JWM v Republic (Criminal Appeal E009 of 2023)
[2023] KEHC 24351 (KLR) (30 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24351 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E009 OF 2023

DKN MAGARE, J

OCTOBER 30, 2023

BETWEEN

JWM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged with defilement contrary to Section C 8 (1) (2) of the *Sexual Offences Act*. He was committed and sentenced to 50 years' imprisonment. There was an alternative count of Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The matter proceeded by way of written submissions, which they adopted.

2. The appellant filed submissions on 19/6/2023. It is his considered opinion that the court has wide powers under Sections 347(4) of the *Criminal Procedure Code* to re- analyse and re-evaluate the same. Being a first appeal, based on both law and facts. He relied on the *locus classicus* case of *Okeno versus Republic* 1973 (EA) 32. He also relied of the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336, which states as doth:-

> "On a first appeal from a conviction by a Judge or Magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not

which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

3. In *Eric Onyango Odeng v Republic* (2014) eKLR the Court of appeal, Githinji, Musinga & M'inoti, JJ.A.) stated as doth: -

> " The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See *Okeno Vs Republic* (1972) EA 32).
>
> It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.

4. It was this case that sentencing him to 30 years (it is actually 50 years, the court did not handle the case surrounding the arrest and alleged penetration as well. He relied on *Fuad Dumila Mohammed v R* (CR. Appeal No. 210 of 2003). It is those decisions that are no longer valid in view of the Amendment to Section 124 of the *Evidence Act*.

5. It is the Appellants case that the prosecution did not discharge the burden of proof. He stated that the anteriority of facts and circumstances germane to the commission of the offence were not proved and were as a fact organized, coordinated and orchestrated.

6. He relied on *Murimi Njoroge v Republic* CACA 115 of 1982. In that case the court held as ditch

7. On the question of whether the prosecution case was proved beyond reasonable doubt I will borrow the description assigned to what is reasonable doubt by the decision of *James Muriithi Njorog E -vs- Republic* [2016] eKLR where the Court quoted Denning J., in the case of *Millier -vs- Minister Of Pensions* (1947) A.C. where he stated as follows:

> " 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 proved beyond reasonable doubt but nothing short of that will suffice."

8. He further relied on the case of *Kazungu Mramba Mweni versus Republic* CR No. 220 of 2007, where Justice f Azangalala stated as doth; -

> " The latter's evidence was categorical that "there was no evidence to support the allegation of sexual assault."
>
> The above discrepancies were not considered by the Learned Senior Resident Magistrate. I have no doubt in my mind that had the Learned Magistrate considered the same, he would not have found it safe to convict the appellant on the uncorroborated testimony of the complainant. On my part and after analyzing the evidence which was presented before the Learned trial Magistrate, I have come to the conclusion that the conviction of the appellant was unsafe."

9. He complained that they depended heavily on PW1 that she was defiled when it was not true. The Appellant indicates that the court failed to interrogate the genesis of the offence. He stated that Section 124 of the *Evidence Act* was not applicable in the circumstances of this case. The said section states as follows:

> " 124. Corroboration required in criminal cases
>
> 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.

10. This was introduced to the law via Act No. 5 of 2003, s. 103, section 103 which applied by didn't of *sexual offences Act* No. 3 of 2006. In this case, the evidence is not only of the alleged victim of the offence. There are other evidence which need to be corroborated,

11. The minor was allegedly mentioned by court, but she was not called. The Magistrate as such failed to direct her mind to Section 150 of the *Criminal Procedure Code*. He stated he was alive to the contents of Section 143 of the *Evidence Act*. He relied on *Kazungu case* (*supra*). He still raised issues of PW1 recording the statement at the police. He urge me to find evidence of PW1 unreliable.

12. The injuries were said to be healing and 4 days old. The form was said to be filled on 8/3/2022. He stated that no evidence that the hymen was broken by the Appellant. On the age of the injuries, he relied on the case of *Maina Mwangi vs Republic* (2006) eKLR. He stated that P3 should be filled within 24 hours. They state that the P3 form was filed by "Dr. Rimba" who was on duty today and the P3 was provided by a clinical officer.

13. In their submissions the Appellant submitted that the sentence of 50 years was harsh.

Respondent's submissions

14. The Respondents filed submission on 9/6/2013. They relied on the case of *Okeno v Republic* (1977) EAR 32 and *Mark Ojiri Mose v Republic* (2013) eKLR on the duty of the court.

15. They also relied on *George Opondo Olunga v Republic* [2016] eKLR, where the court stated is guilty of an offence termed defilement if key ingredients of the offence of defilement are present, that is: -

    a. proof of the age of the complainant.

    b. proof of penetration and

    c. proof that the appellant was the perpetrator of the offence.

16. On questionable and unreliable documentary evidence, they state that the P3 was produced so was the age assessment, treatment notes, which were produced by PW3 and PW4. The state submitted that the appellant did not raise objections on the documents. I shall revert on this issue. The issue of conviction or hearsay, they state that the evidence of PW1 was corroborated by PW5. The evidence was overwhelming and was not dislodged on contradictory and uncorroborated evidence they state that the 4 witnesses evidence was cogent credible and consistent.

17. They relied on the Ugandan case of *Twehangane Alfred v Uganda* (Criminal Appeal No. 139 of 2001) [2003] UGCA 6 (17 February 2003) where the court stated as doth: -

> "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's case.
>
> Therefore the court should consider the broad aspect of the case when weighing evidence. Contradictions in the testimony of witnesses on material points should not be overlooked as they seriously affect the value of their evidence.

18. On the issue of fabrication, he stated that the Appellant was recognized by the victim. They relied on the case of *Anjohoni & Others v Republic* (1976-80) KLR 1566,1568. They submit that the appeal should be allowed.

Analysis

19. The court convicted and sentenced the Appellant to 50 years' imprisonment. He then appealed and raised the following grounds of appeal.

    a. The learned trail magistrate erred in law and in fact by failing to consider sharp contradictions and gaps in the prosecuition witnesses adduced evidence contrary to section 163 of the criminal procedure code and section 124 of the *Evidence Act*.

    b. The learned trail magistrate erred in law and in fact by failing to consider that investigation done by PW4 police officer were shoddy to the extent they did not connect nor link the appeal to the appellant.

    c. The learned trail magistrate erred in law and in fact by failing to consider that the sentence imposed was harsh, unjust and excessive.

20. The appeal is on both the conviction and sentence.

21. The charge was Defilement country to Section 8 sub section (1) as read with subsection 2 of the *Sexual Offences Act*. The statement was that the Appellant on 28/2/2022 in Malindi sub county in Kilifi County intentionally and unlawfully caused his penis to penetrate into the vagina of JM a girl aged 11 years.

22. The charge was read on 10/3/2023. He is said to have been arrested on 4/3/2022 and brought to court on 10 /3/2022 6 days later (though indicated on the charge sheet as 4/3/20221. By 8/4/2022 the Appellant had no received witness statement. Though the prosecutor indicated that he was to supply statements again, he had not supplied till 25/5/2023. The accused was erroneously taken to court on 31/5/2022. The matter proceeded on 16/6/2022.

23. The minor was taken through voire dire and the court found she could give sworn evidence.

24. The evidence she gave was that the defilement took in alternative days. She told M, M. R knew but she was not told by the minor. R saw her doing the act. She knew she was 11 years old but did not know where she was born. She could not remember when she was born.

25. She did not tell anyone because she feared neighbours.

26. There is a second PW1 SN. She stated that on 1/3/22 at 2 pm, she was told by the minor that, MM daddy ameenda jela. She stated that the father defiled her. The last defilement occurred on Sunday. This was crucial evidence. 1/3/202 was on Tuesday. The last Sunday before 1/3/202 was 27/2/22.

27. She told carol who interviewed the child. On cross examination she stated that they took the minor to police station and not hospital. The medical doctor became evasive and the matter had to be adjourned for some time. Despite several adjournments a clinical officer Ibrahim Abdullahi testified. He did not explain why the doctor was not attending court. He simply said the doctor is on duty.

28. In his evidence he gave a legal conclusion that the minor had been defiled. He did not know who did the tests. The minor was treated on 4/3/2022. The P3 was filed on 8/3/2022.

29. PW4 Corporal Marian Hussein testified that she as the investigating officer. He arrested the appellant. The minor was put in a rescue centre.

30. On cross examination she stated that the minor was taken to hospital because she was defiled.

31. The appellant was put on his defence. He gave sworn testimony and stated that he woke up early on 4/3/2022 and headed home, when he son told me that J had been taken by M. They were with relatives from the mother's side. His ID and ATM were missing.

32. The Appellant and the in-laws went to the police station searching for the child. She was at Malindi Children Remand. It is the father in law and S who called the police and he was arrested. The child had gone with the appellant's IDs and ATMs.

33. He stated that it is because of the dispute with his in laws. He did not think she could end up like that. He maintained he was alone in his house. The case was closed. The court analyzed the evidence and delivered a Judgment. She analyzed the evidence she gave the genesis of the case. The Court noted that minor stated that she could not tell anyone earlier.

34. She found that the age assessment was a "similar document hence a proper prove of age. On penetration she relied on *Muganga Chilejo Saha v Republic* [2017] eKLR. In the case, the court, Makhandia, Ouko & M'inoti, Jj.A, stated as doth: -

> "Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "*alinifanyia tabia mbaya*", (*IE V R*, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (*Samuel Mwangi Kinyati v R*, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (*David Otieno Alex v R*, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his *"dudu"* into my *"mapaja"*, (*Joses Kaburu v R*, Meru H.C Cr. Case No. 196 of 2016), "he used his *munyunyu*", (*Thomas Alugha Ndegwa*, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See *A M M v R* Voi H.C Cr. App. No. 35 of 2014, *EMM V R* Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her. Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (*IE V R*, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (*Samuel Mwangi Kinyati v R*, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (*Joses Kaburu v R*, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (*Thomas Alugha Ndegwa*, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See *A M M v R* Voi H.C Cr. App. No. 35 of 2014, *EMM V R* Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her."

35. She also stated that the fact that the Appellant was charged with defilement and not incest is not a serious aspect. The court was guided by the decision of PW Versus republic 2019) eKLR.

36. She relied on the evidence of PW3. She stated that the father was positively identified. He considered the question of the in laws but dismissed the same as he did not question any of the witnesses. I must confess that I am bewildered about this, who among the neighbours will know the differences between a man and his in laws?

37. It was common ground that the wife was out of the country. I do not know whether the investigating officer or the minor should be questioned. In a matter of this nature, the court must have an overlook at the evidence and form an independent opinion. When the evidence is of more than 1 witnesses. Section 124 of the *Evidence Act*, the provision thereto is irrelevant.

38. The test that needs to be carried out is the interval consistence of the evidence, having regard to normal rational differences that are from perceptions.

39. Secondly the issue of the defect in the change sheet was raised. It is true that the correct charge ought to have ben incest. However, it does not make any difference as the only difference is the severely of the sentence. The defendant did not prejudice the Appellants in any way.

40. In *K N v Republic* [2018] eKLR, the court, Justice P. Nyamweya, as she was then, stated as doth: -

> " 25. On the first issue, the Prosecution counsel did concede that the charge sheet was defective and this Court also noted the defect in the charges brought against the Appellant. The issue of when a charge is defective is to be examined in light of the requirements of the law as regards the framing of charges as stated in section 134 of the Criminal Procedure Code which provides as follows:
>
> > "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."
>
> 26. In addition it was held in *Sigilani vs Republic*, (2004) 2 KLR, 480 that:
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> > "The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

41. The first step towards unraveling this imbroglio is to analyse medical evidence. The doctor who made the report was available on duty but chose not to testify. We do not know his qualifications and the basis for which she reached a conclusion in the medical report. The doctor was on duty in the same county, leave available. It is my take that his availability could have been averse to the prosecution case. It is important that parameters set out in section 33 of the *Evidence Act* be met. The doctor simply did not testify.

42. The reports indicate that the reporting was done on 4/3/2022. However, PW1, received the information on 1/3/2022 at 2 pm. They went to hospital on that date. She was told the last defilement was on Sunday, which could be on 27/2/2022. The child is taken to hospital on 4/3/2022 alleged that defilement was on 28/2/2022.

43. The children's innocence sometimes leads them to release bits of suppressed truths. The information as communicated to SN was such that there were certain discussions form where the minor gathered the Appellant was going to prison.

44. Given the gravity of the alleged offence it is not normal that the minors concern could be that of his father being jailed rather than her own predicament. It is equally surprising that the alleged offence having been committed on 28/2/2022 and PW1, SN having got information on 1/3/2012 did noting till 4/3/2022.

45. Further the information was relayed to Caro, a neighbour and nurse who examined her first. We do not have any report from her. The history given in the exercise book marked as exhibit 3 is dramatically different from the witnesses. We do not have the name and qualification or even stamp of the person who filled the same.

46. The P3 indicates that the injuries are approximately 4 months old as at 8/12/2022. This make the time of injury to be December 2021. The hymen was broken and healed tears at both sides. This was secondary to injuries 4 months earlier.

47. Though age was not a serious issue, the document marked as exhibit 4 has no scientific basis. It is a form signed for the medical superintendent who examined the minor and indicated that the child was 11 years. There is no indication of methodology the type of tests and the margin of error. Having not been charged for incest, under defilement the burden was on the state to proof the age of the minor.

48. In *Yahya Hussein v Republic* [2021] eKLR, justice R. Nyakundi, stated as doth: -

> "It is a promise of the *constitution* that in the realm of criminal law an accused person is presumed innocent until the contrary is proved beyond reasonable doubt. It is appropriate at this juncture for purposes of the appeal to draw inferences in the adjudication of this matter and the evidence rendered to discharge the burden of proof of beyond reasonable doubt. In the context of this appeal, it was ultra vires for the trial Court, in its eager and zealous endeavor to accede to proof of age from a source in the P3 filled by a police officer and not a medical doctor."

49. The child was a pupil at a named school. Records therein including registration certificates will suffice. However, age is not in issue in this matter. The main issue was that the timelines were not adding up.

50. Given the recurrence of the issue of the mothers travel to Qautar, the defence raised is not idle. This is because from 1/3/2022 to 4/3/2022. It is a long time for nothing to be done. There is no reason why SN never took action. Secondly, the 2 unnamed ladies who accompanied the minor and gave history of the examining physicians including the one who examined her dido not bother to identify themselves or testify.

51. The medical evidenceis otiose. It does not support the charge. The same indicates the injuries were healed. They were 4 months old injuries. To create more doubt the "Doctor(s)" who filled the documents did not sum up. The examination record for VDRL HIV among others, were on the Malindi sub county hospital as serialized.

52. The treatment chit are in an exercise nook and are dubious at worst and clearly bogus. The source cannot be authenticated. The only person who attempted to tender medical evidence was Abdullahi. He had no connection to the examination of the minor.

53. There is no medical evidence to connect the appellant to the offence. The offence timelines are also off. The P3 shows injury 4 months before actual offence. It is a matter of biology that an 11-year old, who will require rubbing of oil, will not be in the medical condition described in the P3 if the offence occurred. There is actual and real doubt on the occurrence. There is a the defence that the appellant was fixed by the in laws was not farfetched. The defence was not shaken on cross examination.

54. Indeed, PW4 confirmed that the appellant came with us in laws. If could be that the battle for the children's soul with the in laws took a turn for the worse.

55. I find the convictions unsafe and consequently set the same aside. Before I depart, I note that the court sentenced the appellant who was over 50 years. There is latitude in sentencing but in this case, the court ignored the mitigation and meted out a sentence which was excessive.

56. Had the appellant been guilty a sentence of 20 years could have sufficed given his age and the relationship of the other 5 children. The court went overboard in a bid to exert herself and as a result

fettered her discretion. I could have otherwise reduced the sentence to 20 years from the time of arrest on 4/3/2022. This is in line with the decision in *Hillary Munene Moses v Republic* [2020] eKLR, where the court stated as doth: -

> " 41. This court reiterates the fact that the sentence must in the end depend upon the particular facts and circumstance of that case; there is no doubt that the trial courts hands were not tied by Section 8(3) which sets out the mandatory sentence of twenty (20) years imprisonment; this court notes that the trial court invited the appellant's counsel to mitigate on behalf of the appellant; and that the trial court was able to exercise its discretion and thereby accorded a justifiable sentence to the appellant, who was a first offender;"

57. In the end the conviction is unsafe. I therefore set aside the conviction and sentence and set the Appellant free unless otherwise lawfully held.

58. However, the medical evidence does not support the charge. The charge related to an offence single day. However, some witnesses tried to indicate it to be habitual. The P3 however showed the alleged injuries was 4 months earlier. The charge is unsupported.

59. The evidence of the witnesses was doubtful. Medical evidence was bogus. The doctor who allegedly signed the medical documents did not cone to testify. The testimony of the Clinical officer did not meet the tenets of section 33 of the *evidence act*. It provides as doth: -

> " Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
>
> (b) ----made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

60. The treating and examining doctor was clearly available. For reasons known only to the prosecution he or she chose not to testify. The clinical officer who testified did not illuminate any of the queries in the evidence. Unfortunately, everyone in the chain, whoever handled the minors did not want to testify. I am alive to the fact, that there is no need of plurality of witnesses to proof a fact. However, where a witness who is available but is not called, not just one but three witnesses, there is a possibility, that had those witnesses being called, their evidence will have been adverse to the prosecution.

61. In *Suleiman Otieno Aziz v Republic* [2017] eKLR, the court of Appeal, Nambuye, Kiage, & M'inoti, JJ.A., posited as doth: -

> " First, under section 143 of the *Evidence Act*, in the absence of a provision of law requiring a specific number of witnesses, no particular number is required to prove any fact. Secondly, as propounded in *Bukenya v. Uganda* [1972] EA 549, the proposition that the court may draw

an adverse inference from the prosecution's failure to call important and readily available witnesses arises in cases where the evidence called by the prosecution is barely adequate. In *Donald Majiwa Achilwa & 2 Others v. Republic*, Cr. App. No 34 of 2006, this Court explained the position thus:

> "The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case."

62. It is doubtful that the events occurred as narrated. The court did not record on her finding or reasons for finding that the prosecution's evidence was truthful and corroborated. The fact that is his in-laws that went to the police station, only to have the Appellant arrested reeks of mischief. It does not appear that the Appellant ever doubted the animus of the in-laws.

63. The gaps in the medical record and the bogus medical chit or book gives rise to serious doubt. The resulting doubt is given to the Appellant.

Determination

64. Having evaluated the evidence, I find the conviction unsafe. I have no doubt that had cogent evidence been found, they could have been a proper case to serve 20 years.

65. Consequently, I set aside the conviction and sentence of 50 years. In lieu thereof I set the Appellant free unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 30TH DAY OF OCTOBER, 2023.

KIZITO MAGARE

JUDGE

In the presence of: -

PC John Charo

JWM - Accused

Ms Mutua for the ODPP

Court Assistant - Brian