



**BKN v Republic (Criminal Appeal E070 of 2023)
[2024] KEHC 8428 (KLR) (25 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E070 OF 2023
DKN MAGARE, J
JUNE 25, 2024**

BETWEEN

BKN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Conviction of Hon. E. Kanyiri (PM) in Karatina Principal Magistrate’s Court Sexual Offence No. 19 of 2016, delivered on 26th October, 2023)

JUDGMENT

1. This is an appeal from the decision of the Hon. Kanyiri PM, given on 26/10/2023 in Karatina PMC SO 19 of 2016. The petitioner raised the following grounds of appeal:-
 - a. That the learned trial magistrate erred in both law and fact in failing to appreciate the fact that the alleged victim in this case clearly demonstrated an incredibly doubtful integrity and whose evidence was and remains doubtful occasioning a serious prejudice.
 - b. That the learned trial magistrate again erred in both law and fact in failing to appreciate that the critical elements in defilement were not proved to the required standards in law occasioning a serious miscarriage of justice.
 - c. That the learned trial magistrate further erred in both law and fact in not considering that the whole prosecution case was riddled with material discrepancies which were capable of unsettling the verdict hence a prejudice.
 - d. That the learned trial magistrate further erred in law and fact in failing to consider the plausible appellant’s statement in defence which was not contested and or unproved by the prosecution hence still stands clearly demonstrating that the instant matter was a framed up one to curtail my success for envious reasons.



- e. That the instant matter's proof was below the required standards of proof and therefore capable of impeaching the whole substance of the matter.
2. The grounds are on conviction only. The Appellant was charged with defilement contrary to Section 8(1) as read with Section 2 of the [Sexual Offences Act](#). The charge was that on diverse dates between 17th May, 2016 and 22nd July, 2016 in Ihwagi Location in Mathira East Sub County within Nyeri County the Appellant intentionally caused his penis to penetrate the anus of KNM a child aged 11 years.
3. The Appellant was arrested on 3/8/2016, and arraigned on 4/8/2016. He was charged with the said main offence and alternative count. Upon pleading not guilty the Appellant was granted Kshs. 300,000/= bond with Surety of similar amount.
4. On 11/7/2017 the minor went through voire dire examination. He could not understand the oath. He stated that he was headed home from school, at about 5.30 pm while alone. Someone pulled him into napier grass and removed his clothes. He removed his trousers. He made the minor lie on his penis on the belly. The Appellant inserted his penis into the minor's anus. He identified the assailant as the Appellant. The minor pulled his face to recognize him as his cousin. He threatened the minor.
5. One day he carried a knife to school and told his best friend he wanted to kill himself. On cross examination he was asked about parents. It was said that the Appellant defiled the minor on 38 occasions. He wasn't cross examined on the defilement.
6. PW2 AWM testified that on 25/7/2016, a teacher called her that the son carried a knife at school. On being asked the minor stated that he had been defiled by the Appellant on diverse dates from May 2016. The minor was defiled. The minor was 12 years old. On cross examination on the mother and brothers, he stated that there were disputes after the witness' husband died. The witness sought to visit the scene.
7. The matter was thereafter adjourned for the state to supply treatment notes. Unfortunately the court allowed the adjournment. The defence must face the case prepared by the state. They have no role in investigating the case. The magistrate was thereafter transferred and the matter proceeded upon compliance with Section 200 CPC. The new magistrate was firm and as a result the matter proceeded.
8. PW3 SM testified, that on 25/7/2016 at 9.35 am as they were going to school break, they heard a lot of screams and cries from class 4. They discovered that it is the complainant who had a knife. He refused to speak till parents came. He then confided in them about the multiple defilements. On cross examination he stated that it was a rare incident but the minor was traumatized.
9. The complainant was recalled for further cross-examination. He was extensively cross-examined on the land they resided in. He stated that the parents and K's parents were in talking terms before 2016 but were now not in talking terms. He had never witnessed any quarrel between the parents and he did not know why they had differences over land.
10. He stated that the Appellant warned him not to tell anyone. This was repeated daily till 22/7/2016. This was daily from Monday to Friday. He was cross examined on why he did not take evasive steps. The hearing was adjourned to the scene. The court observed that all roads led to the spot where the minor was saying.
11. PW2 testified that (Dr. Stephen Nderitu) he was stood down. The next witness was Lorraine Wairimu who stated that she was in Karatina. She examined the minor. The last incident was 72 hours prior to report. There were signs of penetration. She stated that the incident occurred in 2016. She described how the anus looked like, showing laceration. The laceration was the only tear that was seen.



12. The matter was delayed for some time due to some antics by some of the parties. PW3 was recalled on 20/4/2023. He stated that the minor stated that the incident took place many times. He found a laceration. It was difficult to say whether it was continuous defilement. The last incident was 3 days before the examination.
13. PW4 Sergeant Joan Kirimi testified that on 25/7/2016 at 2 pm, a nurse told her that there was a complainant on defilement. She went to hospital to attend the issue on instructions of Inspector Kosgei. They went with Cpl. Thiga to ward 3 and found the mother and doctor filling PRC form. She interrogated the mother. She had been sent to AP Camp Kiarithaini but was advised to go to hospital. She began investigations where she found that the accused could wait for the minor at Napier grass and defile him. The child wanted to end his life.
14. She produced a birth certificate showing he was born on 21/10/2005. She charged the Appellant. On cross examination she stated that the accused and Appellant's home are near each other but they are related. She interrogated another child, Karanja but the parents refused to allow him to testify. The minor was defiled every day during school days.
15. The Appellant was put on his defence. He stated that he was 42 years old widower with one child. He knew the complainant. He gave his genealogy. He stated that he is a land broker. He said that they had a dispute over land. He stated he could work till 8/9 pm. He stated that he left for work at 6 am. He stated that in May 2016 he was not talking to the child.
16. On cross examination he stated that he was framed because they do the same job. He stated that he was framed. He stated that the doctor's evidence is a lie. He stated that they don't have a succession dispute since each heir has his own place.
17. DW2, MNN. She stated that she knew the minor as a child of his brother and they live in CN land home place (sic). The two families have built near each other. She stated that the broker goes at bar and comes back at 6 pm every day. She denied committing the offence.
18. The court analyzed the evidence and found the Appellant guilty. Upon listening to mitigation the court noted that the Appellant was not remorseful. On the basis of the decision in *Elijah Ndungu Munene & Another -Vs- R (1978) LRR 163*, the court sentenced the Appellant to 20 years imprisonment. The Appellant knew the sentence was very lenient and did not appeal on sentence. This appeal on conviction was preferred raising only 2 issues:-
 - a. The medical evidence was not to the required standards.
 - b. The court ignored contradictions.

Submissions

19. The court ordered submissions to be filed by 4/4/2024 and fixed the appeal for judgment today. The Appellant filed submissions on 21/4/2024. The Appellant stated that sexual offences have had a lacuna where there is a reduced standard of proof. It is in that context that parties extort money or even revenge. He relied on the case of *Eliud Waweru -Vs- Republic*. He stated that the case is about a family grudge.
20. He gave excerpts of the proceedings. He prayed that the conviction be quashed and sentence set aside. He laid the duty of the court as laid out in *Okeno -Vs- Republic [1972] EA 32* and *Pandya - Vs- Republic 1957 EA 336*. He stated that penetration was not proved. He was wondering whether defilement can be done in a route used by many people 38 times. He raised issue whether the nature of injuries are consistent with defilement for over 49 days. He stated that the doctor was not sure whether



there was penetration. This of course is not true. What the doctor was stating was that he cannot tell whether defilement was on some days or on every day.

21. He stated that there were contradictions. For example that there were other routes but he did not use them. He stated that the medical officer indicated that he was defiled for 3 months (90 days) while the minor stated that he was defiled on school days, 38 times in a period of 3 months.
22. On the last aspect he stated that the confession was not extracted willingly. He stated that the minor never mentioned that he was also taken to the house. He was of the view that the minor testified to deflect the crime of having a knife in school.
23. He stated that essential witnesses were not called, in particular the minor's friend K. He relied on the Court of Appeal decision in Philip Nzaka Watu v Republic [2016] eKLR, Where the Court of Appeal held that;

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.”

24. He also stated that the investigating officer did a shoddy job as she never visited the scene, never investigated the minor on using the case to deflect the crime of having a knife in school. He relied on the case of Ndung'u Kimani –Vs- R [1979] KLR 282 where the court of appeal stated:-

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

25. He stated that the contradictions go to the root. He also stated that the burden of proof was shifted to him. He reiterated his evidence. He relied on R.T. Bhatt –Vs- Republic [1957] EA 332-335 where the Eastern African Court of Appeal stated remembering that the legal prosecution's case. He sought that the appeal be allowed. The prosecution opposed the appeal but did not file submissions.

Analysis

26. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question



turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

27. In the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

“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 court’s 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] E.A. 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 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] E. A. 424.”

28. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of *H.L. (E) Woolmington vs. DPP* [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

29. In the case of *R vs. Lifchus* {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove



anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”

30. According to Halsbury’s Laws of England, 4th Edition, Volume 17, paras 13 and 14:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.”

31. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in *Re Winship* 397 US 358 {1970}, at pages 361-64 stated that:-

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

32. The submissions are evasive and self-serving. There is no contradiction on days. The minor stated that he was defiled for 38 times in the period under review. The doctor said that defilement was for 3 months. There is no contradiction. If a person stated that said that he has attended Christmas for 40 years, it is not the same that he has had Christmas for 14,610 days.

33. The doctor was correct that the incidents took 3 months. However, the minor was clear that the defilement was during school days. This excludes holidays, Saturdays and Sundays.

34. The issue of land did not involve the minor and the teachers. The evidence was succinct and compelling. The defence could not hold water. The way to treat contradictions in a case was stated by the Court of Appeal in *Jackson Mwanzia Musembi v Republic* (2017) eKLR where the court cited with approval the Ugandan case of *Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA, 6* where 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.”

35. The medical evidence, like any other expert evidence is not the only evidence to convict. Even if we were to remove the medical evidence, I note that the evidence of the minor was consistent, and unshaken. His conduct, that of wanting to un-alive himself was consistent with personal trauma of deepest kind. The medical evidence stood the muster. The Appellant insisted on the matter of the P3 and PRC



to testify. The Appellant did not have any useful questions to ask, other than invasive embarrassing questions meant to demean the minor.

36. There is no error on the medical records. The Appellant wasted time on trying to prove that it was not repeated. Sadly for him, even a partial penetration completes the offence of defilement. In regard to expert evidence, the Court of Appeal has held as doth in the case of
37. The court will treat the expert report as part of the evidence and analyst its soundness. The court of appeal, quoted with approval a high court decision on expert evidence in the case of *Kagina v Kagina & 2 others (Civil Appeal 21 of 2017)* [2021] KECA 242 (KLR) (3 December 2021) (Judgment)[RN Nambuye, W Karanja & AK Murgor, JJA] stated as follows: -

“Also taken into consideration among numerous others is the case of Stephen Kinini Wang’ondou vs. The Ark Limited [2016] eKLR from which the Judge drew out four tests to be applied by a court when considering admission and acting on expert evidence as more particularly set out in the ruling and which we also find prudent not to rehash and expressed himself thereon, inter alia, as follows: -

“In my view its correct to state that a court may find that an expert’s opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert’s testimony where he finds the expert’s reasoning speculative or manifestly illogical. Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert’s process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable. It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court “of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence.” An expert report is therefore only as good as the assumptions on which it is based. An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based.”

38. In Stephen Kinini Wang’ondou v The Ark Limited [2016] eKLR, Justice Mativo stated as follows: -

“I have also weighed the probative value of the expert evidence. I have also considered the said evidence together with the evidence tendered by the appellant, and I respectfully conclude that there is nothing to demonstrate that the expert’s opinion is based on illogical or even irrational reasoning and I have no basis to reject it. I also find nothing to lead me to conclude that the expert’s testimony and reasoning is speculative or manifestly illogical. Though the report has its weaknesses, I find that its contents and the evidence of an expert tendered in court is not so internally contradictory as to be unreliable, hence there is no basis for the court to reject the said evidence and make its decision on the remainder of the evidence. Considering the competing evidence submitted in court, and bearing in mind the standard



of prove in civil cases, I find that the expert’s process of reasoning is sufficiently clear and capable of enabling the court to choose which of competing hypotheses is the more probable and in this case I find no difficulty in concluding that the evidence tendered by the Respondent was probable in the circumstances. I therefore find no reason to fault the learned magistrates finding based on the evidence of DW1”

39. In *Shah and Another vs. Shah and Others* [2003] 1 EA 290, Ombija, J. expressed himself expert reports as hereunder:

“One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in preference to the opinion of the other, is the responsibility of the court...Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion.”

40. The court analyzed the evidence and found as a fact that the Appellant committed the offence. The court saw the witnesses. Even where the court had not seen the witnesses, they were recalled. The court below had the advantage of seeing the witnesses and assessing their demeanor. Consequently, I find no merit in the postulation that medical evidence fell below the required standards.
41. On the second issue on the aspect of contradiction, the court will look at the evidence on the three elements of defilement, vis-à-vis evidence tendered by witnesses. The minor’s and the medical evidence was succinct that there was penetration. This was an 11 year old boy who testified while at 12 years and 14 years. He was a credible witness. The consistence of his evidence was not shaken.
42. The court did not err in disbelieving the defence evidence. First the defendant confirmed that he was talking to the minor before 2016. It cannot be that he was talking to him while at the market. The Appellant was a pervert who waited on the child and sodomized him almost every other day. The evidence of PW3 and DW2 relates to 17/6/2016. This was a Friday falling within the many days that the Appellant dealt with the minor.
43. It is good that the Appellant did not raise issues regarding an attempt to set up the alibi. The grounds of appeal simply explained the grounds on the petition. The court analyzed the evidence and believed the evidence of the minor. Under Section 124 of the *Evidence Act*, the minor’s evidence is enough to convict if reasons are recorded. The said section states as follows: -

“Corroboration required in criminal cases. 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.”

44. The evidence of being carried to the house was introduced by the Appellant. This is because they knew that that particular aspect was omitted. When the minor was reminded, he recalled being taken to the house. It is utterly disingenuous and lack of strategy to use one of the days that a minor was defiled elsewhere other than the place where he was defiled to state that this was a contradiction.
45. The evidence was something like this: -

“ that the minor is not telling the truth since, I defiled him in the house and he did not tender that evidence”
46. On the contrary it reinforced the minor’s evidence, which apparently was also known fully by the Appellant. Defilement is not a place specific offence. By trying to prove that he defiled the minor on 11/7/2016 in his house and not on grass, the Appellant lost the right to be innocent.
47. I cannot fathom that simply because he defiled the minor in his house, on one day out of a three-month ordeal, the Appellant is entitled to the benefit of doubt. Cross examination removed any doubt that the offence was committed by no one other than the Appellant.
48. The minor stated that he was defiled 38 times. Once is enough. I agree with the court that age of the minor was not in issue. The witnesses did not lay an alibi regarding where he was at the time of first encounter at 5.30 pm and similar time from the first to the last day. The medical evidence confirmed the last incident.
49. The minor’s testimony which was credible confirmed the last incident. The court without saying so in many words found the evidence of the minor corroborated in all material particulars and reported immediately after the incident. I don’t understand what else he expected to tear. The minor was a boy penetrated anally several times. There was no labia majora or minora to tear or even a hymen to break.
50. The facts that he did not do much physical destruction does not mean defilement did not happen. Even a micro penis can still defile.
51. The Appellate court does not have power to set aside or disturb findings of fact unless the court misdirected itself. In this case the magistrate was spot on and her analysis was based on facts and evidence before her.
52. The second aspect was age of the minor. All parties agreed that the minor was aged 11 years at the time of the incident. The court rightly relied on the case of *Dennis Kinyua Njeru -Vs- Republic, Criminal Appeal No. 19 of 2014*, where the court relying on a Ugandan decision of Francis Omuroni –Vs- Uganda, Criminal Appeal No. 2 of 2000, observed 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 ...”



53. In the case of Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139, the court stated as follows:-

“Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”

54. The court found the child was 12 years old at the time of testimony. However, he was 11 at the time of the incident. Consequently, I find that the court was correct in age. In any case, given multiple incidents of defilement, it does not matter as the court will still enhance to life. It is sad that there is no more severe sentence that life for defilement.

55. As regards identification, in the first incident, the minor saw the perpetrator. Subsequently he was direct and more brazen. He was known to the victim. In the case of Daniel Muthomi Marigu & 4 others v Republic [2021] eKLR, Cherere J posited as hereunder: -

“10. The Court of Appeal in the case of Joseph Muchangi Nyaga & another v Republic [2013] eKLR stated that before acting on evidence of visual recognition, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently.

The difference in approach between identification and recognition was expressed thus by Madan J.A in Anjononi and Others vs The Republic [1980] KLR;

“.....This, however, was 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.”

That is not to suggest of course, that cases of misrecognition cannot occur (See Karanja & Anor vs. Republic [2004] KLR 140) and courts are still duty-bound to examine such evidence with great care.”

56. In Libambula v Republic [2003] KLR 683 the Court held that:

“Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.”

57. The court thus was correct in finding the Appellant guilty as charged. Though in the Grounds of Appeal sentence is mentioned, there is no ground on the same.



58. Consequently, the court cannot deal with the same. Had the sentence been a factor I would have enhanced the sentence given that the same was lenient. Consequently, I dismiss the appeal for lack of merit.

Order

59. In the circumstances:-

- a. I find that the appeal lacks merit and is consequently dismissed both on conviction and sentence.
- b. Right of appeal 14 days.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25TH DAY OF JUNE, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

Ms. Kaniu for the State

Appellant in person

Court Assistant – Jerusha

