HKM v Republic (Criminal Appeal E041 of 2021)
[2023] KEHC 19264 (KLR) (27 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19264 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E041 OF 2021

FR OLEL, J

JUNE 27, 2023

BETWEEN

HKM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal arises from the judgement, conviction and sentence dated 27/10/2021 by Honourable. R.L Musiega (RM) in Engineer SPMCR (SO) no 43 of 2020.The appellant had been charged with the offence of defilement contrary to section 8(1)(3) of the Sexual offence Act no. 3 of 2006. The particulars of the offence were that on 5th August 2020 in Kinangop within Nyandarua County intentionally caused his penis to penetrate the vagina of EWW a child of 14 years.

2. In the alternative, the appellant had been charged with the offence of committing an indecent Act with a child contrary to section 11(i) of the *sexual offences Act*. The particulars of the offence were that on the 5th day of August 2020 in Kinangop within Nyandarua county, intentionally touched the breasts/ vagina of EWW a child aged 14 years.

3. The prosecution called 4 witnesses and the appellant was put on his defence and gave sworn evidence. Upon considering all the evidence tendered, the trial court did find that the appellant was guilty and sentence him to serve 25 years imprisonment.

4. The appellant was granted leave to file his appeal out of time on September 6, 2022 and thereafter lodged his petition of appeal on September 9, 2022. In the said petition of appeal the appellant did raise the following grounds of appeal namely;

    a. That the learned trial magistrate erred in law and fact by convicting the appellant in a prosecution case which was not proved beyond reasonable doubt.

b. That the learned trial magistrate erred in law and in fact by failing to note that the medical evidence adduced at trial by the prosecution was insufficient to sustain a safe conviction.

c. That the learned trial magistrate erred in law an fact by convicting the appellant but failed to note that the important element of penetration was not conclusively proved.

d. That the entire prosecution evidence was largely inconsistent and contradicted hence unsafe to rely on the support and conviction.

e. That the appellants defence was not considered accordingly, the evidence tendered was not conclusively considered alongside the appellant's defence.

Facts of the case

5. PW1 Dr. Martin Ouma stated that he graduated from Kenyatta University in 2016 and held a bachelor degree in medicine and surgery. He was in court to produce medical document (P3 form) filled by Dr. Kinyua who was his colleague but was away from work as he was on leave but he stated that he was conversant with the said Dr. Kinyua handwriting and signature. He stated that Dr. Kinyua examined the victim EWW on 07.08.2020. She had a history of having been defiled by her step father on 05.08.2020 at 6.00am. On general examination there were no injuries noted.

6. The victim had earlier been treated at Murungaru Health Centre on 05.08.2020. As per the treatment documents from the said clinic, the mino's labia minora was inflamed and hymen broken. The lab tests were undertaken, pregnancy and HIV tested were all negative. He produced both the P3 and PRC forms. In cross examination PW1 stated that the victim was not bleeding but however blood clots were seen. It was possible that that was due to monthly period. However, based on history and laceration (injuries on the vagina) it was probable that she had been defiled.

7. PW2 EWW testified that she was a student at [Particulars Withheld] primary school. Previously she was at [Particulars Withheld] primary school. On 05.08.2020 at 6.00am she was asleep, her step-father the appellant entered her bed, turned her, removed her clothes and had sex with her. At the time of the incident, she was alone in the room. She stated that the appellant was not her biological father and they stayed together with the appellant, her mother and young brother. PW2 further stated that when she was defiled, she did not scream but later told her mother what happened and when the appellant was confronted, he denied and stated that the allegation was false.

8. PW2 further stated that the appellant told her not to scream and also not to tell anybody. The defilement took long and once the appellant was done, he left. Appellant has slept on top of PW2, spread her legs, when he started to defile her is when she woke up. She tried to push him off but could not. While the incident occurred, her mother was outside the house in the kitchen. PW2 stated that after reporting to her mother, she was taken to hospital and was given the P3 form and PRC form. They also reported to the police. she identified the appellant as her step-father and said they no longer stay together.

9. In cross examination, PW2 stated that she was alone in the room and her brother was sleeping on the chair. The bed was behind the curtain and one was not able to touch the chair from the bed. She reported the incident to her mother minutes after the incident occurred. Before the date of the incident she had a dispute with the appellant because a boy had given her two maize cobs. The incident happened on a Saturday morning, while the appellant defiled her on a Monday. There was also a curtain and cupboard separating her bed and the chair where her brother was sleeping.

10. PW3 MWK stated that on 05.08.2020, she woke up and went to prepare breakfast. She left her husband and children asleep. He husband was in their room. Her husband woke up and she gave him tea. She then went to wake up her children and found PW1 crying. She asked her what the problem was and she said that she had been defiled by her father. She stated that the house was two roomed. They slept in one room and the other room was partitioned with a net. Her son would sleep on the chair while PW1 slept inside on the bed.

11. After being told of what transpired she confronted the appellant and he denied defiling the minor. She took the minor to hospital at Murungaru Health Centre and late she was referred to North Kinangop hospital. She also reported the incident to the police station. Further, she stated that she had not formalized her marriage with the appellant and it was a come we stay relationship. The two children were not biological children of the appellant and this incident was the first time her daughter had told her about being defiled. Previously, they had disagreed when she found him in the girl's room, but he had not said anything when asked.

12. In cross examination, PW3 stated that they had stayed together with the appellant for 5 years and previously there was an incident when PW2 wanted to kill herself due to problems attributed to the appellant. This incident occurred on a Saturday at 6.00am and it was not true that she was trying to fix the appellant. She had prepared tea and had intended to go to work, but after the incident was reported she took the minor to hospital at 8.00am. PW3 also stated that she did not check the minor's private parts when she found her crying and there was no sign on the bed. She only saw blood on the minor's clothes after they came from hospital. She also stated that she was not lying against the appellant.

13. PW4 Cpl Dickson Koipini testified that he was stationed at Murungaru police station under Kinangop police station and was the investigating officer. On 05.08.2020, an incident of defilement was reported at 0600hrs by PW3. She had left her daughter sleeping inside her house, while her husband was also sleeping in the master bedroom. After making tea she served her husband and went to wake up her daughter and found her crying in the bedroom. Upon inquiring what was wrong PW2 stated that she had been defiled by her father (the appellant). He had entered PW2 bedroom and did the act. PW3 confronted the appellant but he denied any wrong doing. PW3 took her daughter to hospital and later reported to the police. He visited the scene but did not get any evidence to assist in the case.

14. PW4 stated that he arrested the appellant and had the minor re-examined at Engineer County hospital. He thereafter charged the appellant in court. The witness stated that the minor was born on 27.01.2006 and was 14 years old. He produced the birth certificate as Exhibit 3. In cross examination he stated the case was reported at 10.30 am and he did visit the scene. The kitchen was just an extension of their house and he could not tell where the incident occurred from the appearance of the complainant. He only saw the victim's bed where the incident took place.

15. The appellant was placed on his defence and gave sworn evidence. He stated that he was from Kinangop within Nyandarua County and was a casual labourer. He knew PW3 the complainant's mother in 2015 and they had stayed together for 5 years. Their stay was peaceful and they did not have any problems. PW3 came with her daughter and they would occasionally disagree because of issues relating to PW2 . The appellant further stated that during covid he was mostly at home and PW2 who had previously joined form one, too was at home due to covid 19 pandemic. He had talked with PW3 and told her that her daughter PW2 was not respecting him. At some point he was told that PW2 had left home and wanted to kill herself but on being probed she had refused to talk.

16. On 01.08.2020, the appellant stated he was away from home and came back. PW2 cooked lunch and thereafter left with her mother PW2. The boy (Son) was riding a bicycle. At about 6.00pm he noticed that PW2 had not come back home and he advised PW3 to go to look for her. When PW2 came home

she had maize which had not fully grown and he told her not to cut it. PW3 got annoyed that he was talking to PW2. They slept well and on the following morning PW3 woke up at 6.00am. He too was awake and went to open for the sheep and chicken. He requested PW3 to bring him bathing water and later she served him tea.

17. While he was having tea, PW3 went to the bedroom and came back after a few minutes, followed by the boy. She requested the appellant to come inside the house and once inside PW3 asked PW2 to report what had transpired. He inquired what the issue was and PW3 told him that PW2 had reported that he had defiled her. On being informed he told PW3 to take her to hospital and he went to work and was later arrested by the police and later taken to court.

18. The appellant further stated that he met PW2 at the cell and asked her what was going on. PW2 asked for forgiveness. She also confessed that what was record in the statement is not what she said. The appellant also testified that PW3 had accused him of having a clandestine lover and that had caused friction. PW3 former husband was also causing friction in their marriage. In cross examination, the appellant confirmed staying with PW2, PW3 and Pw3 son in a two-bedroom house. The children were not his biological children and he had differences with PW3 concerning PW2. PW2 had refused to recognizes him as her father and was general disrespectful towards him. The difference had lasted for 3 years and he had no witness to confirm their differences. The appellant denied defiling PW2 and said he considered her like her daughter. PW2 later also asked for forgiveness from the appellant.

19. Having considered all the evidence adduced the trial court did find the appellant guilty and proceeded to sentence him to 25 years imprisonment.

Submissions

20. The appellant submitted that PW2 was not a reliable witness and her evidence was made of hearsay, speculation, presumption and assumptions which was not admissible in court. Her evidence was that she was 5 years and that the appellant "turned me, I was not feeling, he removed my clothes, he had sex with me, I was alone in the room, I did not scream" was not believable, given he long history of misunderstanding between them.

21. The medical evidence presented too was weak. The initial treatment notes from Murungaru health centre indicated that the libia majora was inflamed and hymn was broken. There were spots of blood too. PW1 evidence contradicted this as he stated that there was no injury in the genitalia, and the blood spot may have been caused by PW2 being in her menses. Such evidence could not be relied on to convict the appellant. To the extent that the medical doctor who examined PW2 was not called and his evidence produced by PW1 embellished the evidence and the same was inadmissible in court of law.

22. On the second ground of appeal the appellant submitted that the age of PW2 was not sufficient proved. The complainant stated that she was 5 years old and that the prosecution did not produce the minors original birth certificate. Reliance was placed on Alfayo Gumba Olallo versus Republic CR. Appeal no.203 of 2009 and Francis Omuromi versus Ugnada COA CR no. 2 of 2000.

23. The appellant also submitted that penetration was not proved. PW2 was not a truthful witness and the magistrate ought to have considered that demeanour of the witness. The medical evidence produced was insufficient and contradicting and no eye witness also saw this alleged incident. A missing hymen was also not prima facie evidence of penetration and the blood stains could be attributed to PW2 being on her menses. The hymen too was not freshly torn. The medial evidence thus did not corroborate PW2 evidence. Reliance was placed on *Baskerville versus Republic* (1916) 2KB658.

24. The final issue raised by the appellant was that the trial court failed to consider his defence and or casually treated it as a mere denial. The trial court also failed to warn itself of the danger of relying on a single witnesses and uncorroborated evidence. Further the court should have given reason as to why it rejected the appellant's defence which clearly had introduced doubt in the mind of the court and was not unreasonable. Reliance was placed on Kiarie versus Republic (1984)eKLR739, PKW versus Republic, David Mwignirwa versus Republic and Michael Odhiambo versus Republic.

25. On sentencing the appellant submitted that he did not get an opportunity to mitigate and in reply the magistrate noted that the accused was not remorseful. The appellant submitted that he was not expected to be remorseful for a crime he did not commit, that was a misdirection by the trial magistrate. The learned magistrate thus imposed mandatory sentence which went against the requirement of the law. The appellant relied on S versus Mchune and another (AR 24(11) (2012) 2AK 2PHC 6 Kwanza Natal High Court) and S versus Jensen 1999(2) SA CR 368 @373(q)- (h) Devis J.

26. The appellant prayed that his court finds merit in this appeal and he be given benefit of doubt. The conviction be quashed and sentence set aside.

Respondent Submissions

27. The Respondent filed their submissions on 26/11/2022 together with grounds of opposition. It was submitted that all the ingredients necessary to prove defilement were proved i.e Age identification and penetration. PW2 gave truthful evidence which was corroborated by the medical reports produced by PW1. In addition, based on section 124 of the *Evidence Act*, the trial court was entitled to rely on the evidence of the complainant if satisfied she was telling the truth. The conviction was thus proper and safe. Reliance was placed on *Erick Onyango Ondeng versus Republic* (2014)eKLR.

28. The appellant submission that the evidence of the witnesses was contradicting too had no basis as the evidence presented was cogent and corroborated by other facts. The Respondent urged this court to dismiss their appeal.

Analysis & Determination

29. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See *Okeno-Vrs- Republic* 91972)EA 32 & *Pandya Vs. Republic* (1975) EA 366.

30. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala-Vrs-R* (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported in doing so, it should make allowance for the fact that the trial Court has made the advantage of hearing and seeing the witnesses.

31. In Peter's vrs Sunday Post (1958) E.A. 424 it was said that it is not the function of the first appellant court to merely 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.

32. The main issues raised in this appeal by the appellant can be summarized as follows;

a. Did the prosecution discharge the burden of proof to the required standard?

b. Did the Trial Magistrate consider the Appellant's defence

c. Was the sentence passed harsh and/or excessive and should this court interfere with the same.

Burden of Proof

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

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

34. The conceptual framework for burden of proof to be discharged by the prosecutor consists of two components i.e the burden of proof and evidential burden which duty is clearly enunciated by Fidelis in his book *Modern Nigerian Law of Evidence*, University of Lagos Press, Lagos (1999) 379 when he stated that;

> " The term burden of proof is used in two different sense. In the first sense, it means the burden or obligation to establish a case. This is the obligation which lies on a party to persuade court either by preponderance of evidence or beyond reasonable doubt, that the material facts which constitutes his whole case are true, and consequently to have the case established and judgment given in his favour. The other meaning of the expression burden of proof is the obligation to adduce evidence on a particular fact of issue. This evidence in some cases, must be sufficient to prove the fact or issue to justify a finding on that fact or issue, in favour of the party on whom the burden lies. It is called the evidential burden. This is the sense in which the expression is more generally used.

35. In the case of *Republic Vs Edward Kirui* (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of *Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another* (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

36. The enormous task of proof beyond reasonable doubt by way of directing or circumstantial evidence rests with the prosecution and the fact the accused is put on his defence does not shift that burden and standard of proof in any way.

37. Section 8 (1) and (3) of the *Sexual Offences Act* provides as follows:

> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve years and fifteen years is liable upon conviction be sentenced to imprisonment for a term of not less than fifteen years.

38. 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 Vs. Republic Criminal Appeal No 72 of 2013 and George Opondo Olunga vs. Republic [2016] eKLR)

A. Was the Age of the complainant proved?

39. The complainant testified that she was 5 years old and was in form one at [Particulars Withheld] secondary school. The proceedings definitely have a typo-error as a 5-year-old cannot be in form one. Pw4 Cpl Dickson Koipini, did produce the Birth certificate of PW2. She was born on 27.01.2006. She was 14 years old. The birth certificate was produced as Exhibit 3. As held in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR

> " "... 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. The documentary evidence produced sufficiently established that age of the child being 14 years of age.

B.Was Penetration proved

41. Section 2 of the *sexual offences Act* defines penetration as follows;

> 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. PW2 testified that they stayed in a two-bedroom house with the appellant, her mother (PW3) and her younger brother. The appellant was her step father it was her evidence that on 05.08.2020 at 6.00am she was asleep when;

> " My step father came (points at the accused). He entered my bed. I was not feeling. He turned me, removed my cloths. He then had sex with me. I was alone in the room. He is not my biological father. We used to stay with the accused and my mother and my younger brother. He was married to my mother. I did not scream"

44. PW2 further testified that;

> " I told him that I would report him. He told me not to say. I could not scream. He did not threaten me he just told me not to say. He did not do the act for long. After he was done he left, when he came at first I did not feel him. I was asleep while facing up. He slept on top of me. He had spread my legs. When he started doing I somehow woke up and saw him. I tried pushing him but I could not. I did not cry during the Act. My mother was just outside the house in the kitchen."

45. PW2 further testified that she immediately reported to her mother PW3 and, they went to the Murungaru hospital and police station. Later she was referred to Nyandarua county hospital, where she was given P3 form and PRC form. In cross examination PW2 testified that she was alone in the house and her brother did not sleep near her. Her brother was sleeping on the chair and her bed and the said chair was separated by a curtain. She reported the incident within 10 minutes after it happened.

46. PW3 confirmed that the appellant was her husband, and was the step father to PW2. On 05.08.2020, she had woke up early and started preparing breakfast. She left the appellant a sleep in the bedroom and the children were in their room. Her husband woke up and she gave him tea. She went to wake up the children and found her daughter crying. She accused the appellant of raping her. The house was a two-bedroom house and the children's room were partitioned with a net. Her daughter would sleep on the bed, while her son would sleep on the chair. She confronted the appellant who denied defiling PW2. She took PW2 to hospital and reported to the police.

47. PW3 confirmed that her children were not the appellants biological children and they had stayed together for five (5) years. In cross examination PW3 did confirm that PW2 had problems with the appellant and there was a time she wanted to kill herself due to differences with the appellant. The incident had happened on a Saturday and she had gone to make tea at 7.00am, she also stated that she did not know who was saying the truth nor did she check the minor's genitalia, when the incident was reported.

48. Earlier PW1 DR Martin Ouma , had produced the P3 form and PRC form filled by his colleague Dr Kinyua, who was off duty. On general examination no injuries were seen, but as per the medical records Dr Kinyua saw, PW2 had earlier been treated at Murungaru Health Center as patient A78. The medics there had noted that the labia majora were inflamed and the hymen was broken. The incident was reported to PW5, it was reported that the incident occurred at 6.00a.m and the appellant had entered the bedroom and defiled the minor. He visited the scene and noted that the Kitchen was just an extension of the house. He also went into the bedroom, where the incident took place, he did not find any evidence at the scene.

49. DW1 in his defence denied defiling the minor and stated that he had differences with PW2, which he had reported to PW3, her mother and the core issue was that PW2 was not respectful towards him. At some point he was told that PW2 wanted to kill herself, but upon being probed, she declined to talk. On 01.08.2020, he did scold PW2 and PW3 was not happy that he was talking to PW2. On the material day of the alleged incident, both him and PW3 woke up at 6.00am and he went outside to open for the sheep and chicken.PW3 fetched for him bathing water and served him tea. PW3 left for the children's room and after a short while came and asked him to join her therein. PW3 started accusing him of sleeping with PW2, which allegation he denied. PW2 was taken to hospital and he was later arrested.

50. The appellant further testified that he met PW2 in the police cells and she fainted and later asked for forgiveness. She further confessed that the statement recorded is not what she had stated.

51. First and foremost, this court notes that the evidence of PW1 did not corroborate the evidence of PW2. The treatment documents from Murungaru health center were never produced in evidence. There was therefore no basis upon which the prosecution could have relied on evidence obtained from the said health center, which evidence was not produced before court. Any reference to such evidence was basically hearsay. Further Dr Kinyua, who purported to have filled in the P3 form and PRC form did examine PW2 and noted that he did not see any injury. The evidence that he used to fill in the P3 and PRC form was based on the documents which were not produced and thus created doubt as to the veracity of the findings thereof.

52. Secondly it was common ground that PW2 had a strong hate relationship with the appellant, who was her step father. According to PW3 at one point she even attempted suicide. PW2 evidence, that the appellant did enter her bed, turned her, removed her cloths, spread her legs and lay on her without her feeling anything until he started the act is simply not believable. As a 14-year-old girl who is in form one, unless one is hypnotized, it is not conceivable that one would turn you while sleeping, remove your cloths, lay on you, spread your legs all while she was asleep. If indeed the appellant had attempted do defile her, she would have immediately woken up and given the revulsion with which she had for the appellant she would have definitely resisted his unwarranted sexual advance.

53. PW3 confirmed that she too was within the house and was in the kitchen preparing tea. The house was two bedrooms with the children using the other room, though the son slept on a chair within the room. PW5 also confirmed visiting the house and noted that, "The kitchen was an extension of their house." If indeed such an incident were to occur at 6.00am, with the son in the same bedroom and the mother in the kitchen extension, it goes without doubt that PW3 or her son would have been alerted by commotion raised by the complainant.

54. Further PW3 in cross examination stated that, "it was Saturday at 6am. When the incident occurred. I went to make tea at around 7 a.m. This goes to show that at 6.00am, when the incident is alleged to have occurred, PW3 was most likely within the house and this also contradicts PW2 version of events.

55. In Joseph Maina Mwangi vs Republic (2000) eKLR it was held that;

> "In any trial there are bound to be discrepancies. An appellate court in considering these 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 sentence."

56. The prosecution evidence looked at in totality is weak and lack's clear consistency. The evidence of both PW1, PW2 and pw3 have such fundamental discrepancy, which this court cannot ignore and

which definitely prejudice the appellant when relied upon to convict him. The trial magistrate too erred by failing to give reasons why he believed PW2 and failed to record the same in his judgment.

57. Unfortunately PW2 and PW3 were not reliable witnesses, whose evidence this court could comfortable use to find guilt on the part of the appellant, especially given the long drawn out differences alluded to between PW2, the appellant and PW3 who also seems not to be comfortable with the appellant having any interaction with PW2. Their evidence adduced cannot found a safe conviction. In the case of Ndungu Kimanji v Republic [1979] KLR 282 this Court said:-

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

Disposition

58. Having found as above, I do find that the conviction of the appellant was not safe. I do therefore wholly set aside the conviction and sentence of Honourable L.Musiega (RM) in Engineer SPMCR (SOA) No 43 of 2020 delivered by her judgment dated 21st October 2021. The appellant is forth with set free unless otherwise lawfully held.

59. It is so ordered.

Judgement written, dated and signed at Machakos this 27Th day of June, 2023.

RAYOLA FRANCIS OLEL

JUDGE

Delivered on the virtual platform, teams this 27Th day of June, 2023

In the presence of;

Appellant

.....for ODPP

.....Court Assistant