified that the complainant reported being defiled by the Appellant on both 17/07/2019, and again on 18/07/2019.

35. On the issue of contradictions in witness' testimonies, the Court of Appeal, in the case of Willis Ochieng Odero v Republic [2006] eKLR, held as follows:

"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of

the offence, is different. But that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the *Criminal Procedure Code*."

36. Similarly, in the case of Twehangane Alfred v Uganda, Crim. App. No. 139 of 2001, [2003] UGCA, 6, it was held that:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

37. The Court of Appeal, also, in the case of Eric Onyango Ondeng' v R [2014] eKLR, held as follows:

> "The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers."

38. As held in the said cases, probability of memory loss as a result of lapse of time is an attribute of human nature, and unless it is demonstrated that the contradictions apparent by witnesses is deliberate and aimed at misleading the Court, minor contradictions will be excused. In this case, among the 4 witnesses who mentioned the date of the offence, two (PW2 and PW4) gave the same date stated in the charge sheet, namely, 17/07/2019, one (PW3) gave the date of 18/07/2019, while the third (PW5) gave both the dates of 17/07/2019 and 18/07/2019 since according to him, the complainant told him that the acts of defilement by the Appellant used to occur regularly and, in this case, it occurred on both dates.

39. In regard to drafting of charge sheets, Section 134 of the *Criminal Procedure Code* provides as follows:

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

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

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

41. Applying the test above and upon keenly perusing the charge sheet, I find that the particulars of the offence were clearly spelt out, and these included the section of the law creating the offence, the date of the offence, the place of the offence, the act constituting the offence and the name of the victim. In the circumstances, my view is that even if there were any contradictions in the dates in this case, which I do not find in any case, the same were minor, not material, and could not honestly have occasioned any injustice or vitiate the conviction.

a. Whether the charge was proved case beyond reasonable doubt

42. It is trite law that for the offence of defilement to be established, 3 ingredients must be proved, namely, the age of the victim, penetration and positive identification of the offender. In respect thereto, Section 8(1) and 8(2) of the *Sexual Offences Act* provide as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

43. The importance of proving age was underscored by the Court of Appeal in the case of Hadson Ali Mwachongo v Republic [2016] eKLR, as follows:

> " The importance of proving the age of the victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In Alfayo Gombe Okello v Republic Cr. App 203 of 2009 (Kisumu) this Court stated as follows: -
>
> > "In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. This must be so because dire consequences flow from proof of the offence under Section 8(1)".

44. In respect to proof of the "age" of the victim, the Court of Appeal in the case of Edwin Nyambogo Onsongo v Republic [2016] eKLR, stated as follows:

> " .... the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

45. In this case, the charge sheet cited the complainant's age as 10 years old. The complainant herself testified that she was 9 years old, while PW4, her grandmother alluded to the age of 7 years old. On the other hand, the complainant's health card produced in evidence indicated that she was born on 19/09/2008. The offence having been alleged to have been committed on 17/07/2019, it would mean that going by the health card which would inevitably be the more reliable evidence, the complainant was about 10 years and 10 months at the date of the offence, thus below 11 years. The health card having been produced in evidence, I am satisfied that it sufficiently proves the element of the complainant's age.

46. On the issue of "penetration", Section 2(1) of the *Sexual Offences Act* defines the term as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

47. In regard thereto, the Court of Appeal, in the case of Mark Oiruri Mose v R (2013 eKLR, guided as follows:

> " ..... In any event the offence is against penetration of a complainant and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence if spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ."

48. In this case, medical evidence was provided by PW3, the doctor who produced the P3 Form. She testified that she examined the complainant on 23/07/2029 and noted that her hymen was freshly broken at 10.00 o'clock, 6.00 o'clock and 1.00 O'clock positions, her labia minora was red instead of pink, the vagina walls were visible meaning that it was enlarged, the anus had fresh tears at 6.00 O'clock and 12.00 O'clock positions, the anal region was reddish and had dried watery stool. In her opinion, the type of weapon that caused the injury was a blunt object and she concluded that there was anal and vaginal penetration. The fact that the complainant was examined on 23/07/2019, about 6 days after the alleged act, does not turn on anything as the 6 days period is clearly within a reasonable recent timeline.

49. There was also the testimony of PW2 who testified that on the material date, she went to teach standard 1 pupils and when she released them for recess, she noticed that the complainant was unable to run and was walking with difficulties despite knowing her to be an agile pupil, that after the class, she asked the complainant to stay behind and talked to her and that this is when the complainant disclosed to her that Kipruto (Appellant) had inserted his organ for urinating into hers, that it was not the first time and that previously, the Appellant had been inserting his sex organ into hers only shallowly but on that day, he had inserted it very deeply inside. PW2 stated that she informed the deputy head-teacher about the matter who summoned the complainant and who repeated the same narrative to him.

50. In view of the above testimonies and evidence, the trial Magistrate cannot be faulted for finding that the element of "penetration" was sufficiently corroborated and thus proved.

51. On the issue of "identification", the Court of Appeal in the case of Cleophas Wamunga v Republic [1989] eKLR stated as follows:

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

52. In this case, the complainant identified the Appellant as a neighbour who lived in the same neighbourhood and referred to him by his name. From the testimony of the witnesses, the complainant also gave the Appellant's name to all the people she narrated the account to. According to PW5, the

investigating officer, after the Appellant was arrested, the complainant was brought to the police station and again identified the Appellant. I also note that in his defence, the Appellant did not expressly deny knowing the complainant. In fact, the Appellant, in his defence, alleged that he had been framed by the Appellant's parents because of a land dispute. This again proves that the complainant's family was well known to the Appellant.

53. I therefore find this to be a case of "recognition" rather than identification of a stranger. Such evidence of "recognition" is clearly more reliable and believable in "identification" as was stated in the case of Reuben Tabu Anjononi & 2 Others v Republic [1980] eKLR, in which the Court of Appeal guided as follows:

> "..... This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).
>
> We consider that in the present case the recognition of the appellants by Wanyoni and Joice to whom they were previously well known personally, the first appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyoni reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three appellants to the police as the robbers who had robbed him.
>
> We are satisfied that there was no mistake as to the identity of the three appellants and they were properly found guilty of the offence with which they were charged in count 1."

54. As correctly pointed out by the Appellant, there is indication that the complainant also mentioned a second perpetrator by the name "Mluhya" to several witnesses. This would not however not affect the individual case against the Appellant since according to the complainant, both the two (Appellant and Mluhya) used to commit the acts separately and on different respective occasions, not at the same time or together, most likely even unknown to each other. There is therefore no doubt created as to the identity of the specific perpetrator the subject of the charge sheet in this case.

55. In light of the foregoing, I am also satisfied that the trial Magistrate correctly found that the Appellant had been positively identified.

56. As aforesaid, in his defence, the Appellant alleged that he had been framed by the Appellant's parents because of disagreements between arising from a land dispute. As correctly observed by the trial Magistrate, the Appellant did not however give the exact nature of the dispute and neither did he give any details thereon. I dismiss that defence as a clear afterthought.

57. The primary testimony against the Appellant was that given by the complainant (PW1) who, although she gave unsworn testimony, I find that such testimony was sufficiently corroborated by the testimony of the rest of the witnesses and also by documentary evidence, such as the P3 Report. That the law requires corroboration of testimony by minors where such minor is the sole or single witnesses is clear from Section 124 of the *Evidence Act*. However, there is the proviso to that very section to the effect that, in cases of sexual offences, there need not be such corroboration if the trial Court believes that

the minor-victim told the truth and recorded its reasons. The Section and the proviso are premised as follows:

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

58. From the foregoing, it is clear that the proviso to Section 124 of the *Evidence Act* allows the Court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not even call all witnesses who may have information on a fact. In this case, there would even be no need to invoke the said provision as there was sufficient corroboration.

b. Whether the sentence of 25 years imprisonment was justified

59. Regarding interference with sentence at the appellate stage, the applicable principles were restated by the Court of Appeal in the case of Bernard Kimani Gacheru v Republic [2002] eKLR, as follows:

> " It is now settled law, following several authorities by this Court and the high Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial Court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial Court on sentence unless, anyone of the matters already stated is shown to exist".

60. In applying the above guidelines, I reiterate that Section 8(2) of the *Sexual Offences Act* provides as follows:

> " (2) 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."

61. The Supreme Court, in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR), guided that, in sentencing, the following mitigating factors would be applicable;

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender; and

(h) any other factor that the Court considers relevant.

62. I also cite Majanja J, in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, in which, quoting the Muruatetu case (supra), he stated as follows:

> "The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ....."

63. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

> "..... we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ....."

64. Applying the above principles to the facts of this case, I note that the Appellant was given the opportunity to mitigate, and he made representations thereon. I also consider that sexual offences, especially defilement are treated as serious offences under Kenyan law and the society at large and are always be severely punished. In this case, the Appellant preyed on a young 10-year-old girl and stole her innocence. According to the complainant, the Appellant had made it a habit of regularly waylaying her either on her way to or from school, diverting her to either his house or to a maize plantation where he would regularly defile her. He did so on several occasions over a long period of time. This is totally unacceptable. The complainant will definitely be traumatised for the rest of her life. I do not find any "mitigating factors" that would justify the extension of any sympathy to the Appellant who has not even shown any remorse. It was upon the trial Court to impose a sentence that is proportionate to the offence committed. Considering the above circumstances, I agree that the Appellant merited a stiff sentence and I find that the 25 years prison term was proportionate and justified. For the said reasons, I find no reason to interfere with the sentence.

65. Regarding the period spent in custody by the Appellant prior to the sentence, Section 333(2) of the *Criminal Procedure Code* provides as follows:

> "Subject to the provisions of Section 38 of the *Penal Code*, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody."

66. A perusal of the Court file reveals that the Petitioner was arrested on 20/08/2019 (as per the Charge Sheet), arraigned on 21/08/209 and was sentenced on 31/01/2022. The trial therefore took about 2

years and 5 months. I however also note that the Appellant was released on bond/bail on or about 19/03/2020. From this account, the period spent by the Appellant in remand custody was therefore about 7 months. The trial Magistrate did not mention whether he took into account the said period when sentencing the Appellant as required by law.

Final Order

67. In the end, I make the following Orders:

    i. The appeal against conviction fails and the same is upheld.

    ii. On sentence, the period between 20/08/2019 (date of arrest) and 19/03/2020 (date of release on bail/bond) spent by the Appellant in remand custody before sentence shall be included in the computation of the 25 years imprisonment period.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 25TH DAY OF APRIL 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

The Appellant

Ms. Okaka for the State

Court Assistant: Brian Kimathi