



REPUBLIC OF KENYA



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**PNM v Republic (Criminal Appeal 5 of 2020)
[2023] KEHC 3372 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3372 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 5 OF 2020**

**FR OLEL, J
APRIL 25, 2023**

BETWEEN

PNM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence delivered on 3rd February
2020 in Gichugu S.O. no 17 of 2019 by Hon G.K. Odhiambo (R.M.))*

JUDGMENT

Introduction

1. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on the 7th day of September, 2019 at [particulars withheld] Village, Kiritu-ini Sub Location, Kabare Location in Kirinyaga East Sub County within Kirinyaga County, he unlawfully and intentionally caused his penis to penetrate the vagina of RNG, a child aged 10 years.
2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that on the 7th day of September, 2019 at [particulars withheld] Village, Kiritu-ini Sub Location, Kabare Location in Kirinyaga East Sub County within Kirinyaga County, unlawfully and intentionally caused his penis to come into contact with the vagina of RNG, a child aged 10 years.
3. Before the trial court, the prosecution called six witnesses in support of their case. The appellant on his part gave unsworn evidence and called three witnesses. After considering all the evidence adduced the trial court found the Appellant guilty and sentenced him to imprisonment for life.



4. The Appellant being dissatisfied filed an amended memorandum of Appeal on 11.01.2023 on the grounds that;
 - a. The learned Trial Magistrate erred both in law and in fact in failing to appreciate the fact that the critical elements of defilement in penile penetration and identity of the alleged perpetrator were not proved to the required standards occasioning a prejudice.
 - b. The learned Trial Magistrate erred both in law and in fact in failing to consider that the instant matter was purely premised on an existing grudge and the charge as laid out was defective occasioning a prejudice.
 - c. The learned Trial Magistrate further failed to appreciate that the instant matter was riddled with material discrepancies capable of unsettling the verdict, was disproved and the use if the accused's defence to fill in the glaring gaps of the prosecution case was a misdirection occasioning a serious dereliction of justice.
 - d. The sentence meted of life imprisonment was harsh and manifestly excessive and urge the court to review the same downwards.

Facts at trial

5. PW1 RNG, testified that she was a class 5 pupil at [particulars withheld] Primary School and was 10 years old. Her birthday was in January 2009. She stated that the person on the dock was her uncle. She recalled on 7.9.2019 was a Saturday she had gone to her grandmother's house but did not find her. She then proceeded to her aunt's house, her Aunty was known as K. As she was watching TV with her Aunty, her uncle, the appellant called her and told her he need her help to fetch fodder for the cattle. They proceeded to the Shamba and while on the way, the appellant told he told her to walk in front while he followed behind.
6. She further testified that while walking enroute to the shamba, the appellant suddenly held her, closed her mouth with a piece of cloth and made her sleep on the coffee plantation facing upwards. He removed her clothes, her pant and skirt, then he removed his trouser and inner pants. He did 'tabia mbaya' with her. He removed his thing for urinating, he placed it 'hapa ndani', and she said it's her place for urinating. The court noted that the minor pointed at her private parts. PW1 further stated that the appellant did 'tabia mbaya' to her and told her not to tell anyone, and if she did, he will kill her. After he was done, she put on her clothes and went home where she met Joan, her sister aged 17 and told her what happened. J told her to wait for their mother to come home. The incident happened at around 2pm and her mother came back home at about 7pm and was told what had transpired . They went to Kabare Hospital and were referred to Kianyaga Hospital. She was given medicine and told to report to the police. They went to Kianyaga Police station and she was told to return the following day, the police interrogated her and they later came to court.
7. PW1 RNG said her uncle is called Ndambiri. She reiterated that the appellant closed her mouth with a cloth, lay her down, remover her skirt and panty, removed his trouser, removed his thing that he uses to urinate with and he placed it on the thing she uses to urinate with. She said she felt a lot of pain when he inserted his thing, she saw blood coming out of her vagina. He did bad manners to her. After he was done, he proceeded to the lower part of the shamba. It was the first time he did that to her. She identified her uncle as being called Peterson Ndamberi.
8. A few days after the incident, one morning as she was going to school, the accused person hid in the coffee plantation and on seeing her approach, chased her while holding a panga. She fell down, and he held her. He saw some school children approach and ran away. He wanted to kill her, he told her he



had dug a hole in the shamba. This was after he had done tabia mbaya to her. The incident happened at about 6.30am, it was not dark and she could not recall the exact date he chased her in the morning. She identified the accused as the person who did tabia mbaya to her.

9. In Cross –examination she stated that when they were watching Tv she had not been defiled. After the incident, she told her sister who in turn informed her aunty. She further testified that if her Aunty was called to testify, she would give the exact same story. She said the incident happened at about 2pm, the appellant was in the house while the other two (2) uncles were not around. She did not scream since he had closed her mouth.
10. PW2, GWM, the mother of the Complainant stated that she was a resident of [particulars withheld] and was a businesswoman engaged in the business of selling cloths. The accused person was her brother, while PW1 RNG was her child aged 10 years old and was in class 5. She said she was born on 27.02.2009 and produced the birth certificate S/N0. 00XXXX as Exhibit 1. She recalled on 7.9.2019 she returned home around 7pm and found PW1 and Joan, her elder child in the house. Joan told her that PW1 had informed her that the uncle had defiled her. PW1 had visited her grandmother, where the accused person told her to go fetch banana stalks at the coffee plantation. The accused person followed her, held her and placed a cloth over her mouth before proceeded to do bad things to her. She called PW1 and asked her if she had taken a bath to which she responded she had at 6.00pm. she asked her to explain what transpired and PW1 told her that Ndambiri did bad manners to her.
11. She examined her, did not see any blood, took her to Kabare hospital and they were referred to Kianyaga Hospital. She called the assistant chief who told her to report to hospital then go to the police station. She reported the incident at the police station and was issued with an OB. She said at the hospital Rosaline was examined, and made reference to lab request form and the treatment notes as well as P3 form. She said the accused was arrested by the assistant chief. She identified the accused person on the dock as the person who did bad things to her child. She said she did not have a dispute with him.
12. In cross-examination, she said PW1 had told her that it was the appellant who had slept with her. She was afraid to tell her what has happened, because the appellant had threatened to kill her and it is Joan who told her what happened. She did not have a land case with the appellant. The child had taken a birth but still had signs of being defiled. The incident occurred at 2pm, they were the two of them at the coffee plantation. She also alluded to the fact that her other brother had warned his wife not to come and testify in court, and threaten to chase her away if she did.
13. PW3, JWG testified that she was 17 years old and was a student (form 3) at [particulars withheld] school. The accused person was a brother to her mother, PW2. She recalled on 7.9.2019 at around 12.30pm she was in their house with two sisters PW1 and Ann. Their mother had left to go to the market. The two sisters went to visit their grandmother. PW1 returned home at about 6pm, she was preparing supper and told her that she wants to inform her about something but she should not tell the mum. PW1 told her that the appellant had told her to go to the coffee plantation to look for fodder for the cows, while at the shamba, the appellant closed her mouth with a cloth, removed her skirt and pant then did bad manners to her. She sent a text to the mother, informing her of what had transpired and when her mother returned home, she asked her if she had read the text earlier sent. That is when she took her phone and read the text, she then informed PW2, that the information contained in the SMS is what the minor PW1 had told her.
14. Her mother interrogated the minor PW1, who admitted that the incident occurred and stated that the appellant had threatened her not to tell anyone. She further testified that on the same day her mother took the minor to Kabare dispensary, from where they were referred to go to Kianyaga hospital. She identified the accused person in the dock. In cross examination, she said she believed what the minor



- told her. She said it is the accused person who did the heinous act against the minor. She denied being coached by the mother. She said the appellant had threatened to kill PW1 and that is why she did not tell her aunty.
15. PW4, Justine Nyaga Githinji, the assistant chief of Gatu Sub Location stated that on 7.9.2019 at around 7.30pm, he received a call from Grace Wakuthie who told her that daughter aged 10 years had been defiled by the child's uncle. He instructed her to report to the police and also advised her also to take the child to hospital. Later after the child had been treated, he was issued with a police order to arrest the appellant. The accused went underground. On 19.9.2019 he received a call from Grace who told him that while PW1 was going to school the accused had chased her with a panga. He told her to report the incident to the police and she did.
 16. On 20.9.2019 while on patrol at Kirigu area, he got information that the appellant had been seen seen within that area. He found the appellant arrested him and took him to Kianyaga police station. He knew the appellant as he was a person he had previously arrested twice and was notorious in the village. He identified the accused in the dock. In cross- examination, he said he was instructed to arrest the accused person. The police had done investigations that is why he was told to arrest him. He said he was not around when the child was defiled.
 17. PW5, Fredrick Mungai, a clinician at Kianyaga Sub- County Hospital stated that the minor went to hospital on 7.9.2019 at 9.48pm. She was 10 years old. She gave history of having been sexually assaulted by the uncle, the mother also gave the story of what happened. On examination, both labia minor and major majora had lacerations and the hymen was freshly broken. From HVS, pus cells yeast cells were seen, urinalysis showed leucocytes were present with few pus cells. They concluded there was penile penetration. He filled the P3 form on 9.9.2019 which he produced, the age of the injuries was indicated as 'hours'. There were no injuries noted on the head and upper limbs. There were bruises on the lower limbs on the inner thighs caused by the struggle between the assailant and the girl. The witness also produced the treatment card and PRC form.
 18. In cross- examination, he stated that the child and her mother informed him that the child's uncle had defiled her(PW1) . He believed PW1 due to the observation he made. The assailant was not brought for examination, he told the PW1 mother to avail the accused person but he was not produced. The witness denied lying to court and had 3 years' experience as a clinician.
 19. PW6, PC Caroline Mbote, the investigating officer stated that on 7.9.2019 she was assigned to investigate a defilement case by OCS Kianyaga police station. She called the complainant and her mother to record their statements. The child was aged 10 years. The minor had been examined at Kianyaga sub county hospital and had been issued with clinical notes. Laboratory tests too had been conducted. She interrogated the minor who informed her that she was at her grandmother's house when the accused person called her and asked her to accompany her to his farm where they were to look for animal feeds. The accused person led the minor to the coffee plantation, covered her mouth with a piece of cloth, and undressed her. He removed his trouser, laid the minor on the ground and caused his penis to penetrate the vagina of the child. The accused defiled the minor and threatened to kill her if she reported the incident.
 20. She said that after sometime the accused left the minor, she went home and informed the elder sister what had happened who advised her to tell their mother. When the mother arrived home, the victim informed her mother of what had happened. The minor was escorted to Kabare dispensary but was not attended to as the mother was advised to report the matter to the police station which she did at Kianyaga police station. P3 was filled on 7.9.2019 and the accused charged with the offence before the court. She identified the accused in the dock as the person she arrested and charged.



21. In cross- examination, she stated that PW1 explained to her what the accused person did and the doctor's report confirmed that PW1 was defiled. Further PW1 did not tell the grandmother what transpired, but told her aunty who is the accused person's sister. The aunty refused to record a statement. She said she could not testify against the appellant (her brother) and wanted to protect the appellant so that the issue could be covered up. She further stated that she did not know if the accused person had a case with the child's mother.
22. The Appellant person was found to have a case to answer and was put on his defence. He chose to give an unsworn statement and called 3 witnesses. He testified that he did not understand the charges he was facing. On 20.9.2019, he was at home when the village headmen came to his house at 7.00pm and told him to go to Kianyaga Police station, he went and was informed that he had defiled a child. He did not know anything about the charges. He was told the complainant was his sister and he had a land case with her. On 20.9.2015, they started a succession case and were told the matter could not commence since they had not taken letters of administration. He further testified that his sister PW2 came back home in 2015. They had a lot of disputes, and she later left home and went to stay in town. Their sister PW2 had planted bhang on her brother James Bundi who was arrested, charged and later on 19.9.2019 he was sentenced to serve one year by Gichugu law courts. The appellant further testified that he was taken to Kianyaga police station and charged with defilement. On 17.9.2019 he was with his brother preparing bricks, the following day he was informed that their sister's child was defiled as they proceeded with work.
23. DW2, James Bundi Mukonostated that he was with the appellant on 17.9.2019 preparing bricks, they started their work from morning till evening. The following day he heard his wife saying that the child of his sister had been defiled and had been taken to hospital. She asked the wife who defiled the child but she did not know. She said the child was defiled at home but they were not informed. He said the child was playing with other children at home and nothing happened. Earlier on 19.9.2019, he had gone to buy bread when he met with the headman who arrested him. He called his father to the chief's office where according to him 'bhang was planted on him'. He was taken to court and pleaded guilty. He said it is possible the child's mother framed him, she had told them they would be arrested and that is why they were in custody.
24. In cross examination, he said they had a land dispute with their sister. They started having a dispute in 2015. He pleaded guilty to the charges when he took plea. He was arrested in 18.9.2019 and the accused person was arrested on 17.9.2019. He said the minor was at their home on the material date and knows him and the accused person as her uncles. He said they did not have a grudge with the child and it is possible the child was told to lie to court.
25. DW3, JKM stated that on Saturday in September 2019 at 10.00am the children of her husband sister came and told her that they wanted to watch TV. At 11.00am they went to the grandmother's kitchen, took potatoes and went back to her house where they told her they wanted to cook chips. She told them to prepare the potatoes. PW1 was among the children who were at her house. After they had eaten, they went out to play at about 3.00pm, their grandmother came and found them playing. At about 5.00pm their grandmother she sent the children to her house to get bottles from her house so that they can be given milk to take home. She gave them bottles and about 6.00pm they went home.
26. In cross examination, she said the appellant was a brother to her husband, James Bundi. The children she was talking about were PW1, Esther Muthoni and Ngungi. Her husband was preparing ballast outside the house, she was with her husband and the children. She said she was in the house sleeping and did not know what happened to PW1. At night the grandmother told her the minor had been



- defiled and was taken to hospital. She did not see the accused person with her husband on the material day, her husband was alone preparing ballast. She did not know if PW2 had disputes with her husband.
27. DW4, RW said that on a date she could not remember, she left her shamba at 3.00pm and returned home where she found PW1, C, A and other children playing. She wanted water to milk the cows, she told PW1 to go fetch a bottle from her aunt so that she can give her milk. She went with the milk to their house. At about 9pm on the same day, her daughter/ mother to PW1 and Pw1 went to her house and informed her that the appellant had defiled the minor. She asked the child why she did not inform her or the aunt that she had been defiled but the child just kept quiet. They went to Kabare Dispensary and were referred to Kianyaga Hospital. She said she did not see the child's walking style change, she just kept quiet. She directed that the matter be reported so that they can know the truth.
28. In cross examination, she stated that when she returned from the farm, she found PW1 and other children playing within her compound. Later PW1 accompanied by PW2 came to her kitchen and informed her that PW1 had been defiled. She accompanied them to hospital where PW1 was treated and given medication. She could not recall the date of this incident. Further she testified that the accused person is her son, and on the material day was at home. He other son James Bundi to was at home preparing ballast alone. She said the appellant was just at home and so was Janet Karimi. She further testified that PW2 is her child and she did not have a dispute with her. She did not have a dispute with her other children. PW2 and the appellant started having problems when the defilement case was reported. She said there was a land dispute but they talked and resolved the problem even the appellant went to visit PW2 when she was admitted in hospital, he gave her animals water during that period she was hospitalized.

Submissions

29. The Appellant filed submissions on 11.01.2023 in which he contends that there existed a grudge between him and PW2 over a land issue in 2015. That the fact that DW3 and DW4 testified without any coercion, or duress goes a long way to show that there existed a grudge. He also questioned how DW2 was arrested on 18.9.2020 and him on 19.9.2020. The Appellant reiterated that his arrest and arraignment was well orchestrated by PW2. He relied on the case of *Eliud Waweru Wambui v Republic* [2019] eKLR, *Sawe vs Republic* [2003] eKLR.
30. He further submitted that the charge sheet was defective, and he ought to have been charged with incest contrary to section 20 of the *Sexual offences Act*. Further no explanation was given as to why the incident allegedly occurred on 7.9.2020 and the charge sheet indicates that the matter was reported on 20.9. 2020 vide O.B No 40 when he had already been arrested. He contends that the charge sheet was defective.
31. The Appellant further submitted that there were material discrepancies in the case and he highlighted the instances as follows; That all the witnesses other than PW1 gave hearsay evidence which cannot be relied upon to base his conviction, the evidence of PW2 contradicted the evidence of the clinical officer on the presence of blood, the incident were alleged to have occurred at different times which were not reconciled. He relied on the case of *John Mutua Musyoki v Republic* [2017] eKLR, *Ndungu Kimanyi v Republic* [1979] KLR 282, *Joshua Afuna Angulas v Republic* Cr. No 277 of 2006, *Owen Kamothi v R* Cr App no. 93 of 1983, *Mbugua Kariuki v R* [1979] KLR 14, *Stephen Mungai Macharia v Republic* Cr. App No 1 of 1994, *J.O.O v Republic* [2015] e KLR and *E.O.O VS Republic* [2018] e KLR.
32. Thirdly, it was submitted that the sentence was manifestly , harsh, excessive and emotional and not based on actual evidence and asked the court to review it downwards while involving section 216, 329 and 333(2) of the Criminal Procedure Code and Article 50 (2) (p) of *the Constitution*. Reliance



was placed on the case of Yawa Nyale v Republic [2018] e KLR, Philip Mueke Maingi and 5 others v Republic [2022] e KLR, Edwin Wachira v Republic [2022] e KLR, Joshua Gichuki Mwangi v Republic [2022] e KLR.

33. The Respondent did not file submissions.

Analysis & Determination

34. 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. The court also must take 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 Okeno v Republic [1927]E.A 32 & Pandya v Republic [1975] EA 366.

35. Also in Peter's v 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 courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate 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.

36. Upon consideration of the facts of this case, the grounds of Appeal and the submissions made by the parties, the following issues are pertinent for consideration:

- a. Whether the offence of defilement was proven to the required standard thereby warranting a conviction.
- b. Whether the charge sheet was defective.
- c. Whether the discrepancies in the Evidence, warrant setting aside of the sentence and acquittal of the Appellant
- d. Whether the sentence of the Appellant should be reviewed downwards.

37. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller v 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.”

a – Whether the offence of defilement was proven to the required standard thereby warranting a conviction.

1. Section 8(1) of the [Sexual Offences Act](#) provides as follows:

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

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.



39. 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.
- (see *Wamukoya Karani v Republic Criminal Appeal No 72 of 2013* and *George Opondo Olunga v Republic [2016] eKLR*)
42. This court will look at each element exclusively starting with the first element which is age. The Court of Appeal in *Edwin Nyambogo Onsongo v 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).
40. In this case, PW1 stated that she was 10 years old. PW2 produced the birth certificate that indicates that the victim was born on 27.01.2009. The date of this incident 7 09. 2019, the victim was approximately 10 years old 8 month. No evidence has been presented to the contrary. This element was therefore proven.
41. The second element is penetration. Section 2 of the *Sexual Offences Act* defines penetration as;
- “Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
42. Section 124 of the *Evidence Act*, Cap 80 provides as follows:
- “Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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.”
43. The victim vividly testified how the Appellant, her uncle and a person well known to her, lured her into the coffee plantation, covered her mouth, and removed her clothes, her pant and skirt. He then removed his trouser and inner pants and proceeded to defile her. She testified that
- “He did ‘tabia mbaya’. He removed his thing for urinating, he placed it ‘hapa ndani’, it’s a place for urinating”



and the court noted that the minor pointed at her private parts. “his thing for urinating” is the penis

44. In addition she testified as to how she felt pain during the incident. PW5 stated that upon examination of the victim, both labia minor and major majora had lacerations and the hymen was freshly broken. From HVS, pus cells yeast cells were seen, urinalysis showed leucocytes were present with few pus cells. In addition, there were bruises on the lower limbs on the inner thighs caused by the struggle between the assailant and the girl. He concluded that there was penile penetration. The P3 form and the PRC form also confirm this injuries. On the P3 form there were healing lacerations at labia majora (3 O'clock and 9 O'clock) and hymen is broken. The question of penetration was therefore proven.

45. Thirdly is identification of the perpetrator. The Victim positively identified the Appellant as the perpetrator. She confirmed that he was a person well known to her, he was a brother to her mother. She identified the Appellant as her uncle. This fact is not disputed. In her testimony PW1 positively identified him and stated as follows;

“My uncle is called Ndambiri.....The person who did bad manners to me is my uncle he is called Peterson Ndamberi,..... My uncle lives with my grandmother. I always see him at my grandmother's home. I see him on several days.”

She identified the accused on the dock and reiterated that, “The person who did tabia mbaya is seated the dock

46. I therefore find that all the elements of the offence were proven contrary to the Appellant's contention. The Appellant contends that he was preparing bricks with his brother DW2. DW2 stated that he was preparing bricks with DW1 from morning till evening. DW3 stated that she saw the Appellant on one part then further stated that she did not see the accused person with her husband on the material day, that her husband was alone preparing ballast. DW4 also testified that that James Bundi was preparing ballast alone. The appellant's evidence is inconsistent and cannot be relied upon.

b – Whether the charge sheet was defective.

47. The appellant submitted that, it was clearly evident that there was a grudge or bad blood over a land issue which is a very emotive issue in the locality from where the parties reside. From the evidence adduced, it was apparent that the appellant was an uncle to the minor and thus should have been charged under section 20(1) of the sexual offence's Act rather than section 8 thereof. The prosecution and the court had the latitude to substitute the charge but did not do so.

48. While it is true that the appellant is an uncle of PW1, it was not mandatory to have him charged under section 20(1) of the sexual offence's Act and that did not make the charge sheet to be defective. There was no legal bar in charging him under sec 8(1) and (4) of the sexual offence Act, which specifically provided and identified the section under which one was to be charged with if the defiled a child under the age of 12 years. Secondly for a charge sheet to be defective it must lack some components and/or ingredients a charge sheet does not become defective when one is charged with a different offence which still discloses an offence.

49. Section 134 of the criminal procedure code provides that;

“Every charge or information shall contain and shall be sufficient if it contains a statement of specific offence or offences with which the accused person is charged together with such



particulars as maybe necessary for giving reasonable information as to the nature of the offence charged”

50. The charge sheet dated 23rd September 2013, did contain all the relevant information and disclosed the offence and further gave out proper particulars as was necessary to give the appellant reasonable information as to the nature of the offence charged. Such a charge sheet cannot be said to be defective. See *Isaac omambia v Republic* [1995] eKLR

c – Whether the discrepancies in the Evidence, warrant setting aside of the sentence and acquittal of the Appellant

51. The other issue raised in the appellant’s submissions was that there were serious discrepancies in the evidence tendered which were enough to set aside the sentence and acquit the Appellant. He contended that all the witnesses other than PW1 gave hearsay evidence which cannot be relied upon to base the conviction. The evidence of PW2 contradicted the evidence of the clinical officer on the presence of blood and the incident were alleged to have occurred at different times which were not reconciled.

52. In *Philip Nzaka Water v Republic* CA Criminal Appeal No. 29 of 2015 while relying in the decision of *Dickson Elia Nsamba shapwater & Anor v Republic* CA App No. 92 of 2007 the Court of Appeal of Tanzania address the issue of discrepancies in evidence and conclude as follows

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out one sentence and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradiction are minor or whether they go to the root of the matter.”

53. The question to be addressed is whether the contradiction mentioned are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. While defining contradictions, the court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria* stated that;

“Now, contradictions means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.”

54. I have perused the record and concur that PW2, PW3 and PW6 majorly restated what PW1 had told them. Nonetheless, the evidence of the victim was corroborated by that of PW5 who was the one who examined her and gave expert evidence on the matter. PW2, PW3 and PW4 gave evidence that corroborated that of the victim. The victim had taken a shower by the time her mother examined her and that may explain why the presence of blood was no seen by PW2 and neither was it seen by the doctor PW5.

55. The time of the incident according to PW1 was around 2pm. The time of visiting the hospital was in the evening and this is confirmed by PW2, PW3 and corroborated by details in the P3 and PRC form which indicated the time of seeing the victim as 9pm on 7.9.2019, the age of the injuries was hours. The prosecution evidence all tallies. Further PW3 testified that the victim returned home at 6pm, PW2 stated that her mother arrived at 7pm. I don’t find any inconsistencies in the timing as alleged by the Appellant. This ground therefore fails.



d – Whether the sentence of the Appellant should be reviewed downwards.

56. As regards the sentence and whether it should be reduced, this Court is guided by the principles in the Court of Appeal case of Bernard Kimani Gacheru v 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, anyone of the matters already stated is shown to exist.”

57. The Court of appeal rendered itself as follows on sentences in sexual offences in the case of Athanus Lijodi v Republic [2021] eKLR

“On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu’s case (supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance Evans Wanjala Wanyonyi v Republic [2019] eKLR). Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited.”

58. The same court in the case of Dismas Wafula Kilwake Vs. Republic [2019] eKLR stated as follows;

“Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

59. In Maingi & 5 others v Director of Public Prosecution & Another (Petition No.E117 of 2021) [2022] KEHC 13118 (KLR) the Petitioners who were convicts serving offences under *Sexual Offences Act* No 3 of 2006 sued the Attorney General and sought for declaration that the mandatory nature of sentence under the *Sexual Offences Act* were unconstitutional as it fettered the discretion of Judges and



Magistrates in meting out sentence. Justice G.V Odunga vide his considered judgment dated 17th May, 2022 did find that –

“to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentence fall foul of Article 28 of *the Constitution*. However, the courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be mandatory minimum prescribed sentences.”

60. The provision of section 8(1) as read together with provisions of section 8(4) of the *Sexual Offences Act* No 3 2006 and legislation that was in force before commencement of *the Constitution* of Kenya 2010 must be considered with adaptation, qualification and exception when it comes to the mandatory minimum sentence and in particular when the said sentences do not take into account the dignity of the individual as mandated under article 27 of *the Constitution* and as appreciated in the Francis Muruatetu case and applied by courts in several cases . See Christopher Ochieng Vrs Republic Kisumu CA Criminal Appeal No 202 of 2011 and Jared Koita Injiri v Republic Kisumu CA Criminal Appeal No 92 Of 2104.
61. The trial magistrate did consider the appellant’s mitigation and also took into consideration all the circumstances of this case and emerging jurisprudence on sentencing and sentenced the appellant to life imprisonment.
62. I have considered the facts in this matter. The victim was 10 years old and after the incident the appellant further attacked her with a panga and was only saved by the presence of other school going children .This court considers the offence to be quiet egregious and calls for a deterrent sentence This court does appreciate the gravity and nature of the offence committed and does not condone offences against minors and vulnerable persons. This was appreciated by Madan J as he was then in Yasmin v Mohammed [1973] EA 370 –

“The High Court is specially endowed with jurisdiction to safeguard interest of infants, as the court is the parent of all infants. The welfare of the infant is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infant in Kenya of whatever community tribe, sect fall within the ambit of guardianship of Infant Act and the court is charged with the sacred duty to ensure that their interest remain paramount and can duly preserve.”

60. In the case R v Scott [2005] NSWCCA 152 Howle J. Grove & Baar JJ then stated –

“There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and then must be a reasonable proportionately between the sentence passed in the circumstance of the crime committed...one of the purpose of punishment is to ensure that the offender is adequately punished... a further purpose of punishment is to denounce the conduct of the offender.”

60. Having considered all factors in this case, considering the gravity of the offence against an innocent minor and Appellants own mitigation it would be appropriate to reconsider the life sentence melted out as against the appellant in line with the principles enunciated in Maingi & 5 others Vs. Director of Public Prosecution & Another (Petition No.E117 of 2021) [2022] KEHC 13118 (KLR) and impose a stiff sentence which is proportionate to the crime committed. I hereby set aside the sentence of life imprisonment imposed on the Appellant in Gichugu SRM Criminal Case SOA No.17 of 2019 vide



judgment dated 03.2.2020 and substitute it therefore with a sentence of Thirty years imprisonment to run from the period he has been in custody before arraignment in the lower court to wit 20.09.2019. For avoidance of doubt the appeal on conviction is hereby dismissed.

61. Judgment Accordingly.

Judgement written, dated and signed at Machakos this 25th day of April 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 25th day of April, 2023.

In the presence of;

.....for the Appellant

.....for O.D.P.P

.....Court Assistant

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