Ondari v Republic (Criminal Appeal E047 of 2024)
[2025] KEHC 6937 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6937 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E047 OF 2024

CW MEOLI, J

MAY 22, 2025

BETWEEN

JOHN ONDARI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against Conviction and Sentence in Loitokitok Sexual Offences Case No. E011 of 2022)

JUDGMENT

1. The Appellant, John Ondari, was charged in the main count with Defilement contrary to section 8 (1) as read together with section 8(3) of the *Sexual Offences Act*. The particulars being that on 5th March, 2022 at Loitokitok sub-county within Kajiado County, he intentionally caused his penis to penetrate the vagina of E.S a child aged 14 years.

2. In the alternative, the Appellant was charged with Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that on 5TH March, 2022 at Loitokitok sub-county within Kajiado County, he intentionally touched the vagina of E.S, a child aged 14 years

3. He pleaded not guilty to the charges. Following a full trial, he was found guilty and convicted on the main charge and thereafter sentenced to serve 15 years imprisonment.

4. Aggrieved with the outcome, the Appellant preferred the present appeal by his Petition of Appeal dated 10th November, 2023, raising the following grounds:

    a. That the subordinate court erred in law by convicting on the basis of a defective charge sheet.

    b. That the lower court failed to appreciate that the evidence of pw1 and pw5 was not credible and ought to have been disregarded.

c. That the subordinate court failed to appreciate the fact that being found in a room perse was not a criminal offence.

d. That the circumstantial evidence was of the weakest nature and what remained was suspicion and suspicion can never be a basis of conviction.

e. That the subordinate court failed to appreciate the fact that the hymen can be broken by bicycle riding or horse riding.

f. That the charges were never proved beyond reasonable doubt as required by law as critical witnesses never testified.

g. That the Appellant gave a plausible defense that was believable and ought to have been taken into account.

h. That the court erred in law by shifting the burden of proof to the Appellant contrary to well settled common law principles.

i. That the trial court erred by failing to resolve the material contradiction and inconsistencies in favor of the Appellant.

j. That the trial court erred in law by failing to appreciate that evidence of pw1, pw2 and pw4 required corroboration hence it could not corroborate.

k. That the trial court misdirected itself ad applied wrong principles to the prejudice of the Appellant.

l. That the subordinate court erred in law and fact by failing to appreciate that no CCTV video was produced showing the room where the Appellant was arrested.

m. That the subordinate court failed to appreciate that there was no tangible evidence in terms of receipts and room number of the alleged hotel (place) where the Appellant was arrested.

n. That the trial court failed to appreciate that there was no scene of crime officers to take any photos or fingers-dusting of the Appellant and the nexus with the complainant and the attire or clothes recovered.

o. That the trial court failed to appreciate that there was no call data produced to show that pw1, pw2 and pw6 (Joan Naserian) were communicating about the Appellant.

p. That the trial court failed to appreciate the doctor's testimony that there was no intercourse between the Appellant and pw1(complainant).

q. That the trial court failed to appreciate the evidence of Joan Naserian was not credible.

r. That the trial court failed to appreciate that there was no call data brought before court between pw2 and the owner of the apartment.

s. That Joan's evidence required corroboration, but her evidence was not corroborated.

t. That there was no proper identification between what Joan Naserian said and pw2 about the attire or clothes that the Appellant was wearing on the material day which was highly prejudicial.

u. That the lower court failed to resolve material contradictions and inconsistencies between pw1, pw2, pw3 and pw7 who never produced the condom they alluded to the prejudice of the Appellant.

Appellant's submissions.

5. The Appeal was canvassed through written submissions. The Appellant by his undated submissions raised five issues for determination as follows;

   i. Whether his rights under Article 49 of *the Constitution* were upheld during trial?

   ii. Whether the learned trial court afforded him a fair hearing per Article 50?

   iii. Whether the evidence by the prosecution was sufficient to secure his conviction?

   iv. Whether the court considered his defence?

   v. Whether the sentence was appropriate?

6. Citing Article 49(h) of *the Constitution* on the accused's right to bail unless there were compelling reasons, he stated that the duty to prove such compelling reasons lay with the prosecution. He asserted that at his arraignment on 11th March 2022, the prosecution was not opposed to his release on bail and bond. However, subsequently on 6th April 2022 the prosecution changed their position on account of the adverse pre-bail and children officer's reports presented. He contended that the grounds advanced by the prosecution did not amount to compelling reasons justifying denial of bail.

7. Recounting events in the lower court proceedings, he stated that although he was eventually granted bail on 5th July, 2022, his proffered surety was not processed by the court and that cash bail deposited by the said surety was refunded without any reasons. And that his further request on 2nd November, 2022 regarding release on bond was rejected by the court, citing the advanced stage of trial. Asserting therefore that the denial of bail by the court amounted to arbitrary deprivation of liberty and pre-conviction punishment and hence a violation of his presumption of innocence as guaranteed under Article 50 of *the Constitution*.

8. In support of this position, he relied on the Court of Appeal decision in Michael Juma Oyamo & another -vs- Republic [2019] eKLR adopting the definition of the phrase "compelling reasons" in R-vs- Joktan Malende and 3 others Criminal case No 55 of 2009 as follows :-

   > " ...the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by *the Constitution*."

9. On the second issue the Appellant argued that his right to a fair hearing under Article 50(2)(g) of *the Constitution* was violated. Asserting that given the nature of the charge facing him and likely penalty, the court ought to have ensured his rights were observed during the trial. And stating that the court did not determine whether an advocate should be appointed for him at the state's expenses. Here citing the case of Republic -Vs- Karisa Chengo & 2 others [2017] eKLR.

10. On the third issue, the Appellant reiterated elements to be proved in a charge of defilement, namely, age of the victim; penetration; and positive identification of the perpetrator. Concerning the age of the victim, the Appellant argued that the Respondent relied on a copy of a birth certificate, rather than primary evidence as required by section 67 of the *Evidence Act*, and without bringing the case within

the exceptions in section 68 of the *Evidence Act*. And despite the fact that the original birth certificate was said to be in the possession of the victim's grandmother, hence readily available. He stated that his failure to raise an objection at the time it did not release the prosecution from performing their duty. In the circumstances, he submitted, that the age of the complainant was not sufficiently proved, relying on the case of Republic -vs- Francis Chahonyo & 3 others [2020] eKLR.

11. Concerning penetration, it was pointed out that the testimony by PW3 was that she removed her dress, and that the Appellant came on top of her having worn a condom and they had sex. He stated that the minor did not describe the act of penetration, hence penetration was not proved. For this proposition, the Appellant cited several authorities including the High Court decision in Stephen Mugambi Wangechi -vs- R (2023) KEHC 22361 (KLR).

12. Also cited in this regard was the Court of Appeal holding in Hamisi Bakari & another -vs- Republic [1987]eKLR that, "We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence and is properly proved."

13. It was asserted further that the medical evidence adduced by PW6 did not corroborate the testimony of PW3, the former having stated that the latter had had previous sexual intercourse in 2020. It is the Appellant's case therefore that her hymen could have been broken then and not during the alleged incidence in March, 2022. That evidence in the P3 and PRC forms did not corroborate the evidence of PW3 and the trial court erred in relying on it concerning penetration. He relied on the case of Julius Kioko Kivuva -vs- Republic [2015] eKLR.

14. The Appellant further complained that the trial court did not consider his defence. Reiterating the substance of his defence at the trial and especially the circumstances of his arrest, he asserted that it created doubt concerning the identity of the man who was in the lodging with PW3. He argued that the trial court failed to consider his defence and to analyze it as they did the prosecution case. Here citing the case of Mohamed Noor Ali & another-vs- Republic [2017] eKLR.

15. Finally, it was submitted that the sentence imposed by the trial court was excessive and harsh and ought to be set aside.

Respondent's submissions.

16. The Respondent submissions dated 1st April, 2025 were riveted on the three key elements of the offence of defilement, namely, penetration, age of the minor and identification of the accused.

17. On the question of age of the victim, the Respondent stated that this element was proved by the production of the birth certificate showing she was born on 5th June, 2008 and was 13 years old at the time of the defilement. The Court of Appeal decision in Hadson Ali Mwachongo -vs- R was cited for the holding that, " the importance of proof of age of a victim of defilement under the *sexual offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim."

18. On identification, the Respondent reiterated testimonies by PW1 to PW5 who had all seen and identified the suspect and were able to recognize him at the trial.

19. On penetration, the Respondent submitted that PW3 gave a detailed account of her interactions with the Appellant leading to the defilement. That the accounts of PW1 to PW5 placed the Appellant at the scene of crime where he was arrested in the room together with PW3, and reiterating evidence by PW1 to PW8 placing the Appellant at the scene of crime.

20. Further that, the trial court considered the Appellant's defence and found that it was displaced by the strong evidence adduced by the prosecution, proving all the ingredients of the charge of defilement. The court was therefore urged to uphold both the conviction and sentence and to dismiss the appeal.

21. Regarding other grounds of appeal, the Respondent submitted that the right to bail is not absolute and where there compelling reasons existed, bail could be denied.

22. On the infringement of the right to representation it was argued that *the Constitution* was available to the Appellant who was a teacher, and that he had not demonstrated that the prosecution in any way prevented him from securing representation or that he suffered any prejudice as a result of acting in person. Moreover, a perusal of the trial proceedings clearly showed that he was actively involved in cross examination of witnesses and in advancing his defence. A demonstration of his awareness of the kind of charges facing him.

23. Concerning alleged contradictions in the evidence of PW1 and PW2, it was asserted that these were minor and did not affect the credibility of the witnesses. Reliance being placed on the case of MTG -VS- Republic (2022) KEHC 189(KLR).

24. In conclusion the Respondent submitted that the conviction was based on credible evidence by which the prosecution proved all the elements of the offence. And that while the Appellant was placed at the scene of crime, he was not caught in the act by any of the witnesses who testified during trial. Besides, under section 24 of the *Evidence Act*, it is safe for the trial court to convict based on the evidence of the minor victim regarding penetration as the victim was a minor. It was submitted in the alternative that, should the court allow the appeal on conviction on the main count, the Appellant should be convicted on the alternative count.

Analysis and Determination.

25. As the first appellate court, this court is required to re-evaluate the evidence adduced before the trial court with a view to arriving at its own conclusions. The duty of the first appellate court was spelt out in the case of Okeno vs. Republic [1972] EA 32, as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. R. [1957] E.A. 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs. R., [1957] E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post, [1958] E.A. 424".

26. Similarly, in the case of David Njuguna Wairimu vs. Republic [2010] eKLR the Court of Appeal reiterated that: " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

27. But first, regarding the Appellant's complaints of infringement of his constitutional rights under Article 49 and Article 50 relating to bail/bond and legal representation during the trial, these matters were not raised in his grounds of appeal and in any event, he has not demonstrated how these alleged infringements prejudiced him at the trial. Looking at the record of proceedings, the Appellant actively participated at the trial by cross-examining the prosecution witnesses in addition to raising lengthy robust defence and submissions. That said, the court will confine itself to the grounds of the appeal challenging his conviction for the offence of defilement.

28. Three key elements, namely, the age of the victim, penetration and identity of the perpetrator must be proved beyond reasonable doubt for the prosecution to succeed in an offence of defilement. The prosecution bears the burden of proof beyond reasonable doubt. This burden of proof never shifts to an accused person.

29. The Appellant's lengthy grounds of appeal and submissions coalesce around his challenge to the sufficiency of prosecution evidence due in part to asserted material contradictions and inconsistencies and want of corroboration inter alia, and his complaint that the trial court failed to consider his defence.

30. The court has reviewed the entire record of the trial. The prosecution case through eight witnesses was as follows. C.P, the grandmother of E.S, the minor (PW3), testifying as PW1 told the court that on 5th March, 2022 she received a call from a friend, Joan Naserian (PW5) who informed her that she had seen the minor at a lodging called Josmart building in the company of the Appellant. PW1 boarded a motorcycle taxi, commonly known as boda boda to the said place to confirm the report. At the said lodging, she told the attendant that she was looking for a schoolgirl who was in the company of the Appellant. She insisted on being shown the room in which the said persons were, and with the help of her nephew S.O.S (PW2) who was with her, rang the owner of the hotel, whereupon they were shown the room.

31. In the company of PW2, PW1 proceeded to the room and persistently knocked on the door until the Appellant opened it after some delay. PW2 entered the room ahead of her with herself in tow. They saw PW3, who appeared in shock standing against the wall while the Appellant was seated on a stool next to the bed. Leaving PW2 standing guard in the room, PW1 went to call the police who accompanied her back to the place. The party thereafter left for the police station.

32. According to PW2, he received a call from PW1 informing him that PW3 had been seen at Josmart building and asking him whether he knew the owner of the building. He testified that he accompanied PW1 to the building and that they were pointed to the room where the Appellant was lodging. That they knocked, and after some delay, the door was opened by the Appellant. That he was the first to enter the room and found PW3 standing and leaning by the wall. He stated that the Appellant began asking them for forgiveness.

33. PW3 herself testified under oath after the trial magistrate satisfied herself that the minor understood the nature of oath. To the effect that the Appellant was her teacher at T. school. She stated that when she moved to class 7 the Appellant became friendly towards her, and soon the two became close and developed a relationship. She stated that the Appellant adamantly propositioned her and confessing his feelings for her, and despite her response that that girls should be taken slowly. She stated that on the material Saturday she met the accused at a shop, and that he asked her to follow him which she did, and he led her into a lodging room number 108.

34. That while there, the Appellant locked the door, proceeded to undress and get into bed and cover himself while inviting her into bed while confessing his love for her. That presently, the Appellant asked her to remove her dress which she did, after which the accused lay on top of her and had sex with her

while wearing a condom. She stated that some ten minutes after he had sex with her once, there was a knock at the door, and she heard a voice asking them to open as there was a schoolgirl inside. That after about five minutes when the door was opened, PW1 and PW2 walked in. That PW1 thereafter left to report the matter to the police, and eventually, she and the Appellant were taken to the police station and thereafter to the hospital.

35. Irene Njoki (PW4), an attendant at Josmart building stated that on 5th March, 2022 at 1pm she rented out a room to the Appellant after he paid Kshs. 500/-. She stated that she assigned him room no. 108 and that as she did so, she did not see anyone accompanying him. Later however, a lady came to enquire if she had seen a young girl enter the rooms. She told her that she had only given out the room to a young man. Stating further that she personally opened the room for the Appellant and then left. As the lady became persistent, PW4 consulted her employer who instructed her to have the room in question opened.

36. Joan Naserian testified as PW5. To the effect that on the material date, at around 3pm she was at the corridor of Josmart building when she saw PW3 whom she knew and who was behaving in a suspicious manner. As her offices are located on the ground floor of the said building, she said she saw PW3 on the 1st floor and moving towards the rooms, which is the same direction taken soon after by the Appellant from the reception area. Being a friend to PW1, she notified her about her observations. She stated that it was her first time seeing the Appellant around Josmart building.

37. Simon Lesinet (PW6) the clinical officer testified that he was based at the Loitokitok sub-county hospital and attended to the complainant at the hospital on 5th March, 2022 at 7:30pm, however carried out an examination on the minor five days later on 9th March, 2022. He stated that the vaginal examination revealed a foul-smelling whitish discharge and that she had a broken hymen, although there were no physical injuries. He stated that the examination of the vaginal swab showed numerous bacterial cells but no sperm cells. He produced the PRC Form as P. Exh.1 and the P3 form as P. Exh.2.

38. During cross examination he stated that there was a possibility that the white discharge was probably caused by bacterial cells. That the complainant was not a virgin at the time of the incident, and that his examination, and laboratory results, did not connect the Appellant and PW3 as regards the offence charged.

39. PCW Mary Ndirangu (PW7) investigated the matter. She produced a copy of the birth certificate relating to PW3 as P. Exh3.

40. PW8 was PC Mwamleu Mzungu of Loitokitok Police Station, who with others, including Cpl. Diana, having received the complaint by PW1 on 5th March 2022 proceeded to the lodging at Josmart Building. Finding the Appellant and PW3 in a room seated on the bed, they arrested the Appellant and escorted him to Loitokitok Police Station and later to the hospital alongside the minor PW3. He testified that it was his colleague Cpl. Diana who had informed him of the complaint and that he accompanied Cpl. Diana and Cpl. Mwambili to the lodging at Josmart building.

41. Upon being placed on his defence, the Appellant elected to make an unsworn statement and did not call a witness. His testimony was that on 5th March, 2022 he left Kilombero which is close to the Tanzania border for Loitokitok town after a soccer game. On arrival at Loitokitok town, he proceeded to Decapoli cybercafé and later Jubilee cybercafe, intending to print his Teacher Service Commission (TSC) number. That while at the latter cybercafe, he was approached by a man who asked him who John Ondari was, and upon confirming that he was the said person, the man claimed that the Appellant had been seen entering the cybercafe in the company of a girl. The Appellant disputed the assertion and proceeded with his business, but soon after, the same man returned accompanied by a woman and

a man and that the Appellant was handcuffed and taken to a police vehicle, where a girl whose head was covered sat in the front seat. He stated that later he was taken to Loitokitok sub-county hospital for examination together with the girl.

42. The court has, as obligated to do on a first appeal, reviewed the record of the trial court. The main elements of the offense of defilement are the age of the victim; penetration and; identity of the accused as the perpetrator. See Lekisei v Republic (2024) KECA 1091(KLR).

43. Regarding the age of the victim, PW3 testified to have been born in May 2008 while a copy of her birth certificate produced as P. Exh.3 showed that she was born on 5th June 2008, which means that she was aged 14 years at the material time, hence a minor. The Appellant took issue with the production of the certified copy of the birth certificate on the basis that it did not comprise primary evidence as envisaged in Section 67 of the *Evidence Act*. The record shows that the Appellant did not object to its production during the trial.

44. This notwithstanding, Section 64 of the *Evidence Act* provides that the contents of documents may be proved either by primary or secondary evidence. Section 66 defines what constitutes secondary evidence while Section 67 states that documents must be proved by primary evidence save in exceptions found in Section 68. The court agrees with the Appellant in this instance that no basis was laid for the production of the copy of the birth certificate in proof of the minor's age, despite PW7 asserting that the original birth certificate was with the minor's grandmother (PW1).

45. Having said that, there was oral evidence by PW1 and PW3 that the latter was aged 13 years at the material time, and that the minor had been left in the former's custody after PW3's parents separated, with her mother relocating to Meru. It is clear from the evidence of the two that PW3 lived with, and took over responsibility for the care of PW1, as evidenced by her described actions in the material period. In the circumstances, it is reasonable to believe that PW1 as the guardian of the minor knew the age of the minor. In addition, the trial court having conducted the voire dire examination of the minor appeared satisfied that she was sufficiently intelligent to understand the meaning of the oath and subsequently received her sworn testimony.

46. Moreover, there was further evidence in the PRC Form (P. Exh.1) and P3 Form (P. Exh.2), both prepared, and produced by PW6 during the trial, showing that the apparent age of the minor at the time of examination on 9.03.2022 was 14 years. This evidence was not seriously challenged by the Appellant during the testimony of PW6.

47. In Mwalongo Chichoro Mwanyembe -vs- Republic, Mombasa Criminal Appeal No. 24 of 2015) (UR) cited in the case of Edwin Nyambaso Onsongo -vs- Republic (2016) eKLR, the Court of Appeal stated:

> " ... 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 presented in proof of the victim's age, it has to be credible and reliable".

48. This Court therefore is therefore satisfied that even excluding the birth certificate copy, the prosecution tendered credible and reliable proof that the age of the minor at the material date was 14 years.

49. On the issue of identification of the Appellant, there was evidence, firstly, by PW4 of the renting of and presence of the Appellant at the lodging room no. 108 on the material date and time; by PW3 who asserted being with the Appellant and who remained in the room until the arrival of PW1 and

PW2 who both stated that they found the Appellant and PW3 in room no. 108; and by PW8 who said he arrested the Appellant from the said room. PW5 said she had earlier seen the Appellant proceed towards the direction of the lodging rooms and motioning the minor PW3 to follow him there. She then called PW1 who came to the scene with PW2.

50. The incident occurred during the day, and it would appear that save for PW3 who identified the Appellant as her teacher, the other witnesses were strangers to the Appellant, without any apparent reason to give false testimony against him. PW4 was performing her ordinary duties renting rooms to lodgers and when confronted by PW1 and PW2 led them to the room which was locked, and in which the latter witnesses found the Appellant with PW3. As PW1 later left to call police, PW2 remained behind to stand guard. PW8 said he found both the Appellant and PW3 in the said room upon his arrival with PW1.

51. The Appellant's claim in his defence that he was at a cybercafe (rather than in the room) when first confronted by a man, whom he neither named nor identified, and his subsequent arrest by police (PW8) was not put to any of the prosecution witnesses, who said they found the Appellant in a room with the minor at Josmart building at the material time, during their cross-examination. Indeed, the Appellant did not challenge by way of cross-examination or his defence, evidence by PW3 that he was her teacher at T. school and that prior to the material date, the Appellant had relentlessly seduced her, resulting in a relationship between them. Equally, his suggestion to PW1 that the prosecution witnesses were procured by the Appellant's alleged former lover, PW5 in order to settle scores was not put to PW5 herself during cross-examination.

52. In the court's view therefore the evidence of identification of the Appellant and his presence with PW3 at the lodging room, which was the scene of the offence, was solid, and displaced the Appellant's denials in that regard.

53. Concerning penetration, PW3 described the prior conduct of the Appellant, her teacher, in pursuit of a romantic relationship with her at school, which essentially grooming of the minor. And included open flattery in the classroom, and which resulted in such a "relationship" and the so-called date on the material date. She described meeting the Appellant in town and that the Appellant requested her to follow him to the room, which was rented to him earlier by PW4. She described in detail how, once inside the room the Appellant undressed and got into bed and persuaded her while confessing his love for her, to similarly undress and join him in bed before the Appellant, after telling her that he was wearing a condom, got on top of her and had sex with her once. However, after a while, there was a knock on the door, and eventually PW1 and PW2 entered the room. PW3 maintained this testimony during cross-examination.

54. The Appellant in his cross-examination and defence at the trial did not directly advert to the critical parts of the evidence of PW3 and contented himself with an alibi that he was at a cybercafe (and not with PW3 in the lodging room) at the time of arrest. However, in submissions before the trial court and on this appeal, he has submitted that penetration was not proved in light of the inconclusive testimony of PW6 the clinical officer.

55. The court noted that the said witness confirmed the absence of the hymen or any genital injuries upon examining PW3, and indicated that from the obstetric history, the minor had what he termed as consensual sexual intercourse in 2020; that no spermatozoa was detected from tests conducted; and that the minor had a whitish foul smelling discharge in her genitalia, probably caused by bacterial cells.

56. This may be so, but under the proviso to Section 124 of the *Evidence Act* the court may convict on the sole evidence of a victim of a sexual offence if satisfied that the victim is being truthful. The section 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 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 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."

57. In dealing with this aspect, the trial court stated inter alia that:

> "Besides the direct evidence adduced by the complainant, even where the court was to consider the totality of circumstantial evidence in this matter, it still remains a safe conclusion by the court that there was penetration. It is irrelevant that the said penetration had been consensual given the young age of the complainant and the power balance that exists between the fiduciary relationship that would exist between a teacher and their students (sic)"

58. The Appellant's submissions on this appeal appeared to suggest that without medical evidence, and especially of the breaching of the hymen, penetration was not proved, and more so because the minor only stated in relation to penetration that " we had sex," without indicating whether penetration was partial or complete. And at the same time highlighting the entry in the medical documents by PW6, which was never put to PW3 during cross-examination, that she had had supposedly consensual sex in 2020.

59. First, while the importance of medical evidence in a charge of this nature cannot be overstated, absence thereof does not necessarily defeat the prosecution case. More so where a victim gives credible evidence, supported by other surrounding evidence. That is the rationale behind the proviso to Section 124 of the *Evidence Act*. In addition, the fact that the minor may have previously engaged in sexual activity and loss of her virginity, itself if true, likely comprised an incident of defilement, and does not mean that she cannot be subsequently defiled again or that such defilement cannot be proved without the common telltale medical consequences such as the breach of the hymen or presence of spermatozoa. In this case, the absence of a hymen, genital injuries and spermatozoa may be explained by the fact that the minor had apparently had a previous sexual encounter in 2020 per her recorded medical history, and that the Appellant wore a condom during the incident in question.

60. Secondly, while it is important for the direct evidence by the victim or relevant witness, to describe what sex or penetration entailed, the victim here was a 14-year-old girl who from her testimony had already started her menses, and according to the medical entries highlighted by the Appellant, apparently had previous sexual experience. She was already in class seven at school and therefore would know the meaning of the term "had sex". On his part, the Appellant did not at the trial question what she meant by stating "we had sex".

61. PW3 in her testimony gave a detailed account of the Appellant's incessant wooing and grooming of the minor at school, eventual friendship and so-called date for which the Appellant had arranged for

intimate private time by hiring a lodging in advance from PW4. Once in the room, he undressed, got into bed, persuaded the minor to undress and join him in bed all the while professing his love for her, and then telling her that he was wearing a condom, got on top of her. PW3 said he then had sex with her once before the arrival of her guardian. What further details were needed to describe the act of penetration? None in my view. PW3 was not a child of tender years, such as would describe sex as "tabia mbaya" which in common parlance is a modest reference of sexual activity; PW3 described the act for what it was.

62. PW3's testimony that the Appellant had sex with her in the lodging was in the court's view not shaken at cross-examination and received ample corroboration through circumstantial evidence by PW1,2,4, 5 and 8. In that regard, the Appellant's defence was an oblique denial based on the allegation that police officers descended on him as he went about his business at the cybercafe, an allegation never put to any of the relevant witnesses. Indeed, despite the evidence by PW3 that she was his student, the Appellant in his defence contented himself by asserting the presence of a hooded girl at the time of his arrest, whom he never identified at the trial.

63. Based on the evidence of PW1,2,3,4,5 and 8, it is my considered view that the trial court was entitled under the proviso to section 124 of the *Evidence Act* to convict on the sole evidence of the minor upon being satisfied that she was a truthful witness and in view of the corroboration from the circumstantial evidence. And although these reasons were inelegantly stated in the caption of the trial court's judgment cited above, they satisfy the requirements of the proviso to Section 124 of the *Evidence Act*. This court cannot find any sound reason to fault the finding by the trial court regarding the element of penetration.

64. As regards the Appellant's complaint that his defence was not considered, the trial court laid out the same in detail before embarking on the analysis at the conclusion of which it made a finding that there was sufficient evidence to prove all the elements of the offence of defilement beyond reasonable doubt. While there may not have been detailed and express references to the Appellant's defence which combined some sort of last-minute alibi and what appear to be submissions, in the analysis, the trial court was alive to the burden placed on the prosecution to prove all elements of the offence beyond reasonable doubt. That alibi defence in any event was completely displaced by the prosecution evidence tendered.

65. In view of the foregoing, this court is satisfied that the main charge laid against the Appellant was established beyond reasonable doubt and that the appeal against conviction must fail and is hereby dismissed.

66. Regarding the sentence imposed, the Appellant complains that it is excessive, harsh, contrary to prevailing jurisprudence and therefore ought to be set aside. He did not cite any authorities in that regard. The Respondent did not address this issue either. However, the Appellant must have been adverting to the jurisprudence emanating from the decision of the Supreme Court in Francis Karioko Muruatetu and Others Versus Republic SC Petition No. 15 of 2015 (2017) eKLR whose rationale has hitherto been applied in many cases involving offences under the *Sexual Offences Act* . Including Christopher Ochieng Vs. Republic (2018) eKLR and Manyeso V. Republic CRA No. 12 of 2021 (2023) KECA 827 (KLR).

67. However, the Supreme Court has recently pronounced itself in Republic Vs. Mwangi and Others Petition No: E018 OF 2023 (2024) KESC 34 (KLR) as follows, with regard to sentences meted out under Section 8 of the *Sexual Offences Act*:

> " In any case, the sentence imposed by the trial court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with the sentence."

68. Further, in Republic Versus Evans Nyamari Ayako Petition No: E002 of 2024 the Supreme Court in its judgment delivered on 11th April 2024 stated that:

> "
>
> " (51) In the instant case, the Court of Appeal in its judgment, referred to the case of Manyeso Vs. Republic case where a different bench of the Court of Appeal cited the Muruatetu I case in stating that the rationale therein applied mutatis mutandis to the issue of mandatory indeterminate life sentence.
>
> In Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the *Penal Code*. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence." (emphasis added).

69. In the circumstances, this court lacks the jurisdiction to reduce the sentence of fifteen years imposed by the trial court and the appeal against sentence must fail.

70. However, based on the provisions of Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act*, and flowing from the recent decisions of the Supreme Court thereon, the lawful minimum sentence for the offence for which the Appellant was convicted remains 20 (twenty) years imprisonment, and not 15 (fifteen) years imprisonment as awarded by the trial court. This Court will therefore set aside the illegal sentence of fifteen years imprisonment imposed by the trial court and substitute therefor a sentence of 20 years imprisonment. The record shows that since his arrest on 11.03.2022, the Appellant remained in custody throughout his trial. Therefore, the substituted sentence of twenty years imprisonment will be reckoned from the date of his arrest on 05.03.2022. In the result, the appeal has failed in its entirety and is hereby dismissed.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 22ND DAY OF MAY 2025.

C.MEOLI

JUDGE

In the presence of:

Appellant

For the State: Mr. Kilunda

Court Assistant: Lepatei