DKG v Republic (Criminal Appeal E210 of 2022)
[2024] KEHC 654 (KLR) (Crim) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 654 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E210 OF 2022

LN MUTENDE, J

JANUARY 25, 2024

BETWEEN

DKG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence arising from Chief Magistrate's Court Sexual Offence No. 48 of 2018 held at Makadara by Hon. E. Kanyiri, PM, and judgment and sentence delivered on 28th September, 2021)

JUDGMENT

1. DKG a, the Appellant, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Offences Act No 3 of 2006. The particulars of the offence being that on 22nd February, 2018 at [Particulars withheld] area in Njiru Sub-County, he intentionally and unlawfully caused his penis to penetrate the vagina of AM a child aged 7 years.

2. In the alternative he faced a charge of committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. Particulars were that on 22nd February, 2018 at [Particulars withheld] area in Njiru Sub-County, he intentionally and unlawfully committed an indecent act with AM a child aged 7 years by touching her private parts namely, vagina.

3. Having been taken through full trial, he was convicted for the offence of committing an indecent act with a child and sentenced to serve life imprisonment.

4. Aggrieved, the appellant appeals against the conviction and sentence on grounds that the learned trial magistrate erred in law and fact: by adjudicating a case whose charge and particulars were irredeemably defective; in adjudicating a case whose plea was apparently equivocal; in conducting a trial whose vital

facilities were undisclosed to the appellant; in disregarding the fact that principle ingredients of the charge were not established; by abrogating the alibi defence to the appellant's detriment; and, that the court erred in sentencing the appellant to serve an amorphous and titular sentence.

5. Briefly, facts of the case were that the complainant lived with his biological father, the appellant, and her younger brother, W aged five (5) years old. On the fateful day, her father told her to shower and also told W to go out and play. That after showering she wore her dress, panty and tights but her dad removed his clothes and removed his urinating organ and inserted into her private parts at the front and behind. At the time the door was locked. He told her not to tell her mum and put his hand over her mouth as she tried to scream. He also threatened to chase her and her mom out of the house if she informed her. That she saw some dirt from his urinating thing which was black.

6. She testified further that it was not the first time he was committing the act as he had done it previously on two other occasions and even recorded the episodes on phone.

7. That on the material day on finishing he locked her inside the house and left. Her mum came at night, W was at his friend's house, and, found her locked in and broke the lock. She told her what her father had done to her and she promised to take her to hospital. That they stayed at her aunt's place and her mum left in the morning and returned while drunk. That her aunt took her to hospital after she told her she felt pain while urinating. Subsequently. She was taken by the By-grace fraternity. She was examined at Mama Lucy hospital and a PRC form filled.

8. Thereafter PW3 Dr. Maundu from Nairobi police surgery hospital examined the complainant and filled the P3 which was adduced in evidence. A report made to the police was investigated that culminated into the accused being arrested and charged.

9. Upon being placed on his defence the appellant denied the allegations. He testified that after living with his family for eleven years his wife moved out with their children and as such he was not living with them at the time. That the report was made by Ann Wanjiku and Sabina Murage who however did not testify, as well as his wife. That he was charged with the offence since he had told the reportees that he did not want them near his wife, and, he was arrested at the chief's place at Mowlem where he had gone to report that his wife had come with Anne and Sabina to ask for Ksh.100,000/= and they all went to the place.

10. The court considered evidence adduced and opined that though penetration was proved as per the oral testimony of the victim and corroborated by people she talked to, no documentary evidence was adduced to prove age. That no birth certificate, baptism card or vaccination card was produced and therefore age was not proved beyond reasonable doubt. On the issue of identification, the court found that it was not in dispute as the appellant was the victim's father.

11. The court analysed the defence put forward and found that no report was adduced to prove that the appellant went to report his wife and the other women to the chief. That the witnesses could not be traced and therefore it was not true that they did not want to come and testify. The court held that ingredients of defilement were not proved on grounds that age was not proved by documentary evidence hence the conviction on the alternative charge.

12. The appeal was disposed through written submissions. The argument advanced by the appellant is that the charge sheet was defective as the statement of the offence omitted the word "sexual" which meant that he was charged with an offence not known in law that effectively rendered the trial a nullity. That the evidence adduced by the complainant disclosed a narrative that would have required the court to order the charge sheet to be amended to read incest but not defilement. He questioned the legality of documents adduced in evidence as he was indicted on 22nd March, 2018 while the P3 form was filled

on 4th May, 2018 which was two (2) months eleven (11) days from the date of the incident, and, that the maker of the PRC form and P3 form were not listed as witnesses contrary to Section 147 of the *Evidence Act*, yet the 3 witnesses who initiated the case also disappeared.

13. That the charge sheet was duplex such that the defect could not be cured by an amendment or substitution due to inclusion of an alternative charge which should not be the case. Reliance was placed on Section 137 of the Criminal Procedure Code. He faulted the Investigating Officer for testifying that he brought the charges after the P3 form was filled, yet, the P3 form was filled on 4th May, 2018 which was two (2) months after arrest and indictment.

14. That the plea was equivocal which violated Section 134 and 214 of the Criminal Procedure Code. That it was brought prematurely. The appellant also submits that the language used during the plea taking cannot be known contrary to the court's decision in the case of Adan -Vs- Republic (1973) EA 457 that the accused's answer must be recorded as nearly as possible in his own words. That the record does not indicate if the accused was a he or she and what answer was given and by who. That the charges were duplex as the charge of incest encompasses the offence of indecent act.

15. That the trial was unfair and in breach of Article 50(1) and (2) of *the Constitution* as the appellant paid for the prosecution witness statements and was not given the opportunity to cross examine or challenge the evidence to be adduced by PW1's aunt called A, a witness called Sabina and PW1's mother, witnesses who featured in the post rape care form as the persons who escorted the minor to hospital, and, reported the matter.

16. The appellant faults PW2 who was availed to produce evidence under Section 77 of the *Evidence Act* but ended up giving direct evidence and was cross examined on the documents. That the witness was to be limited to produce the document under Section 65 and if the court had questions ought to have called the author of the document.

17. That the ingredients of the offence were not proved. The age of the minor, and, the act of penetration were not proved. That the court convicted him for committing an indecent act which was a lesser offence under Section 11 of the *Sexual Offences Act*. The appellant submits that the conviction did not specify what part of Section 11 was proved. That the minor was AM yet the acronym used was AWN and not AM as expected. That both prosecution counsel and the accused counsel submitted that the accused was a first offender but the accused was sentenced to life imprisonment for the misdemeanor.

18. That the magistrate ought to have sentenced him to the minimum mandatory sentence set to be 10 years under Section 11 of the Act, a sentence that was legitimate. That life imprisonment was not commensurate with the misdemeanor he was convicted of.

19. Lastly, that the prosecution and the court did not interrogate his alibi defence, the testimony that at the time of the offence he had separated with his wife. That the child testified that she lived at By- Grace and had also been going to school at By-Grace, she had become a full resident of By-Grace and lived with Mutuku who took her to school and brought her to court.

20. That the court had power under Section 150 of the Criminal Procedure Code to summon Mutuku and determine when the child joined By-Grace. That his defence was clear that he had separated with his wife on 17/12/2017 and that he had been framed by his wife and the other 2 women who came to demand Ksh 100,000/= to withdraw the case and the prosecution having not cross examined his case was not rebutted.

21. The appeal is opposed by the State /Respondent. It is urged that the court had the opportunity of seeing the minor and if it had any doubts it could indicate so. Further that from the proceedings there

was no dispute on the age of the minor. The minor testified during voire dire that she was 7 years old, the PRC form and the P3 form were also produced. Reliance was placed on the case of Fappyton Mutuku -Vs- Republic (2012) eKLR where the court noted that apart from a birth certificate, there are other modes of proof of age.

22. On penetration, the prosecution submits that the child's evidence was consistent on how the accused did tabia mbaya to her and pointed out to court by touching her private parts that she was defiled both on the vagina and anus. The evidence was corroborated by medical evidence which confirmed penetration.

23. On identification, there was no doubt that the appellant and the victim knew each other, the offence took some time and was not hurriedly done. The appellant also defiled her twice the first one he recorded it on his phone. That the defence was not corroborated and was a mere denial, the court was also informed how the other witnesses were not available.

24. On sentence the prosecution submits that the appellant required rehabilitation before reintegration back to the society.

25. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. In the case of Okeno -vs- Republic [1972] EA 32, it was held 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 v. R [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v. 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 courts' findings and conclusions; 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 v. Sunday Post [1958] EA 424".

26. It is contented by the appellant that the charges were defective and that the right charge ought to have been the offence of Incest contrary to Section 20 of the *Sexual Offences Act* which provides that:

> The offence of incest is committed by a male person who willingly has sexual intercourse with another person knowing that the other person is his grandmother, mother, sister, daughter, aunt, niece or granddaughter.

27. The ingredients of the offence were stated in the case of W O O vs Republic [2016] eKLR thus:

> "The ingredients of an offence of incest are as follows: - "relationship, within the meaning of the law and penetration"

28. According to evidence adduced it is not in dispute that the appellant was the complainant's biological father. It is also not in dispute that the complainant was stated to be a minor of tender age and the act done was either penetrative or indecent hence charges preferred. This being the case failure to charge him for incest or to order relevant amendments before judgment was not fatal to the case. It also did not make the charges defective. If charges brought are not known in law or were duplex this would have required amendment or substitution. The most imperative question would therefore be whether the appellant was prejudiced. But, the argument presented has not suggested or demonstrated prejudice

suffered by failure to amend charges to reflect the offence of incest. (Also see the case of Yosefa vs Uganda [1969] E.A. 236)

29. In the case of Isaac Omambia Vs Republic, [1995] eKLR the Court of Appeal held that :

> " A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, and Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO v R, [198] eKLR that:
>
> "(i) In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:
>
> (ii) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
>
> (iii) when for such reason it does not accord with the evidence given at the trial."

30. Looking at the alternative charge of committing an Indecent Act; this can be brought considering that it is a lesser offence to the main offence. The offence of Indecent Act provided under Section 11 is committed by touching the victims private organs by hand or genital organs, it is also completed when the perpetrator touches the buttocks, breast or exposes the victim to sexual content. However, it excludes penetration.

31. The child's name was indicated as AWM, there is no doubt the appellant was aware of the victim in the case, he cross examined her, the child was also his daughter, therefore the erroneous description of the victim's name was curable under Section 382 of the Criminal Procedure Code which provides that:

> .... no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

32. The P3 form and the Post Rape Care form also reflected the correct name leaving out any doubt that the appellant was not aware of the victim in issue.

33. On the question of the language used during trial, it was indicated in the proceedings as "Kiswahili". It is clear that the appellant was able to understand and plead to the charges and also argue his defence.

34. In the case of George Mbugua Thiongo vs Republic [2013] eKLR (Criminal Appeal No 302 of 2007) the Court of Appeal held that:

> "For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial."

35. The charges were neither defective nor equivocal.

36. The proceedings show that the appellant was given witness statements but at his costs. Article 50 of *the Constitution* provides for the rights of the accused person facing trial the right to fair trial is listed among the non-derogable rights under Article 25(e) and the accused must be assured and be seen to benefit from this right.

37. The appellant complains that he obtained the statements at his costs. *The Constitution* does not specify that the evidence would be supplied at the State expense but what is required is that the accused should have reasonable access to the evidence. Article 50(2) (j) provides:

> " Every accused person has the right to a fair trial which includes the right- to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access that evidence."

38. The prosecution complied by making the evidence available in advance, the accused did not urge at trial that he could not raise funds for them. Further, the payment for witness statements is not proved hence cannot be a ground to unsettle the conviction herein.

39. Regarding proof of the offence of defilement, Section 8(1) of the SOA provides that:

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

40. Ingredients of defilement are hence the age of the victim, the act of penetration and positive identification of the perpetrator. The SOA upholds the definition of a child as assigned thereto by the *Children Act* which defines a child as a person below 18 years. The age factor is critical and must be proved beyond doubt. In the case of Hadson Ali Mwachongo vs. Republic [2016] eKLR, the Court stated that:

> " The importance of proving the age of a 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 victim"

41. The Court of Appeal in the case of Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000 held that:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

42. In the case of Fappyton Mutuku Ngui vs. Republic (Supra) the court held that:

> " ... that "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

43. In the case of Mwalengo Chichoro Mwajembe vs Republic (2016) eKLR the Court of Appeal held that:

> " ....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 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 Uche -Vs- Republic, Criminal Appeal No.11 of 2015. We doubt if the courts are possessed of the 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..."

44. In the instant appeal the court conducted voire dire examination and common sense and observation came to play; the PRC form indicated the age of the victim and the P3 form placed her age at 7 years. The appellant, the victim's biological father did not dispute the age as observed at the trial stage. All these demonstrated that the victim a child of tender age. In the result, the court erred in finding that age was not proved beyond reasonable doubt. Further, the finding that age can only be proved by documents was misdirected and erroneous.

45. On the issue of penetration, Section 2 of the SOA defines penetration as follows:

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

46. Evidence herein was of a child of tender age, the act having been committed in the bedroom that was locked. Section 124 of the *Evidence Act* provides for means of proof through the victim's oral evidence. The alluded to provision of the law provides thus:

> "...Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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 material 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..."

47. It has been held that the fact of defilement and penetration does not necessarily require prove by medical evidence as it can be proved by the oral evidence of the complainant or circumstantial evidence. (See AML vs Republic (2012) eKLR)

48. In the case of George Kioji vs Republic Criminal Appeal no. 270 of 2012, Nyeri, the Court of Appeal held that:

> "Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond any reasonable doubts that the defilement was perpetrated by the accused person. In deed under the proviso to section 124 of the *Evidence Act* Cap 80 laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone if the court believes the victim and records the season for that believe,"

49. The minor testified how the appellant penetrated her vagina using his penile organ, she also explained to court how he penetrated her anal region. She also claimed to have been molested previously although the incidences were not reported. That the appellant also took photographs of his perverse actions during the unreported incidences. She explained how the appellant threatened to chase her with her mother out of the house if she reported him. The trial court did not find the evidence to be doubtful, untruthful or less credible. The evidence was corroborated by the medical report filled at Mama Lucy hospital where she was examined. This was proof of penetration beyond doubt.

50. The uncalled evidence refers to evidence from the reportees who went to report the matter at the Mowlem Police Station and the author of the medical report. The medical evidence was produced without objection after the prosecution moved court under Section 77 of the *Evidence Act*. A ground had been laid prior to production, it was established that the witness had worked with the author and was conversant with the writing and signature and also that the witness could not be availed without delay.

51. Section 77 of the *Evidence Act* provides for admissibility of evidence purported to be made by a medical practitioner. It provides thus:

    (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

    (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

52. Section 33 of the *Evidence Act* which is in respect of people who cannot be found to testify provides:

    (a) ...statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible

    (b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty.

53. In the case of Chaol Rotil Angela vs Republic [2001] eKLR the Court of Appeal sitting in Kisumu held as follows regarding the production of evidence by an expert witness other than the maker:

> "A medical doctor or pathologist is a professionally trained and qualified person. When carrying out a postmortem examination, he is undoubtedly performing and discharging a professional duty. When completing and signing postmortem examination report, he is doing so in the discharge of a professional duty. We think, under these circumstances, that subject to other requirements being met, a postmortem examination report is a document made in the discharge of a professional duty and would be covered by Section 33(b) of the *Evidence Act*. But before Section 33(b) can apply, the first part of the section must come into operation. The first part lays out conditions precedent without which, any of paragraphs

(a) to (h) may not be applied. Once again for the sake of convenience and clarity, we set out below the requirements of the first part of the Section. They are:

> "Statements, written or oral on admissible facts made by a person who is dead, or cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the.....".

54. The court was justified in allowing the witness to testify and the appellant consented to evidence being adduced and thus the ground that her evidence was hearsay or that she was limited on what she could testify was unsupported. Its notable that the appellant also cross examined the witness and thus did not suffer any injustice.

55. PW4 the Investigating Officer told court that the incident was reported in OB 26/26/2/18 by Anne Wanjiku and Sabina, and they also recorded their statements. The record bears witness of how the prosecution made effort and intended to avail the witnesses and summons and warrants of arrests were also procured.

56. The courts finding that the witnesses were not traced was correct. The appellant contention that they changed their mind or that the prosecution omitted their evidence to his detriment was not applicable. It was beyond the prosecution and the court's effort to trace them as they had changed their address. With regard to failure to avail Mutuku of the By- Grace Children Home where the child was subsequently taken, he was not an eye witness. And, the victim's evidence was unshakable hence the omitted evidence was not fatal to the case.

57. There is no restriction on the number of witness to be called, the prosecution must call witnesses and indeed evidence that satisfies the burden of proof. In the case of Donald Majiwa Achilwa & 2 Others Vs Republic (2009) eKLR, the Court of Appeal held that:

> " The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case- see Bukenya & Others Vs Uganda (1972) EA 549 and the provisions of Section 143 of the *Evidence Act*."

58. The witnesses who were not found to testify were not eye witnesses since they only reported and took the child to hospital. Key witnesses were presented and their evidence corroborated the ingredients of defilement and also identified the appellant as the perpetrator.

59. The appellant bore the evidential burden of proof of adducing evidence or raising the defence of alibi and once discharged, the duty was upon the prosecution to disprove it. The duty of the court is to test the evidence of alibi against the evidence adduced by the prosecution and if there is doubt in the mind of the court, the same is resolved in favour of the accused.

60. In the case of Ricky Ganda vs. The State, [2012] ZAFSHC 59, Free State High Court, at Bloemfontein held that:

> " The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered

in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

61. PW1 placed the appellant at the scene and testified how he defiled her at their house where they lived with him, her small brother and mother. She was also clear that at the time they lived with the accused where she schooled but later she relocated to Anne's place then By-Grace after her mother disappeared and was attending By-Grace school when she testified. The evidence was not shaken by the defence.

62. An express report or evidence from the chief who received the report by the appellant against the estranged wife and her fiends' threats would assist him but it was not presented. The appellant's defence had to demonstrate that in the year 2017 he was not living with the family and that the case was brought maliciously on 22.2.2018 when he was nolonger sharing a house with the child.

63. The sentence for an offender who defiles a child aged 7 years is provided for in Section 8 (2) of SOA which enacts that:

    (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.

64. The Court of Appeal in the case of Gichuki Mwangi vs Republic, Nyeri Appeal No. 84 of 2015, held that certain accused persons are clearly deserving of no less than the minimum sentences set forth in the *Sexual Offences Act* owing to the heinousness of the offenses committed. That they will continue to be appropriately punished as was pronounced in Athanus Lijodi vs Republic (2021) eKLR"

65. In this appeal, considering the gravity of the offence and the circumstances of commission over a long period of time where the child was defiled and assaulted on her vaginal and anal opening, and, the impact on the child calls for a deterrent nature of sentence. In the premises, I set aside the order of the court sentencing the appellant on the alternative count and return a verdict of guilty in respect of the appellant on the main count, then proceed to sentence him to twenty-five years imprisonment.

66. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 25TH DAY OF JANUARY, 2024.

L. N. MUTENDE

JUDGE

In The Presence of:

Court Assistant- Habiba

Appellant

Ms. Ntabo for the Respondent