Muendo v Republic (Criminal Appeal E086 of 2023)
[2024] KEHC 16181 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16181 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E086 OF 2023

MW MUIGAI, J

DECEMBER 19, 2024

BETWEEN

CLEMENT KIMANTHI MUENDO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the ruling delivered in Mavoko Criminal SO no 014 of 2021 by Hon. S.Kandie (RM) in the Chief Magistrate's court at Mavoko)

JUDGMENT

1. The Appellant was charged with the offence of attempted defilement contrary to section 9 (1) (2) of the *Sexual Offences Act*, No 3 of 2006.

2. The particulars of the offence are that on the day 15th June 2021 at Sabaki area in Athi River Sub County within Machakos County intentionally attempted to cause his male genital organ (penis) to penetrate the female genital organ (vagina) of one Q.A a child aged 8 years.

3. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual offences Act*, No 3 of 2006.

4. The particulars of the offence are that on 15th June 2021 at Sabaki area in Athi River Sub County within Machakos County intentionally and unlawfully committed an indecent act by touching the vagina and breast of one Q.A. a child aged 8 years.

5. The Appellant pleaded not guilty and the matter proceeded to trial.

6. PW1 was QA and after voire dire who stated that she lives with her parents and their child, her mother is JL and her father is called ZK. She stated that she only knew the accused and she used to see him when he went to buy bhajia. She did not know his name. She told the court that she was carrying sugarcane and had made two rounds, on the third trip, he pulled her to the bathroom where they live closed her

mouth with his hands. They stayed for a few minutes and he told her to go to his house and he would buy her chips. She told him that his mother would beat him and that her mother sells bhajia. It was her testimony that he told her that he would buy her chips somewhere else. She heard her mother calling her from outside the place they live in.

7. She stated that he removed his thing and inserted it into her thing and she told him it was painful. The court noted that the minor pointed out the penile area. He closed her mouth. She stated that her mother called her out when the accused had inserted his thing inside her. That when her mother called her out, the accused person ran away and went towards where her mother was. She identified the accused and said that he removed her clothes. it was about 8pm. She stated that she screamed and that is when her mother called her out. She told the court that when they were in the bathroom, the accused made her lie down and lay on top of her. Her mother called her father and the accused was beaten by several other people.

8. She was taken to hospital though she could not recall the name of the hospital. She did not know where the accused person resided. He only came to the place they reside and she had seen him before.

9. Upon cross examination by the accused person, she stated that she went to the police station with her mother to record the statement. That the accused person did it twice. Three people at him up and someone on a motorbike/cycle told them to stop beating him. She denied being told what to state by her mother.

10. In re-examination, she stated that she stated what had happened on the material date, the accused person inserted his penis into her vagina and it was only on that day ,at the bathroom and outside the bathroom.

11. PW2 was LA stated that she has two children, QN and QA and n 15/6/2021 at about 8pm, she called out Q to assist her carry sugarcane, she went for two trips and on the third trip, she did not come back to collect more sugarcane. She inquired from the father if he had seen her. She went from the kibanda to the house only to find Q. She asked neighbours and called out her name. She went toward the edge of the plot calling and the 1st person to emerge was Clement. She told the court that she saw Q running from where Clement was. She called out for help. Clement started running and he was caught up by people who heard her call, he was arrested. She stated that she took Q and Clement was beaten by people. People started surrounding Clement and she told them that she had found him on top of Q. Her husband was among the people beating Clement.

12. It was her testimony that people on a motorcycle intervened and inquired what the problem was. Clement ran from where they were.

13. Her husband advised her to close the business and take the child to hospital. She took her child to Shalom but she was not treated. She took her to Nairobi Women Hospital and the child was treated and she was informed that there was no penetration. The child was given treatment and advised to take her back for check up. She stated that Q did not have clothes on when she found her with Clement. She stated that the child is 8 years. She indicated that Clement does not live in the same plot but has a friend who does. It was the second time she was seeing him. She did not hear Q scream from the bush. She stated that she saw Clement waking up from the top of the child.

14. She identified the accused at the dock and stated that she spoke to the victim who told her that it was the 1st time and upon inquiring how she got to the bush, she told PW2 that she had been pulled by Clement to the bathroom and he had closed her mouth using his hand.

15. Upon Cross examination, she stated that it was about 9pm when she found the accused with the victim and there was no security light. She denied the accused person was her client. PW2 stated that PW1 told her that the Accused inserted his penis but it did not penetrate. She told the court that she did not recognize him at first but recognized him after he stood up to run. She stated that the victim dictated her statement to the police.

16. In re- examination, she stated that what she stated in her statement may not be everything she stated in evidence. She got information from the hospital that the accused had rubbed his penis on her vagina.

17. PW3, ZK stated that on 15/6/2021 at around 9pm he was at his Kibanda where he sells vegetables and they were about to close when he requested Q to assist them in taking the cane to the house. He indicated that she took long to come back and he requested his wife JA to check on her and she went to the house and did not find her. He told the wife call her out. He stated that J went behind the plot and found Q sitting down. She screamed calling him out and told him that someone had taken Q and she is sitting behind the plot. He went to where Q was and found Clement hiding behind the wall. He used his mobile phone to light the place and indeed saw him hiding behind the wall.

18. When they got to where there was light, he started to struggle to free himself. People came and someone threw a stone. The Accused person overpowered him and ran away. He told the court that he took Q to hospital and as she was being treated, he went to Athi River police station and reported. He was advised to go back and pick Q. As he went back to the police station, he was informed that Clement had been arrested and charged with the offence before court. The victim had been made to sit down by the accused person. He told the court that he did not see the accused person defiling the minor. The minor told him that she had not been defiled. The accused person was standing and the minor was seated. He denied beating the minor. He stated that the accused has attempted to defile the minor.

19. Upon Cross Examination, he denied assaulting the accused. He stated that he escaped and he could not confirm whether he was assaulted. He saw the accused person in hospital and he did not know why he was there. He was told by Quintah that she had met Clement and she had been promised chips if she goes with him. He found the victim with her clothes on. He was not at the police station when the victim recorded her statement. He did not know the accused, he saw him on 15/6/21 for the first time. He escorted the victim to Nairobi Women's hospital and was not aware of the prognosis of the doctor.

20. In Re examination he stated that he did not know how the accused was arrested.

21. PW4 was Dr. John Njuguna who works at Nairobi Women's Hospital who testified and produced documents that were prepared by one Fred Sigar with the consent of parties. He referred to the P3 form dated 16/6/2021 and stated that the victim was 8 years old and was brought with a history of having been defiled by an unknown man. On examination she was calm, no injury on the front and back of the body. On clinical examination, there was no injuries. Inflammation was noted on the vagina. She had colourless fluid on the external genitalia, it was not indicated what it was. The stamp was for 15/6/2021 and she was attended to on that night. The findings of the hymen were not indicated on the P3 form.

22. He told the court that according to the PRC form, the victim was attended on 15/6/2021 at 1 having been brought by the mother on complaints of being defiled by an unknown male at Sabaki area. The matter had been reported at Athi River Police station before going to the facility. On examination, the minor was calm, no bodily injury on the front and back. She had not changed clothes. The trouser had a colourless stain on the back. He stated that according to examination of the genitalia, the vagina was not bleeding, the hymen intact anus was normal and no discharge. Outer genitalia was wet with a colourless fluid and reddish and slightly inflamed. Further lab tests indicated that there was no STI. He stated that the examination findings were consistent with attempted defilement because of the redness

and the genitalia was slightly inflamed. The hymen was intact on the P3 and PRC.He produced the GVRC form, lab results.

23. Upon Cross examination, he stated that the report did not mention any breasts, the thorax and abdomen were intact. He stated that any itchiness can cause a bruise, the redness was a bruise. That if the redness is fresh then it will cause discolouration. He indicated that the epithelial cells were seen and they can be seen even when there is no sex, they were between 1.5/HPF. Leucocyts was mild. He further stated that there was no bleeding. He stated that the minor was pre-pubertal and had not produced fluids. He did not know what the colourless discharge was. Further, that the minor was given PEP and the HIV result were negative,

24. In re examination, he stated that PEP is given to all victims and that there was no penetration.

25. PW5 was Cpl Nafula, the investigating officer who stated that on 16/6/2021 she reported on duty and found a report vide OB 106/6/21 by Kiptalam that her daughter had been defiled by Clement Kimanthi and he was physically known to the reportee. She called the complainant who brought the child and narrated to her that on 15/6/21 at around 2100 hours, she was helping her mother carry food stuff inside the house and as she was coming back, she saw a man physically known to her who grabbed her and put her in a bathroom. The man removed her clothes and he also removed his trouser and inserted his penis inside her vagina while covering her mouth. After finishing, he ordered the girl to dress up and go to her mother. She stated that the second round was when the victim was carrying sugarcane and she met the same man again, the man removed her trouser and removed his pants and he inserted his penis in her vagina. The victim's mother got worried when she took long to come and called her out and saw a man who stood up and hurriedly dressed up. That the minor also stood up and dressed up.

26. She stated that the complainant's mother shouted and members of the public went. The accused was arrested but later escaped. The girl was taken to Shalom, and later Nairobi Women's Hospital. She produced the birth certificate where it was indicated that the child was born on 27/11/2013 and was aged 8 years. She told the court that the accused presented himself to the police station on 15/6/21 to the police station and was placed in the cells. She stated that the hymen was intact and she said the accused was before the court.

27. Upon cross examination, she stated that she visited the scene on 16/6/21 and it was not lit. She stated that the incident occurred at 9pm. There were a few bushes around. She was not aware that the accused had gone to make his own report. The P3 and PRC form indicate that the victim was defiled by an unknown man. The accused was physically known to the complainant. He had bruises on the face. The report made indicates that the minor was defiled on two occasions. She did not conduct any DNA. She stated that the child had taken a bath and changed. She told the court that the mother of the minor was not present when she interviewed the minor. The evidence of the minor is that she was defiled while that of the doctor is that she was not defiled.

28. In re examination, she stated that there was no penetration.

DEFENCE CASE

29. The accused person was found to have a case to answer and he proceeded to answer.

30. DW1, CLEMENT KIMANTHI gave sworn evidence and stated that he charges are not true. On 15/6/2021 while he was heading home to Tuffoam where he resided, he was walking and felt someone hit his head, he started bleeding. He stated that he as seen at Athi River Health Hospital where he took himself. He said he went to the police station and was arrested and placed in custody. The following

day Cpl Wafula informed him that he had defiled a girl but he was not informed the name. he averred that there was no evidence presented to demonstrate that he had defiled a girl.

31. Upon cross examination, he stated that he resided at Tuffoam alone. He knew the girl, he used to see her and they did not have any relationship. They had a grudge. He denied defiling the girl.

TRIAL COURT JUDGMENT

32. The court delivered judgment on 27/4 /2023 and found the accused guilty of attempted defilement. After mitigation, he was sentenced to serve 10 years imprisonment.

THE APPEAL

33. Dissatisfied by this decision, the Appellant filed this Appeal to have the sentence quashed and the conviction set aside on the grounds that;

    a. The learned Trial Magistrate erred in matters of law and facts by convicting the Appellant while relying on prosecution's evidence which was doubtful on matters of introductory and explanatory facts in issue of the matter

    b. The learned Trial Magistrate erred in matters of law and facts by convicting the Appellant in a case where identification of the perpetrator of the offence was not free from possible error.

    c. The learned Trial Magistrate erred in matters of law and facts by failing to consider the appellants firm defence

    d. The learned Trial Magistrate erred in matters of law and facts by convicting the Appellant in a case where the evidence of PW1 was not corroborated by medical evidence.

    e. The learned Trial Magistrate erred in matters of law and facts by awarding the Appellant a mandatory minimum sentence which was declared unconstitutional in Criminal Petition no 97 of 2021 at Machakos High Court.

34. The Appeal was canvassed by way of written submissions.

APPELLANT SUBMISSIONS DATED 30.09.2024

35. The Appellant contended that his identification as the perpetrator was not free from possible error. That the alleged offence is said to have occurred in darkness and thus conditions favouring proper identification of the offender were difficult. Making reference to the P3 form and the PRC form that he said indicated that the minor was defiled by an unknown man, he stated that he was named as the perpetrator as an afterthought. According to him, the learned Magistrate erred in matters of law and fact by not putting into consideration the above named evidence thus arriving at a wrong determination of the matter. Reliance was placed on the case of Robert Gitau Wanjiku vs Republic, App no 63 of 1990

36. Secondly, it was submitted that the narrative and evidence before the court were full of contradictions thus raising grave doubts. He indicated that as regards the screen of crime, PW1 alleged that it was in the bathroom of the plot where they resided while PW2 referred to a bush.

37. He contended that there were contradicting chain of events. He questioned whether PW2 found PW1 running from where the appellant was or she was seated behind the plots. It was also contended that the variance between the oral evidence of PW1 that she was defiled twice by the Appellant and the medical evidence that the hymen was intact meant that her evidence was unreliable. He relied on the

case of Morari & Another vs Republic , Criminal Application no 86 of 1994 and Elizabth Waithiegeni Gatimu vs Republic [2015]e KLR.

RESPONDENT'S SUBMISSIONS DATED 2.10.2024

38. While relying on the case of John Gacheru Wanyoike vs Republic [2019], it was submitted that the elements of attempted defilement had been satisfied. It had been proven that the minor was 8 years old and there was an act to cause penetration which was not successful. It was contended that the Appellant was positively identified by the minor as the perpetrator of the offence when the victim stated that she knew the accused person in the court. PW2 singled him out in the dock and had seen him emerge from the edge of the plot. PW3 used his mobile phone light to light the place where he saw the Appellant hiding behind the wall. Reliance was placed on the cases of Peter Musau Mwanzia vs Republic [2008] e KLR and Wamunga vs Republic [1989] e KLR.

39. Secondly, it was submitted that the court considered the defence and found that the same could not stand. It did not raise any doubt as to the ingredients of the offence .

40. The prosecution relied on the cases of John Gacheru Wanyoike vs Republic [2019] e KLR and Benson Musumbi vs Republus [2019] e KLR and submitted that the evidence of PW4 through P3 and PRC form informed the court that the victim was examined on 15.06.2021 and the findings were consistent with attempted defilement. It was contended that the sentence was appropriate and observed the legal parameters in place.

DETERMINATION

41. I have considered the Appeal, the Trial Court record and the submissions of the parties and find that the issues for determination are as follows;

    a. Whether the conviction should be quashed

    b. Whether the sentence should be reviewed, varied and/or set aside.

42. This being a first appeal, the Court will analyse and evaluate afresh all the evidence adduced before the Trial court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses as per the Court of Appeal decision of Okeno vs. Republic [1972] EA 32 where the Court of Appeal stated as follows:

> " 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."

43. The accused person was charged under Section 9 (1) (2) of the *Sexual Offences Act*, No 3 of 2006 which provides that;

    (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

(3) The provisions of section 8(5), (6), (7) and (8) shall apply mutatis mutandis to this section.

44. In the case of John Gatheru Wanyoike vs Republic [2019] eKLR, the court rendered itself as follows:-

> " It is clear that the elements of the offence of attempted defilement are similar to those of defilement save that there was no penetration. The prosecution must prove that the child was a minor, that there was an act to cause penetration, which was not successful, and that there was positive identification of the accused defiler." (Emphasis added)

45. The Court in the case of Rotich v Republic (Criminal Appeal E044 of 2021) [2023] KEHC 2396 (KLR) rendered itself as follows on age;

> " It is an accepted principle that the age of a victim in sexual offences is a paramount ingredient which can be proven by documentary evidence, observation or common sense, by the testimony of a parent or medical evidence (age assessment). This principle is pegged on the fact that, from the establishment of the age of a victim comes the requisite punishment prescribed by the law.
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> In Alfayo Gombe Okello vs Republic Cr App No 203 of 2009 (Kisumu) the Court of Appeal stated as follows: -
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> > "....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)."(See also the case of Kaingu Kasomo vs Republic Criminal Appeal No 504 of 2010.)

46. In this case, the birth certificate was produced which indicated that the the child was born on 27/11/2013 and was aged 8 years. This was corroborated by the evidence of PW2, PW4 and PW5. I find that the age of the minor was proved.

47. The second element is whether there was an act to cause penetration which was not successful. The term 'attempt' is defined under section 380 of the Penal Code as follows:

1. Where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfilment manifests his intentions by some avert act but does not fulfil his intentions to such an extent as to commit the offence, he is deemed to attempt to commit an offence.

2. It is immaterial except so far as regards punishment whether the offender does all that of necessary on his part for completing the commission of the offence or whether the complete is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention.

3. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

48. In the case of Moses Kabue Karuoya vs. Republic [2016] eKLR Mativo J (as he then was) discussed the distinction between actual commission of an offence and attempt to commit an offencean actual commission of an offence and attempt to commit an offence as follows :-

> "In the case of Bernard K Chege vs Republic this court had the occasion to address its mind and to define in detail ingredients of incomplete offences also described as inchoate offences. Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of inchoate crimes are criminal conspiracy, criminal solicitation, and attempt to commit a crime, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime. An inchoate offense requires that the accused have the specific intent to commit the underlying crime.... When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt or to prepare to commit the offence. The essential ingredients of an attempt to commit an offence have been laid down in the following words:-
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> > 'In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An 'attempt' is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded'.
>
> Thus, for there to be an attempt to commit an offence by a person, that person must:-
>
> a. Intend to commit the offence;
>
> b. Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;
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> c. Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence, But in fact, he does not commit the whole offence.
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> For the offence of or attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond reasonable doubt.....For the prosecution to prove the offence of preparation to commit a felony, they must establish that the accused had the intention to commit the offence. It must be shown that the appellant had put in motion his intention by making preparations to commit the offence. The prosecution must establish that the appellant made the attempt to put into effect his intention. The question that calls for determination is whether or not the conduct of the appellant constituted an overt act sufficiently proximate to constitute preparation to commit an offence.

49. The victim stated that the Appellant removed his thing and inserted it into her thing and she told him it was painful. The court noted that the minor pointed out the penile area. PW1 testified in sworn statement that the Accused person closed her mouth and had removed her clothes. She stated that her mother called her out when the accused had inserted his thing inside her.

50. 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."

51. PW4 stated that the examination findings were consistent with attempted defilement because of the redness and the genitalia was slightly inflamed. PW5's testimony was that the accused was defiled twice, this was stated by the victim.

52. The direct evidence presented before this court by PW1 in sworn testimony, she knew the Accused person as he came to buy bhajia, on the fateful day, he accosted her twice each time holding her mouth removing clothes and his manhood touching the victim's genitalia. When PW2 her mother called she came to her.

53. PW2 who stated that when she called out the victim's, name, she ran from where the Appellant was. PW2 saw Clement emerge first. Thereafter the Appellant started running and was caught by members of the public. PW3 stated that he found the Appellant hiding behind the wall where the victim was found. I have considered the defence of the Appellant and I find that PW1 PW2 & PW3 placed the Accused person at the scene; clearly, PW1 & PW2 knew him/seen before,

54. PW1 stated he bought bhajia and PW2 called him Clement in her evidence before the Trial Court. The fact of being found at the scene compounds matters, it does not explain why he was found at the scene of the incident.

55. PW1 explained in her testimony in detail the event where she was the Accused person, in the bathroom and later at the wood area, the Accused person was in close proximity and contact with PW1 and after the ordeal, on coming out after PW2 called her daughter, PW1,PW2 saw Clement. PW2 screamed people came to her rescue, the Accused person was beaten up and he managed to escape.

56. It is more than a coincidence the Accused person reported to the Police and was injured he was hit by/with a stone and he confirmed he knew the victim and they had a grudge whose details he did not divulge.

57. The medical evidence by PW4 was that victim's genitalia was inflamed and had colorless fluid, she had no injuries her hymen was intact and was not bleeding. The medical evidence is consistent and corroborates PW1's testimony of touching her vagina with Accused person's Penis as PW1 pointed out to the Trial Court she pointed to penile area.

58. In Rotich vs R Supra, the court made reference to a decision of the Court of Appeal sitting in Nyeri in the case of George Kioji vs Republic, Criminal App No 270 of 2012 where it was held as follows:-

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be

convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

59. Pw4 has corroborated the evidence of PW1 that there was attempted defilement and no evidence had been produced by the Appellant to cast doubt on the Prosecution case. The Appellant was at the scene in contact with PW1, began to put his intention into action but was stopped by PW2 who was calling out for her daughter and once he was caught, he ran away but was caught and arrested. I therefore find that the second element has been proved.

60. The third issue is that of identification of the perpetrator. PW1, PW2 and PW3 identified the Appellant on the dock. In addition, PW2 stated that she identified him when the Appellant stood up to run away, PW3 stated that he used his mobile phone to illuminate where the Appellant had hidden behind the wall. I find that the Appellant was properly identified, PW1told the court that she used to see him when he went to buy bhajia. PW2 had seen him before and called his name Clement during trial. There is no evidence of any other person at the scene at the time to raise doubt possible there was mistaken identity.

61. The Appellant raised the issue that there were inconsistencies as to where the scene of the crime was, where the Appellant was found and whether the victim was defiled twice. PW1 stated the Accused did it twice PW1 & PW2 testified that PW1 had assisted her mother PW2 to carry sugarcane and she made 2 trips On the 3rd Trip PW2 noticed PW1 delayed, she went from 'Kibanda' to the house and did not find PW1 She enquired from neighbors, she walked to the edge of the Plot and called PW1's name and 1st person to emerge was Clement and she saw PW1 running from where Clement wasPW2 called out for help and Clement started running and was caught by people. So from PW1's twice she stated the Accused did it twice.

62. This court rendered itself on the issue of contradiction and inconsistencies in the case of Muli v Republic (Criminal Appeal E043 of 2022) [2023] where it stated that;

" In MW v Republic [2019] eKLR, the court stated that:

"The law as regards the issues of contradictions and discrepancies is very crystal clear. It is trite law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.

90. Similarly, in the case of Philip Nzaka Watu v Republic (2016) CR APP 29 of 2015, the stated as follows:

" 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.

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 inconsistency 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."

91. Again the Court, in Joseph Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993, held, inter alia, that: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences"

92. In the Court of Appeal decision in Erick Onyango Odeng' v. Republic [2014] eKLR citing with approval the Uganda Court of Appeal case of Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 in which it was held as follows:

> "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 case."

I have perused the Trial court record and the Prosecution proved its case beyond reasonable doubt, the Appellant's Defense failed to cast reasonable doubt, against his defense is the fact that he was at the scene at the time , in close proximity to the victim and on being called by her mother , the Appellant emerged first. The testimony of PW1 sworn statement after voire dire examination coupled with medical evidence leads to the reasonable and logical inference that the Appellant attempted to defile PW1.Therefore, see no reason for interference with the conviction.

63. As regards the sentence, in the case of Nelson vs Republic [1970] E.A. 599, following Ogalo Son of Owuora vs Republic (1954) 21 EACA 270 where the court held as follows:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) C.CA 28 T.LR 364."

64. The Appellant was charged and convicted sentenced on Section 9 (1) & (2) of *Sexual Offences Act* which reads;

(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

65. The punishment for the offence of attempted defilement is imprisonment for a term of not less than 10 years. In this case, the Appellant was sentenced to served 10 years imprisonment.

66. Paragraph 7.17 of the SENTENCING POLICY GUIDELINES provides that;

> Where the law provides mandatory minimum sentences, then the court is bound by those provisions and must not impose a sentence lower than what is prescribed. A fine shall not substitute a term of imprisonment where a minimum sentence is provided."

67. Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024]

> Mandatory sentences left the trial court with absolutely no discretion such that upon conviction, the singular sentence was already prescribed by law. Minimum sentences however set the floor rather than the ceiling with regard to sentences. What was prescribed was the least severe sentence a court could issue, leaving it open to the discretion of the courts to impose a harsher sentence. Using the words mandatory and minimum together convoluted the express different definitions given to each of the two words.....

DISPOSITION

68. The Trial Court exercised judicial discretion taking the evidence record of Appellant and mitigation and granted minimum mandatory sentence with regard to the offence. I find no reason to interfere with the sentence of the Trial court as it is within the law.

69. In the end, the Appeal fails and is dismissed.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT ON 19/12/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE