



**SMM v Republic (Criminal Appeal E028 of 2023)
[2024] KEHC 11619 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11619 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E028 OF 2023
FR OLEL, J
SEPTEMBER 30, 2024**

BETWEEN

SMM APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

A. Introduction

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* of 2006. The particulars were that on diverse dates between July 2020 to May 2021 at Kyuso Sub County within Kitui County caused his penis to penetrate the vagina of LMK a child of 13 years.
2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* of 2006. The particulars were that on diverse dates between July 2020 to May 2021 at Kyuso Sub County within Kitui County he intentionally touched the vagina of LMK. a child of 13 years with his penis.
3. During trial the prosecution called six witnesses who testified in support of their case. The appellant was placed on his defence. He gave sworn evidence and did not call any witnesses to support his case. The trial magistrate considered all the evidence adduced, found the Appellant guilty of defilement, and proceeded to convict the accused under section 215 of the *Criminal Procedure Code*.
4. The Appellant being dissatisfied by the said conviction and sentence filed this petition of Appeal and urged the court to determine this appeal based on the amended grounds of Appeal. The amended grounds raised were that;



- a. That the learned trial magistrate erred in both facts and law in passing judgment convicting the appellant, when the prosecution had not proved the case by discharging the required burden of proof.
- b. That the learned trial magistrate erred in both matters of law and fact in passing judgment convicting the appellant by selectively relying and basing the conviction on the evidence of the complainant which was untruthful.
- c. That the learned Trial Magistrate still erred in both matters of law and fact in convicting the appellant based on evidence that was marred by inconsistencies, doubts, and contradictions.
- d. That the learned trial magistrate erred in both law and fact in failing to scrutinize and analyze the credibility and integrity of the prosecution witnesses.
- e. That the learned trial magistrate erred in both facts and law in passing judgement convicting the appellant after failing to scrutinize and analyze the credibility of the evidence adduced before him by the prosecution to enable him make a fair and just decision.
- f. That the learned trial Magistrate erred in both facts and law in imposing harsh and excessive sentence thereby overlooking the mitigating circumstances of the case and failed to consider the judiciary sentencing guidelines 2013.

B. Facts at Trial

5. The prosecution called 6 witnesses. PW1 LMK the complainant testified that she was a grade 4 student at [Particulars Withheld] Primary School. She recognized and knew the appellant well. One day as she was going home from school, she felt pressed and branched into a thicket to urinate. The appellant found her, relieving herself, removed both their clothes, then removed his penis and inserted in her vagina. After he was done, he told her to go home. When she arrived home, she informed both her parents of what had transpired but they did not take any corrective action.
6. On a different occasion, the appellant did ask PW2 to allow PW1 to accompany him to go visit Aunty Jane. En route to and from the said journey, the appellant again held her, dragged her into a thicket, which was close to the stream, and proceeded to defile her. In total, the appellant had sex with her in the thicket on 3 different occasions. She did not tell anybody about this latter incident, but eventually, when the matter came to light, it was reported to the police and she was taken to Kyuso Hospital for treatment.
7. Upon Cross-examination, PW1 confirmed that the accused defiled her and despite informing her father of this incident, he chose not to do anything about it. Later her father died in April 2021 and also, she did not tell her mother about the incident as she was scared. PW 2 AVK confirmed that PW1 was her first-born daughter, while the appellant was her brother-in-law. She got to know that the appellant was defiling her daughter after her husband had died in April 2021. One night after his burial, she went to sleep at her mother-in-law's house and left her children sleeping in her house. The following day when she went back to her house, she found the appellant's lessso, on her bed and PW1 confirmed that it the appellant who had forgotten it at their house.
8. Upon further inquiry, PW1 confirmed that the appellant had come to their house and asked her to open the door. He took her to the bedroom and asked her not to make noise. He then proceeded to have sex with her until the following morning, when he left but forgot his lessso on the said bed. Pw1 also informed her that, it was not the first time, the appellant had defiled her as there were previous incidences of defilement that had occurred. She reported this matter to the Area chief and it was



- escalated to the police. PW2 also identified PW1's immunization card, which confirmed that she was born on 21.10.2008. Upon cross-examination, PW2 confirmed that she did not see the appellant defile PW1, but she had found his green lessa on her bed and PW1 had confirmed that the incident occurred. She also denied fabricating the case against the appellant.
9. PW3, Patrick Mbiti, the assistant chief Tulanduli Sub location, testified that he got a call from one Philip Ilai, the children officer Kyuso sub county inquiring if he knew about the sexual assault on PW1 occasioned by her uncle, the appellant. He sent for PW2 to be called jointly with PW1 and inquired from PW2 if she knew of the sexual assault occasioned to her daughter. PW2 said that she was not aware and on further inquiry, PW1 admitted that the appellant had defiled her on several occasions.
 10. She referred to an incident that occurred on the day, funds were being raised for her father's treatment. The appellant had taken advantage of her presence in his house and defiled her three times during the said night. At another function, held at their home to pray for her ailing father, the appellant had waited for the other children to fall asleep, he slipped into where they were sleeping and proceeded to defile her. PW3, upon confirming the prevailing facts, called the children's officer and informed him that it was true that the appellant had been defiling PW1. On cross-examination, PW3 stated that he did not know of PW1's reaction to being defiled, and after the incident had been reported the appellant had disappeared from home and was later arrested at Gai market.
 11. PW4 Philip Illai, testified that he was a children's officer based at Kyuso sub-county. He got an anonymous call from a villager based at Tulanduli village, who informed him that two underage sisters (below 16 years), were being sexually molested by their parental uncles. He called PW3 who said he was not aware of what was happening but promised to investigate these incidences and get back to him. On 03.05.2021, the informer called him again and informed him that the children and their mother had left home. He later learned that the children were called LM and KK. He followed up on this assignment and finally had an opportunity to interview PW1 on 19.5.2021, within the school compound. she did indeed confirm that the appellant had defiled her on two occasions.
 12. On one occasion, PW1 and the appellant had gone to pick up some money from her Aunt based at Mwanzo to help treat her ailing father. The appellant took advantage of this situation and defiled her on the way to and on the return journey at the same spot, a roadside thicket. Another incident had occurred during the funeral arrangement of PW1's father, the appellant had followed the complainant to where she was sleeping and again defiled her. PW4 reported the matter to Kyuso Police as PW2 did not want to disclose what had been happening to her daughter, and Immediately after the arrest of the appellant, she was chased away from her matrimonial home. PW4 also talked to the grandmother of the children, but she too was keen on defending her sons. On cross-examination, PW4 stated that his informer was not in court and did not record a statement, but he had done his investigation and confirmed that his information was factual.
 13. PW5 Andrew Wambua testified that he was a clinical officer based at Kyuso Sub-county Hospital. He examined PW1, on 25.5.2021 and her present complaint was pain while urinating and discharge from her private part. She also informed him that her two uncles had defiled her. One had defiled her once, while the other had defiled her on eight different occasions. On examination of her private parts, the hymen was missing showing there had been penetration. Other laboratory tests were done which showed PW1 had a sexually transmitted infection. He filled out the treatment notes, PRC form, and P3 form and produced them as exhibits in court.
 14. In Cross-examination, PW5 stated that PW1 was brought to the hospital by her mother and the police. The defilement had been ongoing for a while, but PW2 did not know about it. The last defilement had occurred about a month before the hospital visit and after a medical examination of PW1, he had



documented his results. PW5 also confirmed that he did not examine the appellant and could not tell if he was the one who infected PW1 with the STI.

15. PW6, PC Beatrice Mungai testified that she was the case investigating officer. On 21.05.2021 they received a report from PW4 of 2 minors being defiled by their uncle at different times. She and PW4 went to the minor's home and rescued both of them. On the way back at Ngige market, PW1 saw the appellant and became extremely scared/terrified. With the help of her colleagues, she managed to arrest him and subsequently undertook further investigation. PW1 informed her that one day in July 2020 as she was coming from school, she went to relieve herself in a roadside thicket. The appellant who was behind her, followed her to the thicket, defiled her and after he was done, warned her not to tell anybody. She went home and did not report this incident to anyone.
16. On another date when her father was very sick, the mother sent her with the appellant to collect money from her aunt, and on the return journey he again defiled her. The third incident again occurred, during the period after her father died. while sleeping in the house the accused got inside the house and defiled her again. She escorted the minor to the hospital, where she was examined and got treatment. PW6 further produced PW1's immunization card showing that she was born on 21.10.2008 and was 13 years old.
17. Upon cross-examination, PW6 confirmed that she did not go to the scene of the crime as the report was made about three weeks later after the last incident had occurred. The minor had identified him at Ngai market and the appellant, who had a mask attempted to flee but was arrested.

C. Defence Case

18. The appellant gave sworn evidence in defence and called no witness. He stated that he was employed as a jua kali and was employed by one Nduli K. He confirmed that he knew PW1, as her daughter and she was aged 13 years old. On 25.05.2021 he was arrested by the police on allegation of defiling PW1 and later on 27.05.2021 arraigned before court. In April before K (PW1 father) died, they had fought over a parcel of land at Tulanduli, which parcel of land they shared and both families had built their homes thereon. His late brother was not happy that he had been given a bigger portion of said parcel of land and that was the genesis of his problem. It was therefore his belief that this case had been instigated in bad faith due to this dispute. Further, the appellant admitted to having attended, his brother's burial/ funeral but denied defiling PW1 during the said period or on any other occasion.
19. Upon cross-examination, the appellant stated that he had been set up because of the land dispute. He had no problem with PW1 but had differences with her father and had asked the local administrator to intervene. He believed that PW2 had set him up given the land dispute that had existed between him and her late husband. While in custody he had also been informed that Pw2 had moved away from her matrimonial home and gone back to her village, where she came from, but he did not know if his parents had chased her away from home due to the ongoing criminal case.
20. The trial magistrate considered the evidence adduced, the parties' submissions and proceeded to convict the appellant on the main charge under section 215 of the criminal procedure code. After considering the Appellant's mitigation, the trial magistrate sentenced the appellant to serve twenty (20) years imprisonment.

D. The Appeal

21. The Appellant submitted that the prosecution's case was not proved beyond reasonable doubt as none of the witnesses who testified in court saw him in any compromising position with the complainant. Furthermore, they were five brothers who resided within the same compound and used the same



clothes line and therefore it was easy for a leso to find its way to PW2's house. PW5, too had failed to medically examine him and therefore, he could not be linked to the STI, which PW1 had. The appellant also urged the court to note that PW1 had also confirmed that she had engaged in sexual intercourse and was therefore not a virgin. Accordingly, the lack of a hymen could not be attributed to the alleged incident involving him.

22. The appellant further faulted the investigations carried out by PW4 as he had received information concerning two children but opted to only parade PW1, who was found malleable and easy to manipulate to propel lies against him. PW4 had also failed to investigate the hiccups in the family and the fact that two uncles had been mentioned. To the extent that PW4 only opted to deal with the complainant, yet the information he had was that two girls had been defiled was an indication of a fabricated case against him and urged the court to so find.
23. The appellant further submitted that the prosecution evidence was riddled with contradictions and inconsistencies. He gave several instances of the said contradictions, which include the lack of consistency as to when the incidences are alleged to have occurred, who PW1 reported the incidence to, and lack of clarity in PW1 and PW2 evidence. Accordingly, this firmly showed that the witnesses were untruthful and had a collective plan to fix him. The inconsistencies impeached the overall reliability of the said evidence and it was therefore unsafe to convict him based on the same.
24. Finally the appellant faulted the trial magistrate for passing down a harsh sentence without pointing out, what the aggravating circumstances were to justify the same. He urged this court to find that his appeal was merited, but if it were to find otherwise, the court should consider that he was a first offender and the current jurisprudence allowed for court discretion when considering the appropriate sentence. Reliance placed in the case of Edwin Wachira & 9 others vs Republic and Philip Mueke Maingi & 4 others vs DPP.
25. The Respondent opposed this appeal and submitted that it was the duty of the 1st appellant court to look into the evidence afresh and determine whether the conviction was proper. The charges were proved beyond reasonable doubt. Age, was proved through THE immunization card produced by PW2 and it confirmed that the victim was born on 21.10.2008 and was 12 years old when the offence was committed. On penetration, the victim's evidence was that, the appellant had defiled her on three different occasions and described in clear and consistent terms how it occurred. PW5 also confirmed that the victim's hymen was missing and the victim had a sexually transmitted disease, an indication of penetration. The second ingredient was thus proved to the required standard.
26. On identification, it was submitted that the appellant was well known to the victim as her uncle, and some of these incidences had occurred in broad daylight, leaving no doubt as to the identity of the perpetrator. This final ingredient too was thus proved to the required standard. On the sentence passed, the respondent submitted that the appellant was not remorseful and the trial court having considered the seriousness of the offense committed, properly sentenced him to serve 20 years imprisonment as provided for in law.
27. The respondent urged this court to find that the evidence on record was enough to sustain a conviction as charged and proceed to dismiss this appeal

E. Analysis And Determination

28. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This



court is guided by The Court of Appeal case of *Okeno – VS – Republic* (1972) EA 32 where it was stated as follows: -

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate’s findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”.

29. Also in *Peter’s vs Sunday Post*(1958) E.A. 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate’s findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

30. Having considered the trial court record, the grounds of appeal and the submissions of the parties, I find the following as issues for determination;

- a. Whether the prosecution proved the case beyond reasonable doubt
- b. Whether the sentence should be reviewed

31. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller vs. Ministry of Pensions* (1947) 2 All ER, 372 stated as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice.”

32. In this case, the Appellant was charged and sentenced under Section 8 (1) and (3) of the [Sexual Offences Act](#) which provide as follows:

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (23) A person who commits an offence of defilement with a child aged between the age of twelve years and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

33. The ingredients for the offence of defilement can be summarized as follows;

- a. Age of the victim (must be a minor),
- b. penetration and
- c. proper identification of the perpetrator.



34. On the age of the victim, The Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... 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.” (emphasis added).

35. Similarly, in *Hadson Ali Mwachongo vs. Republic* [2016] Eklr;

“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. In *Alfayo Gombe Okello vs. Republic Cr. App. No. 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 the 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. That must be so because dire consequences flow from proof of the offence under section 8(1).”

36. Rule 4 of the *Sexual Offences Rules, 2014* which provides that:-

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

37. In this case, PW1 testified that the appellant defiled her on three different occasions between March 2020 and May 2021. PW2, the Complainant’s mother stated that the complainant was born on 21.10.2008 and was 13 years old. She marked PW1 immunization card, which confirmed this birthday and the said card was eventually introduced into evidence by PW6 as Exhibit 4. I do find that the age of the victim was proved.

38. On the issue of penetration, the same is defined in section 2 of the *Sexual Offences Act* as;

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

39. PW1 testified that the accused ambushed her when she was from school and had gone into a thicket to urinate. He held her, removed both their clothes and proceeded to insert his penis into her vagina and when done told her to go home. She went home, and informed her father of what had transpired but, he did not act. The second incident occurred when the appellant asked PW2 to let him go with the complainant to see Aunty J, who was to assist them with money to treat PW1’s ailing father. The appellant took advantage of PW1 and had sex with her both en route and while returning from the said journey. He simply took her to the thicket and defiled her.

40. The final incident had occurred after the burial of PW1’s father. PW2 had gone to sleep at her mother-in-law’s house and left her children behind sleeping in her house, when she came back the following



- day, she found the appellant's lesso on her bed. When she inquired from PW1 as to, how the lesso ended up on her bed, she confided in her that the appellant had come overnight, defiled her until morning, and while doing so had threatened her not to make noise. Early that morning the appellant had left and forgot to take his lesso. PW4 got wind of what was happening and contacted the assistant chief PW3, who then summoned PW1 and PW2 to his office. PW2 confirmed to have been defiled severally by the appellant. PW4 also took his own initiative and he also interviewed PW1, who confirmed what had been happening.
41. PW5 Andrew Wambua confirmed that he examined PW1 on 25.5.2021. She complained of pain when urinating and had discharge from her private part. On examination of her private parts, the hymen was missing showing there had been penetration. Other tests were done and revealed that she had a sexually transmitted infection. He filled the treatment notes, PRC form and P3 form, which he produced into evidence.
 42. The evidence of PW1 was corroborated by the evidence of the clinical officer (PW5). PW1 was a child of sufficient intelligence and gave cogent evidence of what had transpired. PW2 also found the appellant's lesso on her bed and confirmed from PW1 how it got there. PW5 also confirmed that there was evidence of penetration and PW1 had a STI infection. The evidence on record thus sufficiently established the fact of penetration.
 43. On the issue of identification, the Court of Appeal in the case of *Peter Musau Mwanzia Vs The Republic* 2008 eKLR expressed itself as follows:-

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness , in seeing that the suspect at the time of the offence can recall very well having seen him earlier on before the incident”.
 44. From the nature of the evidence led, it is obvious that PW1 knew the appellant well as her uncle, a fact he too acknowledged in his evidence and further stated that they resided within one parcel of land. The first two incidences of defilement occurred during broad daylight, leaving no room for doubt as to the identity of the person who had carried out the heinous act. The third defilement incident occurred at night and the appellant Lesso was found on his late brother's bed the following morning. PW1 also confirmed this incident to her mother PW2 and was sure of who the guilty culprit was. There is therefore no doubt that this was a case of undeniable positive recognition.
 45. The appellant in his submissions did raise the issue that the prosecution evidence was riddled with contradiction and inconsistencies, especially as regards to the dates as to when the defilement incident occurred, PW1 evidence as to who she informed of these incidences and lack of corroboration of this evidence by PW6, the investigating officer.
 46. The law as regards the issues of contradiction and discrepancies is very clear. It is trite law that inconsistencies unless satisfactorily explained would usually, but not necessarily result in the evidence of a witness being rejected. (See *Uganda Vrs Rutaro* (1976) HCB ; *Uganda Vs George w. Yiga* (1979) HCB 217). In trying to shade light as to why there might be minor discrepancies between two witnesses



testifying on the same case, the high court of Kenya in Philip Nzaka watu V Republic (2016) CR APP 29 OF 2015, had this to say:

“The first question in this appeal is whether the prosecution case was riddled with contradiction and in consistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gain said that 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 version 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.

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this court, some inconsistencies in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies’ in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

47. The question to be addressed is whether the contradictions mentioned are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. After reviewing the evidence presented, I do find that the discrepancies pointed out by the appellant were minor and do not point to the deliberate untruthfulness of the witnesses. The appellant also pointed to some inconsistencies without fully considering the entire follow of evidence as presented, thereby misconstruing the same.
48. Considering the totality of the evidence presented, the appellant’s defence and issues raised by him in his submissions, there is no doubt that the prosecution proved their case beyond reasonable doubt and proved that the appellant was guilty of defiling and molesting PW1. The appeal against conviction therefore fails.
49. As regards the sentence, This Court is guided by the principles in the Court of Appeal case of *Bernard Kimani Gacheru vs. Republic* [2002] eKLR where it was stated as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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 some wrong material, or acted on a 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, any of the matters already stated is shown to exist.”

50. Sentencing is a discretion of the court of law but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in *Thomas*



Mwamba Wanyi Vs Republic (2017)eKLR cited the decision of the Supreme Court of India in *Alister Antony Pereira Vs The state of Maharastra* at paragraph 70 – 71 where the court held;

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for the award of an appropriate sentence.”

51. Having considered the sentence meted out, the circumstances of this case and also having considered the provisions of Section 8(3) of the [sexual offenses Act No 3 of 2006](#), I do agree with the prosecution that the sentence passed was reasonable considering the proportionality of the crime committed. The appellants action to severally defile his niece was selfish and inhuman. That he even went to the extent of defiling PW1 on his deceased brother's matrimonial bed, within days of his burial shows how callous and barbaric the appellant was. He is a person who lacks “utu” and If anything, deserved a more severe punishment.

F. Disposition

52. Having considered the facts in this case and all the grounds of Appeal as raised, I hereby find that this appeal lacks merit and is hereby dismissed.

53. Right of Appeal 14 days

54. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF SEPTEMBER 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 30th day of September 2024.

In the presence of:-

Appellant present from Embu prison

Mr. Mongare for ODPP

Susan/Sam Court Assistant

