CS v Republic (Criminal Appeal E028 of 2023)
[2024] KEHC 15606 (KLR) (29 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15606 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E028 OF 2023

AC BETT, J

NOVEMBER 29, 2024

BETWEEN

CS .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgement and sentence of the Chief Magistrates court at Kakamega by Hon. J.R Ndururi, dated and delivered on 10th May 2023 in Sexual Offence Case No. E100 of 2022)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on the 10th of September 2022 at Kakamega East sub-county within Kakamega County the appellant unlawfully and intentionally caused his penis to penetrate the vagina of E.S a child aged 11 years. In the alternative, the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* with the particulars being that on the 10th day of September 2022 at Kakamega East sub-county within Kakamega County the appellant intentionally touched the vagina of E.S a child aged 11 years with his penis.

2. The appellant faced a second charge of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on the 10th of September 2022 at Kakamega East sub-county within Kakamega County the appellant unlawfully and intentionally caused his penis to penetrate the vagina of M.M.A a child aged 12 years. In the alternative, the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* with the particulars being that on the 10th day of September 2022 at Kakamega East Sub-

county within Kakamega County the appellant intentionally touched the vagina of M.M.A a child aged 12 years with his penis.

3. After a hearing appellant was convicted of both charges and was sentenced to life imprisonment for each count.

4. The appellant herein seeks to upset the said conviction and sentence vide a Petition of Appeal dated 23rd May 2023 on the following grounds: -

   a. That the learned magistrate erroneously convicted the appellant by failing to find that the charges were defective in their form and substance contrary to Sections 214(1) and 134 of the *Criminal Procedure Code*.

   b. That the trial magistrate grossly erred in both law and fact by failing to note and consider that crucial and vital witnesses were mentioned but not called to testify.

   c. That the learned magistrate erred and/or misdirected himself in law by finding the 1st ingredient of defilement proved.

   d. That the learned magistrate erred in both law and facts by failing to attempt to deal with the contradictions regarding the date of the incident and the date when P.W.4 escorted the victims to hospital.

   e. That the learned magistrate grossly erred in both law and facts by rejecting the appellant's possible defence without proper evaluation.

   f. That the learned magistrate erred in law and facts by failing to attempt to deal with an averment that the appellant was HIV positive.

   g. That in all manner and circumstances, the sentences imposed are harsh, excessive and not considerate of the period of time spent in remand custody.

5. The appellant further submitted the following supplementary grounds of appeal: -

   h. That the trial court erred in law and in fact in convicting the appellant by relying on the evidence that was obtained in a manner detrimental to justice.

   i. That the trial court erred in law and in fact by failing to find that the charges were defective in its form and substance

   j. That the learned magistrate erred in both law and facts by failing to note and consider that crucial and vital witnesses were not called to testify.

   k. That the learned trial magistrate erred in law and in fact by failing to attempt to deal with the contradictions and inconsistencies in the prosecution's case.

Submissions

6. This appeal was canvassed by way of written submissions. The appellant vide his submissions dated 11th January 2024, submitted that the court erred in law and fact by convicting him while relying on evidence that was detrimental to justice. He submitted that the evidence that was rendered by PW1, the first complainant, was evidence of a hostile witness. He submitted that the complainant denied, under oath, all the allegations that had been levied on the appellant. He submitted that the complainant, under voir dire, had told the court that she understood the meaning of an oath and the court was satisfied that the witness was intelligent enough to testify.

7. The appellant argued that at first, the complainant testified that two men had instructed her sister and herself to lie that their father was defiling them and that their father's third wife had asked them to frame up their father so that they could sell his land and share the proceeds. The appellant submitted that the complainant appeared later in court after being stood down by the prosecution and gave a totally different testimony from the one she had given earlier. The appellant argued that the state of hostility of the complainant should have introduced a reasonable doubt in her testimony. The appellant argued that neither the 1st or 2nd statement of the complainant was credible to be relied on by the court to convict him.

8. The appellant claimed that before he was arraigned in court, all investigations had been done and that the 1st statement of the complainant ought to have been relied on. He argued that the prosecution had stood down the complainant in order to coach her to turn against him. The appellant relied on the case of Shiguye Vs Republic (1975) EA 191 where the court held that: -

> " The effect of declaring a witness hostile is to render his/ her evidence untrustworthy. It is said that CAJ after having declared Shizya a hostile witness, the effect would be that Shizya would be an unreliable witness whose evidence would not be accepted by the court. All parts of the evidence of a witness declared hostile would be rejected as untrustworthy, not only some parts. The purpose of having a witness declared hostile by the party who called him is to discredit him completely."

9. The appellant further submitted that the court erred in law and fact by failing to find that the charges were defective in their form and substance. He states that he was charged with the main charge of defiling E.S, a girl aged 11 years old, and an alternative charge of committing an indecent act with M.N., a child aged 12 years. He states that the evidence adduced in court to prove the age of the minors was an age assessment which showed that the victims were between 12- 14 years old. He argues that on the main count, he ought to have been charged under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* instead of Section 8(2). The appellant further argued that he was charged with defilement contrary to Section 8(1) as read with Section 8(2) and the evidence adduced was in line with Section 8(3). He relied on the case Kipkurui Arap Sigilai & another v Republic [2004] eKLR where the court held that:

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

10. The appellant submitted that the learned trial magistrate erred in law and in fact by failing to attempt to deal with the contradictions and inconsistencies. He submitted that PW1, in her first testimony stated that on 10th September 2022 at 6:00 p.m., she had gone to visit her 'sister' B who is a sister to her stepmother where she spent the night up to the following day. He argues that after PW1 was recalled, she stated that on the same date, she was with her father. He argues that PW1 told the court that she was staying with her father and her siblings but never informed the siblings about the act. He further pointed out that PW1 had stated that she was sleeping in a neighbor's house while the appellant would sleep alone in the house but PW2 stated that before the incident they were living with the father. He also submitted that PW4, the police officer, stated that the children were accompanied to the station by two women but PW1 stated that the two young men that questioned them later took them to the police station.

11. Lastly, the appellant submitted that the sentence imposed on him was harsh, excessive, and not considerate of the period he spent in remand. He submitted that this court should exercise the power to interfere with sentences. He relied on the case of Ogolla s/o Owuor vs Republic, [1954] EACA 270 where the court stated as follows: -

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors or the sentence is illegal or manifestly excessive as to amount to a miscarriage of justice." The appellant submitted that the sentence that was meted to him was only for the purpose of retribution without considering rehabilitation. He further relied on Section 26(2) of the *Penal Code* which provides that: "save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term."

12. The respondent submitted that the prosecution was able to prove all the ingredients of defilement. The respondent relied on the case of Charles Wamukoya Karani Vs Republic where the court stated that: -

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant." The respondent argued that the ingredients of the offence were proven through oral and documentary evidence.

13. On the age of the complainant, the respondent submitted that an age assessment was done, and the complainants were confirmed to be between the ages of 12 and 14.

14. On the proof of penetration, the respondent submitted that PW1 and PW2, being the complainants, testified that the accused person had been defiling them on numerous occasions. The respondent further submitted that the medical report adduced by PW3, a clinical officer, showed that the complainants had been defiled. He testified that E.S PW1, had a swelling in her private parts and that there were bruises on the labia with lacerations and inflammation with a whitish discharge. He further testified that M.M PW2 had lacerations and inflammation on both her labia, rashes on the vaginal cord, and whitish deposit on her outer genitalia. The respondent further submitted that the prosecution produced treatment notes, P3, and PRC forms as exhibits which the appellant did not dispute.

15. On identification, the respondent submitted that PW1, PW2, and PW4 testified that the appellant defiled the complainants.

16. The respondent submitted that there were no contradictions and inconsistencies in the prosecution's case and that if there were, they were minor and did not go to the root of their case, hence, this court should ignore them. The respondent further submitted that if there were any inconsistencies, they were satisfactorily explained.

17. The respondent argued that the trial magistrate considered the appellant's defence in his judgement but the defence did not destabilize the prosecution evidence in any way. The respondent further argued that the onus was on the appellant to prove that he was HIV positive as he alleged. The respondent further submitted that HIV testing is free and available even in prison and that the appellant had the capacity to avail proof without the assistance of the court.

18. On the sentence, the respondent submitted that the court should set aside the life sentence and a term sentence be imposed. The respondent submitted that an indeterminate life sentence is unconstitutional and relied on the case of Frank Turo Vs Republic (2023) eKLR where the court declared the indeterminate life sentence to equal thirty (30) years imprisonment. The respondent further submitted that the court in imposing a term sentence, should consider the seriousness and

nature of the offence of defilement, the tender age of the victims, and the breach of the duty of care and protection owed to the victims which the appellant breached. The respondent also submitted that the age of the victim should be an aggravating factor in determining the sentence and that the sentence to be meted on the appellant should be a deterrent sentence. The respondent submitted that the appellant should be sentenced to thirty (30) years imprisonment for each count.

Analysis

19. Since this is a first appeal, the court is bound to re-evaluate the evidence that was placed before the trial court and come up with its own findings with regard to the fact that it has neither heard nor seen the witnesses testify. This principle was enunciated in the case of David Njuguna Wairimu v Republic [2010] KECA 495 (KLR) where the court rendered itself as follows:-

> "In Okeno v. R [1972] EA. 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

20. I have painstakingly analyzed the evidence that was placed before the trial court. The prosecution's case was that the appellant herein had been defiling the complainants, E.S and M.M on several occasions. The prosecution called four witnesses in support of their case, M.M (PW1), E.S (PW2), a clinical officer by the name Humprey Masika of Shinyalu Model Health Centre (PW3), and PC Dogo Hassan of Khayega Police Station (PW4).

21. M.M (PW1) testified and stated that the appellant was her father and that at the material time, she and her two younger siblings, including E.S, were staying with her father at his home. She stated that their mother got married elsewhere and they were staying alone with the appellant. She testified that on 10th September 2022 after they had taken supper and gone to bed, the appellant carried her to his bed, undressed her and himself, and then inserted his "thing used for urinating" into her "thing used for urinating". She further testified that when he finished, she went back to her sleeping place. She stated that the appellant had done that to her many times before and that the following morning, she and E.S decided to run away from home. She stated that they went to the home of one C, whom they told what happened. She further testified that they spent the night at C's home and the following day C took them to Khayega Police Station where they made a report. She stated that they were thereafter taken to Shinyalu Model Health Centre for examination. She further stated that they were taken to a children's home where one Jesca, who worked at the children's home, persuaded her and E.S to recant the statements they had made at the police station and to lie to the court that the appellant did not know anything regarding the allegations they had made against him.

22. In cross-examination, PW1 stated that E.S told her that the appellant used to do the same thing to her. She further stated that she had reported the matter to her grandfather and aunt who were living in the same compound, but they did not believe her.

23. In re-examination, she reiterated that their house had two rooms. She stated that the appellant would sleep on the bed in the bedroom, and she would sleep on the floor with her sisters. She stated that they would all sometimes sleep on the bed.

24. E.S (PW2) testified and stated that they initially used to sleep in the dining room, but the appellant moved them to the bedroom since he started to put their cow in the dining room. She stated that the appellant picked her from where she was sleeping at night and placed her on his bed, undressed her then undressed himself and put his "thing" into her "thing". She stated that the appellant had done that to her many times. She further testified that they reported the matter to their stepmother and the stepmother stated that she would ask the appellant to stop. She testified that when they were at Prince Orphanage, one Jesca and her children told her to lie to the court that the appellant did not know anything. She stated that she was taken to the hospital, examined, and treated. She stated that they were taken to the police station by other people who were instructed by their stepmother.

25. Humprey Masika (PW3) testified and stated that he examined both M.M and E.S at Shinyalu Model Health Centre on 13th September 2022. He stated that on E.S, he found swelling in her private part. He stated that there were bruises on her labia with lacerations and inflammation, a whitish discharge, and the hymen was not intact. He stated that he filled the P3 form and PRC form for E.S. He further testified that on M.M, he found lacerations and inflammation on both labia, rashes on the vaginal cord, and a whitish deposit on her outer genitalia. He also stated that he filled the P3 form and PRC form for MM. he produced the treatment notes, P3 forms and PRC forms as exhibit.

26. In cross-examination, PW3 stated that he confirmed that the girls had been defiled. He stated that he examined them on 13th September 2022, and they were said to be last defiled on 10th September 2022. He stated that it is not a must for a victim to be examined immediately.

27. PC Dogo Hassan (PW4) stated that two ladies by the name Otinga and Festus Lubasia came into the station at about 10:00 a.m. He stated that the ladies were accompanied by two minors, ES and MM. He testified that the minors had reported to the two ladies that the appellant had been defiling them. He further stated that he interrogated the minors, and they stated that on 10th September 2022 at about 9:30 p.m., the appellant took MM to his bed and defiled her and later took E.S to the bed and also defiled her. He testified that he escorted the children to Shinyalu Health Centre for examination and treatment. He stated that the accused was arrested, and a 3-year-old sister to the complainants was also rescued. He stated that they took the 3-year-old for examination at Shinyalu Health Centre. He stated that on 15th September 2022, he escorted the two complainants to Kakamega County General Hospital for age assessments and obtained the age assessment reports where E.S was found to be twelve (12) years and M.M was found to be fourteen (14). He produced the age assessment reports as exhibits.

28. The appellant was put on his defence, and he gave an unsworn testimony. He stated that E.S and M.M disappeared from home on 11th September 2022, leaving their youngest sibling. He stated that he searched for the children to no avail. He further stated that his brother informed him the next day that he had met with the mother of the complainants who informed him that the complainants had made allegations that the appellant had defiled them. He stated that police officers arrived at his home on 14th September 2022 and arrested him. He further stated that he had an affair with the lady who had taken the complainants to the police station and that she had stayed in his home in August 2021. He stated that he wondered why the complainants never reported him to her during that time if at all their allegations were true. He further stated that the other lady who accompanied the complainants to the police station had been his girlfriend and that they had quarreled two weeks earlier. He stated that none of his family members had complained that he had done something wrong to the complainants.

29. That is the totality of the evidence that was placed before the trial court.

30. From the appellant's Petition of Appeal and supplementary grounds of appeal, I find that the salient issues to be determined are as follows:

a. Whether the charges against the appellant were defective in form and substance

31. The appellant claims that the charges against him were defective since he was charged with defiling E.S under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* but the evidence that was produced in court showed that E.S was aged 12 years and thus he was supposed to be charged under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*.

32. Section 134 of the *Criminal Procedure Code* states:

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

33. Section 382 of the *Criminal Procedure Code* provides:

> " Subject to the provisions hereinbefore contained, 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 inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

34. The court in the case of Benard Ombuna v Republic [2019] KECA 994 (KLR) on the issue of defective charges stated as follows: -

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

35. I am further guided by the case Peter Sabem Leitu v Republic [2013] KECA 270 (KLR) where the Court of Appeal held thus:

> " The question therefore is, whether the aforesaid defect in the charge sheet caused any prejudice to the appellant as to occasion a miscarriage of justice or a violation of his fundamental right to a fair trial. We think not. Having pleaded to the charge, which contained a clear statement of a specific offence, we are satisfied he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet gave further details as to the description of the property stolen, the date, place and the manner of the alleged offence."

36. The question therefore is, did the purported defect prejudice the Appellant herein as to cause any miscarriage of justice?

37. I find that being charged under Section 8(2) as opposed to Section 8(3) of the *Sexual Offences Act* did not occasion any prejudice to the appellant since he was still able to understand that he was being

charged with the offence of defilement and this was no more than a curable irregularity, because the ages of the complainants were not yet clearly defined at the time the charges were drafted. The appellant has not shown how the said defect prejudiced his understanding of the offence and the prosecution of his defence.

38. Consequently, I find no merit on this ground.

b. Whether the trial magistrate grossly erred in both law and fact by failing to note and consider that crucial and vital witnesses were mentioned but not called to testify.

39. Section 124 of the *Evidence act* provides that:

> "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."

40. Further, Section 143 of the *Evidence Act* provides that:-

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

41. In the case of J.W.A v Republic [2014] eKLR the court stated that:-

> "We note that the appellant was charged with a sexual offence and the proviso to Section 124 of the *Evidence Act* clearly states that corroboration is not mandatory. The trial court having conducted a voir dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error of law on the part of the High Court in concurring with the findings of the trial magistrate."

42. Being guided by the finding of the Court of Appeal above, I find that the trial court took the necessary steps to ensure that the two complainants, PW1 and PW2, were fit to testify since a voir dire test was conducted. I also find that the testimonies of the two complainants were corroborated by the evidence of the medical officer and the police constable.

43. Based on the aforesaid, I am of the opinion that the evidence that was placed before the trial court was enough for the court to render itself on the matter.

c. Whether the learned trial magistrate erred in law and in fact by failing to attempt to deal with the contradictions and inconsistencies in the prosecution's case.

44. The appellant herein claims that there were inconsistencies and contradictions in the prosecution's case. He claims that PW1 gave contradicting versions of her testimony when she first testified and when she was recalled. He stated that PW1 claimed to have told the neighbor about the incident, but she later claimed that those who were in the compound knew about the incident. He also pointed out that PW1

stated that they were taken to the police station by two men while PW4 stated that the complainants were brought to the station by two women. He further pointed out that PW1 stated that she was sleeping in a neighbor's house while the appellant would sleep alone in his house and PW2 stated that they would sleep in their father's house.

45. The Court of Appeal stated in Richard Munene v Republic [2018] eKLR stated that:-

> "It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

46. The court in the case of Julius Kitsao Manyeso v Republic [2020] KEHC 6180 (KLR) cited the case of Affabhai v State of Gujrat AIR [1988] S.C. 694 CR. L.J. 848 where the Court observed that:-

> "The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due attendance. The Court by calling into and, its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter, so as to demolish the entire prosecution story. The witness nowadays go on adding embellishment to their version perhaps for the fear of their testimony being rejected by the Court. The Courts however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy."

47. This court is cognizant of the fact that the appellant is basing his argument on the contradictions between the initial testimony of the complainant, M.M, which the trial court did away with after it was established that there was interference with the complainants, and her second testimony. The first testimony that was given by M.M was subject to manipulation since she later testified that a woman named Jesca, who worked at the children's home they were transferred to, had asked them to testify that their father was innocent. This was corroborated by E.S (PW2) who confirmed that they were approached and asked to lie in court. Owing to the age of the complainants and their relationship with the appellant herein, it is clear that the complainants were vulnerable witnesses who were prone to intimidation or manipulation and the trial court was right in ignoring the first testimony of M.M (PW1) after it was established that there was indeed manipulation of the complainants.

48. With the first testimony of PW1 set aside, there are no contradictions in her second testimony, and if there are any, they are too insignificant to be considered as going to the root of the prosecution's case. Moreover , her evidence was corroborated by that of her sister and the evidence of PW3 who produced medical reports that confirmed that the two girls had been defiled. There was no suggestion that the minors could have been the victims of a different sexual predator other that the appellant who lived alone with them and had ample opportunity to perpetrate his acts.

49. Consequently, this court does not find any material contradictions in the prosecution's case to warrant a different conclusion to that of the trial court.

d. Whether the learned magistrate erred and/or misdirected himself in law by finding the 1st ingredient of defilement proved

50. The court in the case of Gacheru v Republic [2023] KEHC 3005 (KLR) discussed the ingredients for the offence of defilement as follows: -

> " The ingredients for the offence of defilement are identification or recognition of the offender, penetration and the age of the victim."

51. I find that the prosecution satisfactorily proved all the ingredients for the offence of defilement. On the age of the victims, PC Dogo Hassan (PW4) produced as exhibit the age assessment report from Kakamega County General Hospital of the two complainants that showed that E.S was 12 years old and M.M was 14 years old. The ingredient of age was thus proven to the required standard.

52. On penetration, Humprey Masika (PW3) testified and stated that he examined both M.M and E.S at Shinyalu Model Health Centre on 13th September 2022. He stated that on E.S, he found swelling in her private part. He stated that there were bruises on her labia with lacerations and inflammation, a whitish discharge, and the hymen was not intact. He stated that he filled the P3 form and PRC form for E.S. He further testified that on M.M, he found lacerations and inflammation on both labia, rashes on the vaginal cord, and a whitish deposit on her outer genitalia. All of these were evidence that there was penetration. I therefore find that the ingredient of penetration was sufficiently proven.

53. On identification of the offender, both the complainants testified that it was the appellant who used to defile them. Owing to the relationship of the appellant to the complainants, it is impossible that the complainants would confuse the appellant with someone else since the appellant is their father and he is well known to them. Additionally, PC Dogo Hassan (PW4) testified that he interrogated the complainants, and they told him that they were defiled by the appellant herein.

54. The trial court had the benefit of observing the witnesses as the gave evidence and having heard the Appellant in his defence, rejected the same. It is trite law that an appellate court should be reluctant to interfere with a trial court's finding unless it is shown that the finding was based on no evidence at all, or that the evidence was so perverted that any reasonable tribunal properly directing its mind would arrive at such findings .See, Okeno v Republic (1972) EA 32

55. It is clear that all the ingredients of defilement were proven to the required standard and the averment by the appellant that the 1st ingredient was not proven is similar to the efforts of a drowning man clutching on a straw.

e. Whether the sentences imposed on the appellant are harsh, excessive and not considerate of the period of time spent in remand custody.

51. The appellant on the issue of the sentence relies on the case of Maingi & 5 others v Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) where the court expressed itself thus: -

> " The sentence of life imprisonment goes against the principles of sentencing which include equity and proportionality to the circumstances and at such reducing it to the very least severe form would neither be a prejudice nor a case of injustice in any way."

51. The appellant also relied on Section 26(2) of the *Penal Code* which summarily states that a person liable to imprisonment for life or any other period may be sentenced to any shorter term.

52. The respondent conceded to the setting aside of life imprisonment and urged the court to mete a sentence of 30 years for each count against the appellant.

53. I am guided by the decision of the Court of Appeal in Manyeso v Republic [2023] KECA 827 (KLR) where the court stated:-

> " We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation, and recidivism."

Determination

51. For the above reasons, I find that the conviction by the trial court is safe and I accordingly dismiss the appeal and uphold the conviction.

52. The sentence of life imprisonment imposed on the appellant is however set aside and substituted therefore with a sentence of 30 years imprisonment for each count, to run from the date he was first in custody in accordance with Section 333(2) of the Criminal Procedure code.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF NOVEMBER, 2024.

A. C. BETT

JUDGE

In the presence of:

The Appellant at Kisumu Maximum Prison

Ms. Chala for the Prosecution/Respondent

Court Assistant: Polycap