Koech v Republic (Criminal Appeal E053 of 2024)
[2025] KEHC 9785 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9785 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E053 OF 2024

JRA WANANDA, J

JULY 4, 2025

BETWEEN

TONY KIPTANUI KOECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Judgment of Hon. V. Karanja-PM, delivered on 26/09/2024 in Iten Senior Principal Magistrate's Court Criminal - Sexual Offences – Case No. E010 of 2024)

JUDGMENT

1. The Appellant was charged in the said criminal case with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on 4/02/2024 at around 1630 hours at [Particulars Withheld], Kapkoi sub-location, Mutei Location, in Keiyo North sub-County, within Elgeyo Marakwet County, he intentionally and unlawfully caused his penis to penetrate the vagina of GJ, a child aged 9 years old. The Appellant was also charged with the alternative offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were on the same date, time and place, he intentionally and unlawfully touched the vagina of the same child aged 9 years with his penis.

2. The Appellant pleaded not guilty to the charges and the case proceeded to full trial in which he was represented by Mrs. OrinaAdvocate, and in which the Prosecution called 6 witnesses. At the close of the Prosecution case, the Court found the Appellant as having a case to answer and placed him on his defence. The Appellant then gave a sworn statement, was cross-examined, and called 3 witnesses. By the Judgment delivered on 26/09/2024, he was convicted on the main charge, and sentenced to 50 years' imprisonment.

3. Dissatisfied with the Judgment, the Appellant through the firm of Messrs Manyoni Orina & Co. Advocates, filed this Appeal by way of the Petition of Appeal dated 08/10/2024, which I must say, is

actually more of final written Submissions that what the law recognizes as a Petition of Appeal. Be that as it may, the grounds preferred are as follows:

i. That the learned Honourable Magistrate erred in law and fact by failing to subject the entire evidence tendered in the course of the hearing to an exhaustive scrutiny and therefore arriving at a verdict that was manifestly unsafe.

ii. That the learned Magistrate erred in law and in fact by failing to find that the identification of the Appellant was not proper as the complainant was grabbed from behind by an unknown person who defiled her from her anus while she facing down and he warned her not to look at her which she obeyed, that there was therefore little or no chance of the complainant seeing her perpetrator as per her statement and testimony. The Prosecution failed to place the Appellant at the scene of crime even by means of phone technology. Identification was therefore not subjected to scrutiny and validation on the accepted standards to warrant a conviction on the part of the Appellant

iii. That the learned trial Magistrate erred both in law and fact in finding that the identification parade was properly conducted and relying on the same when in fact it was flawed, irregular and did not adhere to the rules of the parade for a witness to make any significant identification. That the complainant PW1 was coached and shown clothes and photographs of the Appellant before the parade to enable her pick on him.

iv. That the Honourable Magistrate faulted in law and fact by convicting the Appellant on evidence that was very incredible as the charges against the Appellant were not adequately proved to point to his guilt thus rendering prejudice. The Honourable Court relied on extraneous opinion as to the manner the sexual offence occurred despite the clear explanation by the complainant PW1 that she was actually sodomised.

v. That the Honourable Magistrate erred in law and in fact by finding that the complainant had earlier on met the Appellant before the alleged act, when the same was an afterthought and false, not being in any of the Prosecution witness statements, an indication that the Appellant was framed and implicated for a crime he did not commit.

vi. That the Learned Honorable Magistrate erred in Law and fact by failing to have regard to the act of material contradictions of evidence during the entire Court proceeding, especially the act that the complainant testified having been defiled from her anus and the evidence that was led by the prosecution was that of vaginal penetration, which pointed to the fact that the case was not proved to the required evidence.

vii. That the learned Magistrate erred in law and fact by failing to take judicial notice that the appellant was a very tall man above 6 inches feet and the perpetrator was a man of short stature as explained by the complainant, being her only recollection if any of her perpetrator - as documented in the medical records produced by the prosecution.

viii. That the Learned Magistrate erred both in law and fact by convicting the Appellant on the basis of the evidence of a single minor complainant which was materially inconsistent, made up and was basically afterthoughts which did not constitute her statement and was not corroborated even by medical evidence such as DNA sample matches to link the appellant to the said crime and therefore fatally insufficient to constitute a safe conviction,

ix. That the Learned Honorable Magistrate erred in Law and fact by failing to properly evaluate the evidence by the defence, including his alibi evidence whereby he called two witnesses who

were with him at the alleged time of crime. The defence witnesses together with the appellants written submission were disregarded and not taken into account at all.

4. At this point, I am obligated to comment that the Court of Appeal has on several occasions reminded litigants that this practice of filing unnecessarily verbose and argumentative Memoranda or Petitions of Appeal is wrong and unnecessary. Lengthy and verbose pleadings, are not only irritating but also many a time end up containing duplication and repetition and rarely adds any value to the content thereof There are for instance, the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR, the case of William Koross v. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, the case of Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR, and also the case of case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR.

5. The 9 verbose grounds cited above can, in fact, be simply all summarized into one brief ground, namely, "whether the Prosecution proved its case beyond reasonable doubt"

6. Be that as it may, Counsel for the Appellant further filed the Supplementary Petition of Appeal dated 12/11/2024, although I cannot find evidence that she sought and/or obtained leave to do so. The two additional grounds cited are the following;

    i. That the learned Honourable Magistrate erred in law by recording some parts of the proceedings narrative that are different from the actual testimony given in Court.

    ii. That the learned Magistrate failed to have regard to the witness testimonies as narrated during the hearing of the trial before her and drew conclusions and formed opinions without properly analysing the evidence given.

Prosecution evidence at the trial Court

7. PW1 was the minor. The Court conducted a voire dire examination and concluded that the minor understood the meaning of an oath, and thus allowed her to give sworn evidence.

8. The minor then testified that she was 9 years old Grade 4 pupil and referred to her Certificate of Birth, which indicated that she was born on 02/07/2014. She stated that on 04/04/2024 at around 4.30 pm – 5.00 pm, she had gone to the forest to fetch firewood and on her way back, she met "Tony" (the Appellant) who told her that he had lost his house keys, but who then sneaked through the "back door" and dragged her to the forest while threatening to kill her and covered her mouth. She stated that the Appellant asked her whether "she had ever done it" and then took away her phone. She testified further that the Appellant then put his 'dudu' in her anus and made her lie down on her back, that she was wearing a pink skirt and a biker which he removed and he threatened her when she tried to pull them up. She testified that the act lasted between 4.29 pm and 4.30 pm as she checked in the phone, that she felt a lot of pain and asked him to stop but he refused, that when she went home, she told her mother what had happened and she was taken to the hospital and treated at Kapteren.

9. She testified that the Appellant was a customer at their shop and that it was her second time seeing him. She also identified in Court, the clothes that she was wearing on the said date, namely, a skirt, biker and pants. Under cross-examination by Mrs. Orina, the defence Counsel, the minor stated that their shop sells "KDF", kangumu, sweets, sugar and biscuits. She also stated that she had not met the Appellant before the incident and she did not know him before then. She described the assailant as brown, tall and not fat, and that he was wearing a black trouser. She stated further that the assailant (Appellant) threated to kill her if she turned to face him and thus, she did not do so but she saw his face when he was leaving. She stated further that she was taken to the police station where she narrated the incident,

and that she identified the Appellant in a line of many people. She also stated that she did not know his name before the incident and only learnt of the same at the police station.

10. She stated further that the Chief brought the old black jacket and trousers that the Appellant was wearing on the said date, which she identified at the police station. She stated that there were 6 people at the parade at the police station and none of them was wearing the old black jacket. She then agreed that her statement indicates that "an unknown person" grabbed her from the back.

11. PW2 was AJ, who stated that she is the minor's grandmother. She testified that the minor was born on 04/02/2024 and she, too, referred to the Certificate of Birth. She stated that on 4/02/2024, at 4.30 pm, she sent the minor to go and fetch firewood but shortly afterwards, the minor came back crying, and that she was with her in-law and the minor told them that she had been grabbed by someone, pointing at her vagina. She stated that upon checking the minor's private parts, she noted the presence of bloodstains on her clothes and they concluded that she had been defiled, that they rushed her to the hospital and later, she described the person who had defiled her as he was unknown to her. She testified further that the clothes were taken by police officers and they were issued with treatment notes, P3 Form, PRC Form and Laboratory Report which she then identified. She testified that the Appellant was arrested during an identification parade, that she did not know his name but that he was a customer at her shop. In cross-examination, she stated that they did not know the Appellant but stated that "he normally walks around the village" and that the Chief identified the Appellant and the villagers were also involved. According to her, the minor was penetrated in the vagina as she opened the minor's legs and saw it. She stated that the Appellant comes from Kapkoi area and that it is the Chief who brought him to the station

12. PW3 was TC who stated that on 4/02/2024 around 4.30 pm – 5.00 pm, she had gone to visit PW2, her in-law, who then sent the minor to fetch sheep from the forest but who came back shortly, crying that she had been beaten by an unknown person. She stated that the minor lay down and they checked her private parts and noted that her clothes had stains, that they rushed her to the hospital and the doctor confirmed that she had been defiled, upon which they went to the station and reported the matter. She testified that after 4 days, PW2 informed her that the perpetrator had been arrested and they went to the police station where the minor identified the assailant (Appellant) during an identification parade. She then identified the Appellant in the dock and stated that she did not know him before the parade. In cross-examination, she insisted that the defilement was in the minor's vagina and that she did not know how the Appellant was arrested.

13. PW4 was Philemon Kittony, a clinical officer. He stated that the minor, aged 9 years old, went to the facility on 5/02/2024 with a history of defilement. She testified that the minor's inner clothes were soaked in blood, that on examination, she established that the minor's labia majora and minora were bruised, the hymen membrane was torn, the vagina wall had a tear at 8.00, 9.00 o'clock description, and that she had a bruise on the vestibular. She testified further that the bleeding had stopped, and that the injures had occurred less than 72 hours before. She stated further that the date of the incident was reported as 4/02/2024 at 4.30 pm, and that the laboratory results revealed the presence of a few epithelial cells. She then testified that she made the conclusion that there had been recent vaginal penetration, and she then produced the laboratory results, and the PRC and P3 Forms. In cross-examination, she stated that no DNA test was conducted, that it is the tear within the vaginal wall that caused the bleeding, and that the anus was intact as noted in her Report that "NAD (nothing abnormal detected). She thus reiterated that there was only recent vaginal penetration. She also stated that the Appellant was not produced at the facility for examination.

14. PW5 was Police Officer Elias Kiptoo who testified that he conducted an identification parade on 07/02/2024, that the victim was 9 years old and the accused (Appellant) was one "Tony". He stated that

he was the OCS Iten at that time, that he arranged 8 men similar to the Appellant whom he notified of the purpose of the parade, and that he brought the minor who then pointed out the Appellant. He testified that the Appellant stated that he was comfortable in the position that he was standing. He stated that he conducted the parade a second time and told the Appellant to change clothes and position, and the minor again identified the Appellant. He stated further that he conducted the parade a third time, this time the Appellant wore his initial clothes and position and yet again, the minor pointed him out. PW5 then identified the Appellant in Court and also produced the identification parade Report (Form 156). In cross-examination, he stated that he is a Chief Inspector, and that the Appellant was brought to the station by members of the public. He stated that he instructed the Investigating Officer to look for 7 people of similar age, height and skin colour, that the Appellant is brown and 5'8 in height, that it was a closed room and there were only the 8 people, together with him. He however agreed that the Appellant did not have a friend or Counsel at the parade and stated that the Investigating Officer was present. He testified that it is the members of the public who arrested two people (including the Appellant) and that the minor was outside the parade room and was not shown the Appellant's clothes. In re-examination, he stated that the signature at the back of the Form is the Appellant's, and that he listed the people who participated in the parade and he did not expose the Appellant to members of the public or to the minor. He stated that the participants in the parade were about 5'8 and 5'7 in height, of medium built, and none had a pot-belly.

15. PW6 was Corporal Joylene Chebet, the Investigating Officer. She testified that on 04/02/2024 she was at her place of work at Kapteren Police Post when 2 women accompanied by a victim reported an allegation of defilement. She testified that she booked the Report and they then went to Kapteren Health Centre where the doctor confirmed that the minor had been defiled, and that on 5/02/2024, she took the minor for further check-up at Iten Hospital where it was again confirmed that she had been defiled. She stated that the minor told her that her mother had sent her around 4.00 pm to get sheep, when on her way back, she met a person familiar in face but she did not know his name, who was tall and was smoking and who pulled her to the bush and defiled her. She stated further that the minor told her that the assailant instructed her not to tell anyone and not to turn back, and that she informed her mother when she reached home. PW6 stated that she visited the scene on 06/02/2024 but did not recover any exhibits, that on 7/07/2024 members of the public brought one suspect and were looking for another, that she decided to conduct an identification parade which was then conducted by the OCS and in which the 2 suspects were part of. She stated further that the minor identified out the Appellant as the assailant, upon which PW6 charged the Appellant for the offence.

16. She then produced the minor's Certificate of Birth and the stained clothes. In cross-examination, she stated that the minor knew the Respondent by face but she did not know his name, and told PW6 that the assailant was tall, light-skinned and smoked, although PW6 agreed that she did not record this description in her Statement. She stated further that the whole village teamed up in arresting the Appellant who was brought to the station together with his cousin. She also agreed that the Occurrence Book described the assailant as "unknown person" and that no description was made therein. She also reiterated that the penetration was in the vagina, and that the Appellant was arrested about 3 kilometres away from the scene. She further stated that the minor did not describe the clothing worn by the assailant. In conclusion, she stated that she was present during the identification parade.

Defence evidence at the trial Court

17. As aforesaid, upon close of the trial, the Magistrate found the Appellant as having a case to answer and placed him on his defence. The Appellant, in his defence, then gave sworn testimony and called 3 other witnesses of his own.

18. Led by his Counsel, Mrs Orina, the Appellant testified as DW1. He stated that he lives in Kapkoi and repairs motor-cycles at Kapkoi Centre and that he is a family man, married and with a child whom he lives with, although he had separated with his wife. He denied knowing the minor and stated that he saw her for the first time during the identification parade.

19. He pointed out that the Chief referred to by the Prosecution witnesses did not record a Statement and he stated that on the date of the alleged offence, a Sunday, he was at home watching movies with his brother when was he told that his photograph was circulating on social media. He stated that one Philip, a village elder, came and told him to accompany him and that he was then taken to the police station. He stated that the OCS told him that a child had been defiled and they were then paraded and the child identified him. He stated that he changed his position on the parade and the child identified him the second time, and the third time. He stated his suspicion that the child may have only pointed him out in the parade because of the circulated photograph although he conceded that he never himself saw it. He denied any knowledge of the scene of crime which he stated, costs Kshs 50/- in transport to reach from his home, and wondered how would opt to go to a shop that far. He stated that the OCS did not ask him any questions before the Identification parade was conducted, that some of the participants in the parade were taller than him, some were shorter and that they were of all ages, young and old, and also some were fat. He stated that his own height is 6'5 and he does not take any drugs. He denied any knowledge of the minor's family and stated that he had no grudge against her. He then pointed out that no DNA test was conducted and stated that he was framed.

20. DW2 was Barnaba Kipkoech, who testified that he is the Appellant's father. He stated that he lives with the Appellant and the Appellant's child and that the child's mother left. He stated that on 4/02/2024, he was at home with the Appellant and the Appellant's said child and he is therefore not aware that the Appellant went to defile the minor. He stated that he left home at 6.00 pm and left the Appellant at home with the child.

21. DW3 was Nickson Kipchumba, who stated that he is a cousin/brother to the Appellant. He stated that on 04/02/2024 between 4.30-6.30 pm, a Sunday, he was at home all day, that the Appellant watched movies until 1.00 pm, that he (DW3) stayed with the Appellant and the Appellant's child until 5.30 pm when DW3 left went out. In cross-examination, he conceded that they live separately and he could not therefore account for the Appellant's movements.

22. DW4 was Sandra Cherono Kemboi, who stated that she works at a hardware and that the Appellant is a mechanic at the same place. She testified that on 07/02/2024 she was at work with the Appellant when she heard people conversing that the Appellant's photograph was circulating at Kapkoi Trading Center, that the Appellant was then arrested at his workplace, and that it is the village elder who picked him up. She stated that she never saw the photograph, and that the Appellant never goes near the village as he works from 8.00-5.00 pm from Monday to Saturday. In cross-examination, she, too, agreed that she does not live with the Appellant and thus could not account for his movements.

23. As aforesaid, after close of the trial, the trial Court convicted the Appellant on the main charge and sentenced him to serve 50 years imprisonment.

Hearing of the Appeal

24. The Appeal was canvassed by way of written Submissions. The Appellant's Counsel filed the Submissions dated 16/12/2024 while the Respondent, through Prosecution Counsel Racheal Mwangi, filed the Submissions dated 22/05/2025.

Appellants' Submissions

25. As was the case with the Petition of Appeal, the Appellant's Counsel, again, filed a lengthy 27-page Submissions! I will try my best to recount an abridged narrative thereof.

26. Counsel submitted that the first 4 grounds of Appeal mostly touch on identification of the Appellant which is the main issue for determination. She urged that the minor gave testimony that varied significantly to what was stated in the statements that were supplied to the Appellant. She stated that she had attached copies of the Statements to the Submissions. At this point, I must state that I will not look at the said Statements since ordinarily, written Statements made to the police in criminal matters by witnesses, do not form part of the Court record as they are not shared with the Court. Perusing the Statements at this Appellate stage may therefore amount to an irregularity in procedure.

27. Counsel pointed out that the minor wrote her Statement on 07/02/2024, three days after the alleged date of the incident, in which she stated that the time of the incident was around 4:30 pm, that the incident occurred in a forested area, and that, most importantly, the perpetrator was unknown. She referred to the minor's narration of the harrowing ordeal and severe trauma that she was subjected to, and also the minor's narration that the assailant ordered her not to look back, which she admittedly obeyed. Counsel urged that under such traumatic environment which lasted a short while (one minute as alleged by the minor), although it was during day time, it is hard to imagine that a positive identification of a stranger could be made. She cited the case of Frederick Gitonga Mungania & Others v R, Voi High Court Criminal Appeal No. 21 of 2020 & E003 & E068 of 2021 (Consolidated). She also urged that the minor's testimony was a departure from her initial report. She referred to the minor' testimony of familiarity with the Applicant that the Appellant was a customer at their shop, and that the Appellant had a conversation with her about some house keys before defiling her. She submitted that these allegations were not included in the minor's original statement and were thus calculated to prejudice the Appellant. She cited the case of Ndung'u Kimani Versus Republic (1979) KLR 282.

28. Counsel also referred to the minor's testimony that she even timed the duration of the defilement ordeal with her phone, and wondered whether this is the same phone which the minor admitted, was forcefully taken from her by the assailant before the act. Counsel submitted that these discrepancies are critical as it is what the trial Court relied on in believing the single witness. She cited the case of R vs Turnbull and others (1976) all ER 549. She also referred to the minor's testimony that she was wearing a pink skirt, pink biker and a blue trouser and submitted that there was no mention of a sweater in her Statement, and which was not produced as an exhibit with the rest of the clothes. According to Counsel, the issue of the sweater was a part of the made-up story. She also pointed out that the minor stated that the assailant sneaked through a "back door" and grabbed her sweater yet the scene of a crime was allegedly a forest, that the trial Magistrate in her Judgment referred to it as "sneaked through the barbed wire" yet no evidence was led by the Prosecution on the existence of "doors" or "barbed wire" in the forest. She also pointed out the confusion in the testimonies on whether the minor was in the forest to tend to sheep or to fetch firewood. According to Counsel, these contradictions ought to be resolved in favour of the Appellant. She cited High Court of Kenya at Kajiado, Criminal Appeal No. 15 of 2020 – Abel Maina Mburu versus Republic.

29. Counsel then referred to Section 124 of the *Evidence Act* and submitted that the minor's evidence is clearly erratic, and confused and cannot be singly relied upon in such a grave matter as this one, that this is one of those cases that are exceptions in sexual offences' testimony by a single eye-witness where corroboration is needed and that Section 124 was not properly invoked by the trial Magistrate in this case. She cited Criminal Appeal at Kabarnet - No. 16 of 2019 - Nicholas Kipng'etich Mutai vs Republic, the case of Abdalla Bin Wendo Versus Republic (1953) 20 EACA 166 and also the case

of the case of Wamunga vs Republic (1989) KLR 424. She then submitted that from the Judgment, the reasoning of the trial Court for convicting the Appellant was the positive identification at the identification parade, which parade, according to Counsel, was a sham and the trial Court should not have relied on it. She cited the Appellant's testimony that the OCS (PW5) admitted to having singled out the Appellant 3 times before each pick before the minor got to pick him out, and submitted that this was contrary to Rules 6(iv) of the Force Standing Orders, that the parade was made up of persons of irregular heights and sizes, a fact that the minor admitted to, and is contrary to Rule No.6 (d) of the Standing Orders, and that although PW5 affirmed that she picked people of similar height and age, the same could not be affirmed by the Parade Forms produced as exhibits. She submitted that the Forms have no notes or comments from the Appellant as required under Rule No.6 (j), (k) and (m), apart from the names of those who participated.

30. She submitted further that Rule No. 6 (iv) (a) (c) of the Standing Orders were also flouted as the Appellant was not informed of the reason for the parade and that he was never advised on his right to have a Solicitor or friend present. Counsel added that, on the Investigating Officer's own admission, the suspect's description was not given to the Investigating Officer at the time of reporting hence there is no record of the suspect's description at the time of crime for similar looking persons to be produced or referred to during the trial. She cited High Court Criminal Appeal No. 47 of 2019 at Naivasha – Robert Muniu Gichoge vs The Republic. She submitted further that the description that the minor later gave in Court was after having already been introduced to him in the identification parade. According to Counsel, the Appellant was a victim of suspicion and vendetta. She also cited Criminal Appeal at Kabarnet - No. 16 of 2019 - Nicholas Kipng'etich Mutai vs Republic. She then submitted that the rest of the Prosecution witnesses' evidence, especially PW2 and PW3, was based on hearsay, that these two witnesses also recanted and deviated from their original written statements and supported and adopted the minor's testimony. Counsel observed that the issue of the Appellant being a previous customer in PW2's shop also was never recorded in her initial Statement, and she failed to answer, during cross examination, why someone should come all the way from Kapkoi area about 5 kilometres away, use Kshs 50/- to come and buy items like mandazi, kangumu for almost a similar amount and yet these items are common and easily available at the Appellant's place of work.

31. She also submitted that the Investigating Officer's (PW6) testimony in Court was at variance with her Statements as she echoed the testimonies of the other witnesses, though she added another aspect to it, that the perpetrator was a smoker, a fact that was denied by the Appellant and no proof was led by the Prosecution to establish it. On the medical examination, Counsel pointed out that the medical Report indicates that there was vaginal traumatic penile penetration, but the laboratory results presented showed negative results, including the absence of spermatozoa, and she observed that no sample from the Appellant was taken. She observed that the minor however categorically stated, and even illustrated to Court, that she was penetrated from the anus. According to Counsel therefore, this is a contradiction between the doctor's Report and the minor's testimony regarding the part of the genitalia that was penetrated. She also pointed out that the doctor confirmed that he also examined the minor's anus in which he did not detect any abnormality and confirmed that there was no penetration. She faulted the trial Court for making the assumption that the child was a minor and thus could not tell the difference between the anus and the vagina. According to Counsel, the trial Magistrate made a conclusion on the basis of her own assumptions, and not on actual evidence as presented.

32. She further urged that the minor never stated that the Appellant lay on top of her and that she could see his face although though that is what is contained in the proceedings. She submitted that the minor was clear that she was 'entered from behind' with the perpetrator's face away from her. She submitted further that from the minor's initial Statement, it was without a doubt that her assailant was a stranger. She thus faulted the arrest of the Appellant and the failure of the Prosecution to call

key witnesses, urging that there were many holes in the Prosecution witnesses' testimonies. She cited the case of Bukenya versus Uganda (1972) E.A 549, and cited the witnesses not called in this case as the village elder, Philemon, and one Mr. Kite, who assigned PW6 the duty of tracing the Appellant and the Chief who allegedly brought the Appellant to the station, and supposedly also brought his old clothes to the parade. According to Counsel, the evidence of these persons could have added value to the case. She maintained that the pick on the Appellant was mistaken, based on suspicion or underlying vendettas among the families of the parties involved. She urged further that the defence, after receiving the typed proceedings, was surprised that some crucial evidence was not recorded and that some recorded narratives did not reflect what was actually stated by the witnesses, and that she had to file the Supplementary Record of Appeal, and realized that some parts are wrongly recorded which will prejudice the Appeal.

33. She submitted that the Appellant actually stated, when asked by the Prosecutor, how the offence took place and the minor affirmed that the unknown person grabbed her from behind, made her to lie on her stomach, face down and tried to strangle her with his hands, and that she could not see him. Counsel submitted that the Respondent has referred to this in its Submissions and insisted that at no time did the minor state that she lay on her back while being defiled, but the same has been alluded to and recorded in many places in the proceedings and even formed part of the basis for convicting the Appellant. Counsel proceeded to identify various parts of the proceedings which, she insisted, were recorded wrongly and different from the oral testimonies, and which, according to her, creates reasonable bias calculated to prejudice the Appellant. She questioned the impartiality of the trial Court and submitted that the Appellants' right to a fair hearing, under Article 50 of *the Constitution* was breached. She also complained that the Appellants' defence was not considered despite corroboration on the issue of the Appellant's photographs that had been circulated, as stated by DW4, that the Court also failed to consider the Appellant's defence of alibi despite the defence witnesses' account on the same. She cited Criminal Appeal No. 357 of 2012 – Mwendwa Mulinge vs R. On sentencing, Counsel cited Eldoret HCCRA E043 of 2023 and the "Judiciary Sentencing Guidelines, 2023" and submitted that the sentence meted out in this case was harsh and excessive as the Appellant is a young man aged 32 years, thus shall be released at 82 years, and that he has a 2-year-old child, and he was the only parent.

Respondents' Submissions

34. Prosecution Counsel Ms. Mwangi, in contrast, made brief and "to the point" Submissions which is what the Courts encourage, considering the heavy workload and limited judicial time.

35. Counsel submitted that the Prosecution proved all the ingredients of the offence of defilement beyond any reasonable doubt, and that the conviction was within the legal confines of the law. On the issue of "age", she submitted that the minor testified that she was born on 2/07/2014 and was thus 9 years old when the defilement took place on 4/02/2024, that her grandmother, PW2, confirmed this fact, and this was also corroborated by the Investigating Officer, PW6, who produced the Certificate of Birth. On "penetration", she cited the minor's testimony that she had gone to the forest to fetch firewood where she met the Appellant who pulled her into the forest and put his "dudu" into her anus after removing her trouser and pink pants. She submitted that this evidence was corroborated by PW2 and PW3 who checked her private parts and noted that her clothes were stained with blood. She also cited the evidence of the doctor, PW4, who examined the minor on 5/02/24 and found that her labia majora and minora were bruised, hymen torn and the vaginal wall with a tear at 8 and 9 o'clock, and concluded that there was vaginal penetration.

36. On "identification", she referred to the minor's testimony that on 2/04/2024, she met Tony on her way from the forest who told her that he had lost his keys, that the Appellant was a customer at their

shop, that it was the second time she was seeing the Appellant, that she saw the Appellant's face at the hill as he slept on top of her and that the assailant was the person before Court. Counsel submitted that the minor's testimony was corroborated by PW5 who conducted the identification parade, and that the minor was able to identify the Appellant 3 time after being placed with 7 people with similar characteristics. Counsel urged that the offence took place during the day and the minor was therefore able to see and identify the Appellant well, and that the minor was able to identify the Appellant in the parade even after the Appellant had changed positions and even clothes. She cited the case of Francis Kahuki Njiru & 7 others v Republic [2001] 1 KECA 58 (KLR). She observed further that in this case, the identification occurred immediately the Appellant was arrested. She further submitted that the trial Court correctly noted that although the minor stated that she was defiled in the anus, being was a child of tender age (9 years), she could not distinguish between the vagina and the anus. She, too, cited Section 124 of the *Evidence Act* and submitted that PW1's testimony was consistent and thus did not need further corroboration other than the medical evidence.

37. On the issue of sentence, Counsel submitted that Section 8(1) of the *Sexual Offences Act* defines defilement as an act causing penetration with a child and that Section 8(2) specifies that defilement with a child aged 11 years or less, carries a life sentence upon conviction. According to her therefore, the prison sentence of 50 years was erroneous, as the mandatory sentence of life imprisonment is what is provided for by the Act and constitutional. She cited the case Supreme Court case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) (20241 KESC 34 (KLR). She therefore urged the Court to enhance the sentence to life imprisonment.

Determination

38. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (see Okeno vs. Republic [1972] E.A 32).

39. The issues that arise for determination in this Appeal are evidently the following:

    i. Whether the trial Court erred in convicting the Appellant of the offence of defilement.

    ii. Whether the sentence of 50 years imprisonment was justified.

40. Before I proceed further, I observe that Counsel for the Appellant urged that the trial Court inaccurately recorded parts of the witness' testimonies and different from what was orally stated by the witnesses in Court. Noting that this is an appeal, but such allegation is one that is evidentiary in nature. The trial Court is the Court of record of the proceedings in this instance and there is no mechanism in which this Appellate Court can verify an allegation such as those made. For the said reasons, I have no choice but to go by the proceedings as recorded by the trial Court. Going forward however, Court proceedings in Kenya are now being recorded thanks to the automation and digital steps implemented by the Judiciary. It shall therefore be now possible to scrutinize such records and act on allegations such as those made herein.

41. On the first issue, namely, the Appellant's conviction, Section 8(1) of the *Sexual Offences Act* under which the Appellant was charged provides as follows, respectively:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

42. For the offence of defilement to be established, 3 ingredients must therefore be proved, namely, the age of the victim, penetration and positive identification of the offender. (see George Opondo Olunga v Republic [2016] eKLR).

43. In this Appeal, the trial Magistrate's findings that the "age" of the victim (as being a child, and thus a minor), had been sufficiently proved, is not in contention. What is in contention is basically the trial Magistrate's findings on the issue of "identification", and to a lesser extent, the issue of "penetration".

44. In any event, the minor's age of 9 years was addressed through the Certificate of Birth produced in evidence, which indicated that she was born on 02/07/2014. This was corroborated by her own testimony, and also that of her grandmother, PW2. The alleged offence having occurred on 04/02/2024, the minor was indeed therefore about 9 years and 7 months old at the time. The description of the victim as being a "child" is therefore settled.

45. In respect to "penetration", Section 2(1) of the *Sexual Offences Act* defines the phrase as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

46. In the case of Mark Oiruri Mose v R [2013] eKLR, the Court of Appeal stated that:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

47. The charge sheet in this case is that the Appellant penetrated the minor in the vagina. Her grandmother (PW2) and the neighbour (PW3) who claimed to have "checked" the minor's private parts after the incident also testified that the penetration was in the vagina. PW2 testified that the minor pointed at her vagina as the place which was penetrated. The clinical officer (PW4) who examined the minor at the hospital, and who stated that the examination was conducted within 72 hours of the incident, too, concluded that the minor was penetrated in the vagina. He testified that the minor's clothes were blood stained, that she had bruised labia minora and majora, that the hymen was torn and the vaginal wall also had tears. However, the minor, in her own testimony, stated that she was penetrated in the anus. The clinical officer, in his Report found the minor's anus to be intact and found no evidence of "penetration" therein.

48. Faced with this contradictory state of testimonies, the trial Magistrate concluded that due to her age, the minor most probably was unable to properly differentiate penetration of the anus from penetration of her vagina. She therefore concluded that the penetration in the vagina was proved and she so held. Although this contradictory statements by the minor may become a factor when holistically assessing the reliability of her testimony at the end of the day, I am constrained to agree that the trial Magistrate's conclusion was proper in the circumstances of the case. This was a 6 years old "innocent" girl and thus a child of tender age. She presumably had never engaged in any sexual intercourse act before and could understandably been confused by the whole episode, partly also contributed to by the violent nature of the experience and the trauma she underwent. Although I also note that according to the entries made in the Laboratory Report Form produced in evidence, there was no spermatozoa found in or on the minor, I find this to be insignificant. On this issue of penetration therefore, I find no fault with the trial Magistrate's findings.

49. On the issue of identification, the Court of Appeal, in the case of Cleophas Wamunga v Republic [1989] eKLR cautioned as follows:

> " What we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well known case of R v Turnbull [1976] 3 All E.R. 549 at page 552 where he said:
>
> "Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

50. In this matter, the only eye-witness account is that of the minor, the victim. Her testimony was that on 4/04/2024 at around 4.30-5.00 pm, she went to the forest to fetch firewood when on her way back, she met a person who told her that he had lost his keys but who then grabbed her by her sweater and pulled her into the forest and threatened to kill her. She stated that the man then covered her mouth, took away her phone and made her lie down and then defiled her. She stated that the act lasted 1 minute, from 4.29 - 4.30 pm since she checked the timing in the phone. She stated that she saw the assailant's face when they "reached the hill and he turned back". She also testified that she had not met the assailant before and she did not therefore know him. She then however contradicted herself by stating that it was the second time that she had seen the assailant as he is a customer at their shop. She then testified that she identified the assailant (the Appellant) in an identification parade conducted at the police station and it is at that police station that she heard the assailant being referred to as "Tony". During her testimony, she again identified the Appellant in Court as the assailant.

51. At this point, I may state that the pointing out of the Appellant in Court by the minor is what is generally referred to as "dock identification". This mode of identification has however been described by various Courts as unreliable and as "the worst form of identification". For instance, the Court of Appeal, in the case of Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, observed as follows:

> " A dock identification is generally worthless and the Court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."

52. The weight of "dock identification" is therefore dependent on the proper conduct of a prior identification. In this case, the initial identification of the Appellant was through an identification parade. The minor testified that she was taken to the police station and that the Appellant was in a line of many people among whom she was able to identify him. PW5, Chief Inspector Elias Kiptoo, confirmed that he is the one who conducted the identification parade by lining up 8 people of similar bodily attributes to the Appellant, out of whom the minor picked out the Appellant. He testified further that he conducted the parade 3 different times (with Appellant changing his clothes) and on each occasion, the minor identified the Appellant.

53. In respect to identification parades, the Court of Appeal, in the case of David Mwita Wanja & 2 others vs. Republic [2007] eKLR expressed the following:

> " The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this Court over the years and it is worrying officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3EACA There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia vs. R [1986] KLR 422 where the Court stated at page 424: -
>
> "It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in Court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course, if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

54. The manner of, and procedure for conducting an identification parade is stipulated in paragraph 7 of Chapter 42 of the National Police Service Standing Orders under the *Legal Notice No. 100 of 2017*. The commonly known Police Form 156 is what is used in the conduct of identification parades and it provides for the requirements that ought to be met when carrying out such parade. Some of the provisions that are relevant to the matter at hand are the following:

7.

(1) The police shall organize on identification parade to ensure a fair and correct identification when the whereabouts of the walked or suspected person is known to the police but there is some doubt as in whether he or she is the person so accused.

(2) The police shall not take a witness direct to an accused of suspected person for the purpose of identification except when they are sure that the accused or suspect is well known to him or her.

(3) .....

(4) The officer conducting the parade shall, at the time of holding the identification parade, complete all relevant sections of "Report of an identification Parade" (Form P.156) which shall be used by the conducting officer to refresh his or her memory in any subsequent court proceedings as authorized by Section 167(1) of the *Evidence Act*, 2009.

(5) Where a witness is asked to identify an accused or suspected person, the following procedure shall be followed–

(a) the accused or suspected person shall always be informed of the reasons for the parade and that he or she may have a counsellor or a friend present when the parade takes place;

.....

(d) the accused or suspected person shall be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as him or her;

.....;

(m) a careful note shall be made after each witness leaves the parade, to record whether he or she identified the accused or suspected person and in what manner;

(n) a record shall be made by the officer conducting the parade of any comment made by the accused or suspected person during the parade, particularly comments made when the accused or suspected person is identified;

(o) the parade shall be conducted with utmost fairness, otherwise the value of the identification parade as evidence shall be nullified; and

(p) no police officers shall be used as witnesses in an identification parade unless a police officer is the accused or suspected person.

55. Having scrutinized the testimony of PW5 in comparison with the Form 156 produced in evidence, I am not convinced that the identification parade was satisfactorily conducted. First, the defence raised serious questions on whether the 7 other people lined up in the parade were, as far as possible, of similar age, height, general appearance and class of life as the Appellant. The Form 156 on record has no remarks whatsoever on this issue and thus, in my view, the trial Court was not in a position to verify whether this requirement was observed. This is important because in her testimony, the minor stated that "some were tall, medium", and the Appellant, in his defence, stated that "some were taller than me. There were short and of all ages, young, old, fat." and also that "I know my height is 6'5". Insofar as the Form 156 produced in evidence is silent on this issue, it was not possible for the trial Court to verify the truth of these allegations.

56. Secondly, on whether the Appellant was asked whether he consented to appear on the parade, whether he was informed that, if he desired, a friend or solicitor may be present, and whether he was satisfied with the conduct of the parade, although there are signatures in the relevant space attributed to the Appellant, the replies he gave to the questions are not captured in the Form and the relevant spaces have been left blank. This is also relevant because in his defence, the Appellant stated that the "The OCS never asked me any questions before the ID parade".

57. Even assuming that the identification parade was properly conducted, I am still not convinced that the chronology of events preceding the conducting of the parade itself laid a sufficient basis for conduct thereof. I say because there is no explanation on how and why the Appellant was singled out for arrest in the first place. According to the Investigating Officer, PW6, the Appellant was brought to the police station by members of the public and according to other witnesses, it is the area Chief who arrested the Appellant. I also note that the minor's grandmother (PW2), under cross-examination by Mrs. Orina, in reference to the Appellant, testified that "We did not know him. He normally walks around the village. The chief identified him. The villagers were involved". PW3, too, stated that "I did not know him before the ID parade".

58. Considering the above, it is curious that neither the Chief nor any of those members of the public said to have participated in the arrest was called to testify and thus give reasons why they singled out the Appellant as the suspect to be arrested. There is no evidence that the minor, before the arrest, gave a description of the assailant to the Chief, or to the members of the public. The minor also, admittedly, did not know the Appellant's name before the identification parade. The Appellant was also not arrested by the police and neither was the police looking for him nor had they labelled him a suspect. So who decided that the Appellant was the suspect such that the villagers decided to go and arrest him, and on what basis? In fact, there is testimony that another person, presumably the Appellant's brother or cousin, was also arrested by members of the public. What was the basis of also arresting this other person? What were the accusations against him. Was this perhaps a fishing expedition signifying that perhaps the members of public were not certain who the suspect was?

59. The Chief is also said to have brought clothes allegedly confiscated from the Appellant. Who told the Chief that those clothes were the clothes worn by the assailant at the time of the incident when the minor herself never testified so and even the Investigating Officer, PW6, testified in cross-examination, that "the description of clothes was not given to me"? In view of the absence of any explanations on the basis for all these matters that preceded the identification parade, including the silence on why the Appellant was singled out for arrest, I find that those events seriously weakened the efficacy of the parade conducted subsequently.

60. I am not saying that identification parades must be preceded by a prior description of the suspect given to the police. Indeed, this assumption was refused by the Court of Appeal in the case of Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134. What I am saying is that, this being a Court of law and the charge facing the Appellant being a capital one under which the Appellant was facing the possibility of a life sentence, there really was need for the Prosecution to at least give some explanation on who linked the Appellant to the crime such that someone found it necessary to frog-march the Appellant to the police station, before he was even subjected to the identification parade. The minor being the only eye-witness and there being no evidence that she at any time identified or described the Appellant to the Chief, or to the members of the public, my view is that the loud silence by the Prosecution on how the Appellant was linked to the crime creates a lot of uneasiness. Without any basis being laid, the subsequent conduct of the identification parade after arrest may, for all intents and purposes, have been a worthless venture. With this state of affairs, the statement by the defence witnesses that the minor's "identification" was influenced by a photograph of the Appellant that had already widely circulated on social media may indeed carry some weight. There being no explanation, and there being no explanation on who the author of the anonymous social media post was, this Court cannot rule the possibility that the targeting of the Appellant was perhaps a case of a personal vendetta by third parties.

61. Coming back to the minor's testimony, I also find substantial contradictions and inconsistencies therein which go the root of the whole charge. I agree that slight contradictions and inconsistencies in testimonies may be excused. Indeed, the Court of Appeal, in the case of Philip Nzaka Watu v Republic [2016] eKLR guided as follows:

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing in the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether

discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In Dickson Elai Nsamba Shapwata & Another v The Republic, CR APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

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

62. It is therefore only where inconsistencies or contradictions are so substantial and fundamental to the main issues in question such that they would create doubts in the mind of the trial Court that the same can be interpreted in favour of the accused person. The question is therefore whether the inconsistencies, contradictions and some incomprehension apparent in the minor's testimony in this case, can be treated as negligible and insignificant, hence excusable.

63. The first inconsistency apparent in the minor's testimony is her statement in evidence-in-chief in reference to the Appellant, that "Tony is the accused person. He is a customer at our shop. It was the second time for me to see him during the incident". However, under cross-examination by Mrs Orina, the minor testified that "I had not met him before the incident. I did not know him before the incident. I did not know his name." and further, that "I did not know his name at the police station. I heard him being mentioned at the station and I know his name as Tony." and even further, that "I got to know him at the station". The minor's admission that she did not know the Appellant before the incident casts serious doubt over her clearly contradictory earlier statement in evidence-in-chief that she knew him before. This is even more relevant because in the P3 Form filled in on 5/05/2024, a day after the incident, it is indicated that the minor was defiled by an "unknown person".

64. I also note that the minor's grandmother (PW2), in her testimony, testified that "We concluded that she had been defiled ..... We went to report. She did not know the person. She later described the person".

65. I also notice fundamental inconsistencies in the minor's own account of whether she really identified the assailant at the time of the incident. She stated, in cross-examination, that "We reached the hill and he turned back and I saw his face. He told me if I face him, he will kill me. I did not face him but I saw him when he was leaving". Although not very coherent, the minor appears to be saying that throughout the ordeal she never faced the assailant as he had threatened to harm her should he look at his face, and that she only therefore momentarily saw his face after the act when he was leaving. This testimony lends credence to Mrs. Orina's submission that most likely the assailant made the minor to lie down on her stomach and penetrated her from the rear. I say so because she would have definitely seen the assailant's face during the act had she had lay on her back since they would have been in a face-to-face position. This might also explain why the minor had difficulty in ascertaining whether the penetration was in her vagina or in her anus.

66. I also note that while the minor, in cross-examination, described the assailant as "tall", and the Investigating Officer, PW6, also testified that the minor told her that the assailant was "tall", in the Post Rape Care (PRC) Form produced in evidence, the account given by the minor is stated to be that the assailant was of "short stature". The Appellant's testimony that he is 6'5 in height (quite tall on average) was also not challenged or questioned or challenged in cross-examination. This, too, is stark contradiction.

67. The minor also indicated that the act lasted one minute. She stated that "It was 4.29 pm when he started and stopped at 4.30 pm. I checked that I am on phone. I felt pain and I told him to stop but he refused". If indeed the whole episode lasted only 1 minute and if the minor had never seen the assailant before, considering the shock and trauma caused by the sudden attack, her tender age, the frightening environment which she was put under, the" roughness" with which she was handled by the assailant, and the threats of death issued to her, I find it substantially possible that that the minor may not have been in a conducive emotional or mental state to have properly identified the stranger/assailant.

68. For the same reason, I find the minor's testimony that she even had time to, and did, look at the phone and estimate the time that the act lasted to be very doubtful. In any case, did she not state that "He pulled me to the forest and he told me he would kill me or strangle me. He had covered my mouth ..... I had a kaduda phone and he took it". If the assailant took away the phone from her, how was the minor again able to comfortably look at the time in the same phone, and ascertain when the act started and when it ended?

69. For the above reasons, and coupled also with the minor's earlier pointed out inability to tell whether she had been penetrated in the vagina or in the anus, apart from the loopholes in the identification parade, I also find the minor's testimony to have been unreliable to a great extent. Such contradictions may understandably have been because of the minor's tender age, and not necessarily an indication of her conduct or even "coaching". In the circumstances, I find that the inconsistencies and/or contradictions in the minor's testimony were so substantial and fundamental to the main issues in question such that they ought to have created reasonable doubts in the mind of the trial Magistrate, and the same ought to have been interpreted in favour of the Appellant, the accused person. The inconsistencies and contradictions apparent in the minor's testimony, in my view, cannot be treated as negligible or insignificant, and should not have therefore been ignored by the trial Magistrate without any proper analysis.

70. On the alibi defence raised by the Appellant, it is true that there is no evidence that the same was raised at any time earlier, not even during cross-examination of the witnesses, and was only brought up at the defence stage. The logic behind the requirement to raise an alibi defence early enough is to give the police an opportunity to investigate it. The timing on when an alibi defence is raised determines the weight the Court will give to it. Where it is raised late as in this case, the weight of the defence is weakened as there is no opportunity for the police to scrutinize its veracity. This has been restated in may authorities, for instance, in the case of R v Sukha Singh S/o Wazer Singh & Others {1939} 6 EACA 145.

71. Nonetheless, and although the Appellant raised the defence of alibi very late in the day, I have considered this defence and find it substantially credible. The Appellant (DW1) stated that he lives with his father and his (Appellant's) child, and that on the said date, 4/02/2024 at the time that the defilement is alleged to have occurred (4.00-4.30 pm), he was at home with his child watching movies. DW2, who stated that he is the Appellant's father, supported this statement and testified that on the said date, he (father) was at home at 4.30 pm until 6.00 pm when he went out and left the Appellant behind at home with the child. Similarly, DW3, who testified that he is the Appellant's cousin, too, stated that on the said date, a Sunday, at 4.30 pm until 6.00 pm he was with the Appellant in the (Appellant's) home with the Appellant's child, and only went out to buy milk around 5.00-6.00 pm. The Appellant also stated that where he lives is about 3 kilometres from the minor's home and it costs Kshs 50/- to get there. He therefore wondered at what time could he have travelled all the way to commit the act. About his being a customer at the minor's grandmother's shop, he also wondered why he would choose to travel all the way to buy simple snacks from the minor's grandmother's shop 3 kilometres away, such snacks being what the minor testified that the shop stocks.

72. Although raised late in the day, I find the defence of alibi raised by the Appellant to have merited some close attention by the trial Magistrate, which she does not however seem to have undertaken.

73. I agree that although the law, in criminal cases, requires corroboration of the testimony given by a victim of the offence, there is the proviso in Section 124 of the *Evidence Act* that there need not be such corroboration in cases of sexual offences if the Court believes that the victim is "telling the truth", and records its reasons for believing such victim. The section and the proviso provide 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."

74. It is therefore clear that the proviso to Section 124 of the *Evidence Act* permitting the Court to convict on the sole evidence of a victim of a sexual offence, will only apply if the Court is satisfied that the victim is being truthful. Considering the fundamental contradictions and inconsistencies apparent in the minor's testimony particularly in respect to the issue of the identification of the Appellant, I am not satisfied that this is a case where the proviso to Section 124 aforesaid ought to apply.

75. The Court of Appeal for East Africa in the case of Roria vs Republic 1967 EA 583 held that:

> "A conviction resting entirely on identity invariably causes a degree of uneasiness ... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this Court to satisfy itself that in all circumstances it is safe to act on such identification."

76. Further, the Court of Appeal, in the case of Peter Musau Mwanzia v Republic (2008) eKLR, expressed the following sentiments:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition"

77. I also note that the State has not at all responded to the Appellant's Counsel's protests that the testimony given by the witnesses at the trial substantially deviated or was markedly different from what was contained in the Witness Statements that were supplied to the defence before the trial commenced. Although I have no way of verifying this allegation, the loud silence by the Prosecution on this issue lends credence to the allegation, and does not help the Prosecution's case.

78. In view of the foregoing, I find the existence of weighty grounds to fault the trial Magistrate for reaching the finding that the Prosecution discharged its burden of proving that the Appellant was sufficiently identified as the perpetrator or the person who committed the offence. With the state of evidence being as described above, it was clearly unsafe to convict the Appellant. Accordingly, I find enough reason to interfere with the Judgment of the trial Court.

79. In the end, weighing the whole case in general, I find that the Investigating Officer did not sufficiently ensure that identification of the assailant was water-tight before charging the Appellant. She did not carefully scrutinize the minor's narrative to rule out the possibility of "influence" from third parties. She ought to have done more. She seems to have simply relied on information from undisclosed members of the public and the Chief who implicated the Appellant yet it is the minor who was supposedly the only eye-witness. The Investigating Officer seems to have been in a hurry to appease the public by taking the person they had brought to Court without carrying out any independent investigations of her own. As a result, the question of identity of the perpetrator remained in doubt.

80. As I have found, as did the Magistrate, the minor was no doubt defiled. The perpetrator, whether it is the Appellant or somebody else, certainly deserves to be severely punished for the heinous act which will, no doubt, leave the child with serious psychological and psychological trauma that will last throughout her life. Unfortunately, the case was poorly investigated and the Appellant hurriedly charged before sufficient evidence of his participation in the crime, of the nature that can withstand Court scrutiny had been collected. Due to the bungling of the case by the police, the beastly offence committed against the child may remain forever unpunished. While the Appellant may as well be the perpetrator of the offence, because of insufficient evidence, he walks free. It is sad but that this ends up being the painful fate of this case.

81. Having found as above, and which findings inevitably render unsustainable the conviction of the Appellant, the second issue that arose for determination, whether the sentence of 50 years imprisonment was justified, does not now arise.

Final Order

82. In the circumstances, this Appeal succeeds and is allowed, and I hereby order as follows:

    i. The conviction of the Appellant by the trial Court in Iten Senior Principal Magistrate's Court (Sexual Offences) Case No. E010 of 2024 for the charge of defilement is hereby quashed and the sentence of 50 years imprisonment imposed therein set aside in its entirety.

    ii. Accordingly, the Appellant shall be set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4 TH DAY OF JULY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mrs. Orina for the Appellant

The Appellant (present virtually from Eldoret Main Prison)

Ms. Mwangi for the State

C/A: Brian Kimathi