Atiti v Republic (Criminal Appeal E054 of 2022)
[2024] KEHC 2785 (KLR) (13 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2785 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E054 OF 2022

RL KORIR, J

MARCH 13, 2024

BETWEEN

LEONARD SHIKANDA ATITI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number E054 of 2021 by Hon. Omwange J. in the Magistrate's Court in Sotik)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars of the Charge were that on 8th November 2021 in Konoin Sub County within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of F.M.A, a child aged 17 years.

2. The Appellant faced an alternative Charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were 8th November 2021 in Konoin Sub County within Bomet County, he intentionally and unlawfully touched the vagina of F.M.A, a child aged 17 years with his hands.

3. The Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called seven (7) witnesses in support of its case and the Appellant gave sworn testimony and did not call any witness.

4. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. The Supreme Court of India explained the duty of a first appellate court in K. Anbazhagan v State of Karnataka and Others Criminal Appeal No. 637 of 2015 as follows:-

> " The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed....."

5. I proceed to consider the case before the trial court in the succeeding paragraphs.

The Prosecution's Case.

6. It was the Prosecution's case that the Appellant defiled F.M.A (PW2). PW2 testified that the Appellant was her boyfriend with whom they had sex on the night of 25th October 2021. That it was not her first time to have sex with the Appellant.

7. Nancy Wendot (PW7) testified that she was a clinical officer at Kericho Referral Hospital. That she examined the victim (PW2) on 8th November 2021 and found that she had epithelial and pus cells which indicated recent sexual activity. PW7 further testified that the victim's genitalia was normal and that she had an old broken hymen.

8. No. 118348 PC Peter Mwangi Macharia (PW6) testified that he was the Investigating Officer. That he recorded the statements of the victim and other witnesses. PW6 further testified that he charged the Appellant after he received the P3 Form and Treatment Notes.

9. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.

Appellant's Case

10. The Appellant, Leonard Shikanda Atiti gave sworn testimony and stated that on 7th November 2021, he travelled from Nairobi to Kericho and he went to work on 8th November 2021 where he worked the whole day and later went to his brother's house in Finlay.

11. It was the Appellant's testimony that as he prepared to leave for Nairobi the following day, he received a phone call informing him that his brother was in the Police Station. That when he went to the Police Station, he was arrested and taken for medical examination in the company of the victim (PW2). It was the Appellant's further testimony that he was thereafter charged.

12. In a Judgment dated 10th November 2022, the trial court convicted the Appellant of the charge of defilement contrary to section 8(4) of the *Sexual Offences Act*. He was consequently sentenced to serve 14 years' imprisonment with the court observing that he had already spent one year in pre-trial custody.

13. Being aggrieved with the Judgment of the trial court, the Appellant, Leonard Shikanda Atiti through a home-made Petition of Appeal filed on 17th November 2022 appealed against his conviction and sentence on the following grounds reproduced verbatim: -

i. That I pleaded not guilty at the trial court and still maintain the same.

ii. That the learned trial Magistrate erred in both law and fact by relying on uncorroborated evidence.

iii. That the learned trial Magistrate erred in both law and fact by relying on evidence adduced by the Prosecution which was inconsistent and full of irregularities.

iv That the learned trial Magistrate erred in both law and fact by not considering that the Prosecution failed its mandate by not providing enough evidence to prove that he committed the said crime.

v. That the learned trial Magistrate erred in both law and fact by failing to analyze the entire evidence adduced by the medical officer and by admitting hearsay testimonies.

vi. That the learned trial Magistrate erred in both law and fact by rejecting my plausible defence without any explanation.

vii. That I pray to be present during the hearing of this appeal.

14. On 20th February 2023, the Appellant filed the following additional grounds of Appeal reproduced verbatim:-

i.That the learned trial Magistrate erred in law and facts by failing to realize that the Occurrence Book Number was missing in the Charge Sheet, hence the Charge Sheet was defective and it could not be cured.

ii. That all the ingredients of the present offence were never proved against the Appellant.

iii. That no age assessment Report was produced in court as an exhibit for PW1.

iv. That PW1 was an untrustworthy witness.

v. That PW5 received a report of escape and adduced the same in court and not defilement.

vi. That the Appellant was not arrested or found with the complainant.

vii. That the Investigating Officer visited the scene but failed to link him to the offence.

viii. That of the 3 suspects arrested in this case, 2 were released in unclear circumstances contrary to Article 50(2) of *the Constitution* of Kenya.

ix.That the Appellant was not provided with all the documents that the Prosecution relied on including the Investigation Diary and therefore he was not accorded a fair trial.

x. That the medical evidence by PW7 exonerated him from the present offence.

xi. That the trial Magistrate erred in both law and fact by putting a high premium on an old broken hymen which was not proof of defilement or penetration.

xii. That the P3 Form, PRC Form and Treatment Notes have uncorroborated entries and details.

xiii. That PW7 was an incredible witness.

xiv. Thathis mode of arrest was unlawful.

xv. That the trial Magistrate erred in both law and fact by convicting me on the single uncorroborated evidence of PW1.

xvi. That crucial witnesses were never brought to court to testify.

xvii. That the trial Magistrate erred in both law and fact by failing to realize that the Prosecution case had not been proved beyond reasonable doubt.

xviii. That there was no medical evidence to link me to the offence.

xix. That the trial Magistrate erred in both law and fact by failing to give a benefit of doubt to the Appellant after the Prosecution failed to produce the exhibit mentioned by the complainant which was not escorted to the Government Chemist for analysis.

xx. That the trial Magistrate erred in both law and fact by demonstrating the fact that he was biased and prejudicial against the Appellant and as a result, the Appellant was not accorded a fair trial.

xxi. That my alibi defence was wrongfully dismissed.

15. On 22nd February 2023, this court directed the Appeal to be canvassed by way of written submissions.

The Appellant's Submissions.

16. In his undated submissions filed on 20th February 2023, the Appellant submitted that the Charge Sheet was defective as it lacked the Occurrence Book Number. That a Charge Sheet without the Occurrence Book Number could not sustain a conviction and was incurable. The Appellant further submitted that the particulars indicated in the Charge Sheet did not corroborate PW1's evidence.

17. It was the Appellant's submission that the Prosecution failed to prove defilement. That there was no conclusive evidence on the age of the minor. It was the Appellant's further submission that the age of the minor could only be proved through age assessment and the age assessment report was not presented in court as an exhibit.

18. The Appellant submitted that he was not positively identified by any Prosecution witnesses. That he was not arrested with the complainant. The Appellant further submitted that dock identification was misleading and led to the miscarriage of justice.

19. It was the Appellant's submission that penetration had not been proved. That PW7 did not produce any report from the Government Chemist to ascertain whether the pus and epithelial cells belonged to the Appellant or Complainant. It was the Appellant's further submission that a missing hymen was not proof of defilement. He relied on P.K.W v Republic [2012] eKLR.

20. The Appellant submitted that the victim was not a credible witness. That the medical evidence did not support PW2's testimony. The Appellant further submitted that it was unsafe for the court to rely on PW2's testimony to convict him.

21. It was the Appellant's submission that vital witnesses like baba Juma and Sylvester' wife were not brought to court to testify. That their evidence could have secured his acquittal.

22. The Appellant submitted that the Investigating Officer conducted shoddy investigations. And that his arrest was unlawful and an afterthought.

23. It was the Prosecution's case that all the Prosecution witnesses were reading from different scripts as their testimonies contradicted each other. It was the Prosecution's further testimony that his alibi defence was not considered as he was in Nairobi and not Kericho during that period.

24. The Appellant submitted that the Prosecution did not prove its case beyond reasonable doubt.

25. The Prosecution did not file its written submissions despite being directed to do so and being granted time extension.

26. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal filed on 17th November 2022, the Supplementary Grounds of Appeal and Appellant's written submissions both filed on 20th February 2023. The following issues arise for my determination:-

    i. Whether there were procedural issues affecting a fair trial.

    ii. Whether the Prosecution proved its case beyond reasonable doubt.

    iii. Whether the Appellant's defence placed doubt on the Prosecution case.

    iv. Whether the Sentence preferred against the Appellant was just and fair.

        i. Procedural issues affecting a fair trial

a. Whether the Charge Sheet was defective.

27. The law on Charge Sheets is contained in Section 134 of the Criminal Procedure Code which provides as follows:-

    Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

28. In BND v Republic [2017] eKLR, Ngugi J. (as he then was) held that: -

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.
>
> The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective."

29. The Appellant submitted that the Charge Sheet was defective as it did not contain an Occurrence Book Number.

30. I have looked at the Charge Sheet and the Appellant was charged with defilement contrary to section 8(1) (4) of the *Sexual Offences Act* No. 3 of 2006. The Charge Sheet clearly spelt out the statement of the offence that the Appellant was charged with. It contained the particulars of the offence. The defilement was alleged to have been committed on 8th November 2021 at Marinyin estate of James Finlay Estate in Konoin Sub County within Bomet County. It was clear from the Charge Sheet what charge the Appellant faced. There was no ambiguity at all.

31. The question then became whether the Appellant understood the charge he faced and if he did not what prejudice he suffered. The Court of Appeal in the Peter Ngure Mwangi vs Republic [2014] eKLR quoted the case of Peter Sabem Leitu v R, Cr. App No. 482 of 2007 (UR) where it was held that:-

> " The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea....."

32. Similarly in Benard Ombuna v Republic [2019] eKLR, the Court of Appeal addressed the issue of a defective charge sheet in the following terms:-

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

33. The substance of the charge and its particulars were read out to the Appellant in a language he understood and he pleaded not guilty. The Appellant was present during the trial and cross examined all the Prosecution's witnesses. He thereafter presented his defence. This demonstrated that the Charge Sheet had been properly drawn and that the Appellant fully understood the Charge he faced.

34. The missing Occurrence Book Number on the Charge Sheet did not occasion any prejudice on the Appellant.

35. It is my finding therefore that this ground of the appeal holds no water and I accordingly dismiss it.

b. Whether the Appellant was served with all the documents that the Prosecution relied upon.

36. Article 50 (2)(j) of *the Constitution* provides that:-

Evert Accused person has the right to a fair trial, which includes the right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.

37. The Appellant submitted that he was not furnished with all the documents that the Prosecution relied on including the Investigation Diary thereby occasioning him an unfair trial. I dismiss this ground of appeal because there was evidence on record that the Prosecution supplied the witness statements, and the P3 Form and the Birth Certificate to the Appellant. The trial court record showed that on 27th January 2022, the Appellant confirmed that he had been given the P3 Form, Birth Certificate and that he had received all the witness statements.

ii. Whether the Prosecution proved its case beyond reasonable doubt.

38. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.

39. The Appellant submitted that the age of the victim was not proved. That the only way to prove the age of the victim was to avail an age assessment report. The Appellant further submitted that the Prosecution's failure to produce such a report was fatal.

40. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an Accused person. The age of the victim may be proved through the production of a birth certificate or a parent's testimony.

41. Rule 4 of the Sexual Offences Rules of Court 2014 provides that:-

> When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

42. Contrary to the Appellant's assertion that age could only be proved through an age assessment report, the age of a minor could be proved through several ways as discussed by the Court of Appeal in Malindi in Mwalengo Chichoro Mwajembe vs. Republic, Msa. App. No. 24 of 2015 (UR) where it held: -

> " .....the question of proof of age has finally been settled by decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa - vs – Republic, Criminal Appeal No. 19 of 2014 and Omar Uche Vs Republic, Criminal Appeal No. 11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond reasonable doubt. This form of proof is a direct influence by the decision of the Court of court Appeal of Uganda in Francis Omuroni is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable....."

43. Quinter Akoth (PW1) who was the victim's mother testified that the victim (PW2) was aged 17 years. The Court of Appeal in Richard Wahome Chege v Republic [2014] eKLR, held as follows:-

> "On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth?....."

44. No. 118348 PC Peter Mwangi Macharia (PW6) who was the Investigating Officer produced the victim's Birth Certificate and the same was marked as P.Exh 1. The Birth Certificate indicated that the victim was born on 26th March 2004. The authenticity and veracity of the birth certificate was not challenged by the Appellant.

45. It is my finding that the Prosecution satisfactorily proved the age of the victim. It is my further finding that the victim (PW2) was aged 17 years of age at the time of the commission of the offence.

46. With regard to the issue of identification, the English case of R vs Turnbull (1977) QB 224 stated:-

> "If the quality (of identification evidence) is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the

identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution".

47. The victim (PW2) testified that the Appellant was her boyfriend and that he had promised to marry her. That they had met earlier in church on 20th October 2021 and later had sex with him on the night of 25th October 2021. The victim further testified that she had sex with the Appellant twice and knew the Appellant's street name as Rooney.

48. Sylvester Otengo (PW4) was the Appellant's brother and he testified that he found the victim in his house on 8th November 2021 and she told him that they fellowshipped in the same church with the Appellant.

49. In my analysis of the above evidence, it is clear to me that the Appellant and the victim knew each other and had a relationship. This is buttressed by the fact that the victim also knew PW4 and his wife as she sought refuge in their house. This evidence in my view is more of recognition than identification. There was no possibility of mistaken identity.

50. It is my finding therefore that the Appellant was positively identified by PW2 as the perpetrator.

51. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.

52. Penetration can be proved through the evidence of the victim corroborated by medical evidence. It should however be noted that if the medical evidence is insufficient, courts can convict solely on the evidence of a victim provided they believe the testimony of the victim and record such reasons.

53. In the instant case, I proceed to carefully evaluate the medical evidence and the victim's testimony.

54. Regarding medical evidence, Nancy Wendot (PW7) who was the clinical officer testified that upon examining PW2, she found epithelial and pus cells which indicated recent sexual activity. She further testified that PW2 had an old broken hymen. She produced the P3 Form, PRC Form and Treatment Notes which were marked as P.Exh 1, 2 and 3 respectively.

55. I have looked at the aforementioned exhibits and they all indicate that PW2 had normal genitalia, had an old broken hymen and had epithelial and pus cells. The exhibits also indicated that PW2 had been examined on 8th November 2021.

56. The medical evidence above confirm that the complainant was penetrated on 8th November, 2021 or thereabouts.

57. I have considered the medical evidence against the evidence of the complainant, PW1, PW3 and PW4 with respect to the date of the offence. This is because PW2 in her testimony dwelt a lot on her sexual encounter on 25th/26 October, 2021 while the charge stated that the offence occurred on 8th November, 2021.

58. A keen look at the evidence of the complainant shows that she also stated that they had sex in November. Her mother PW1 testified that the complainant left home for school on 8th November, 2021 but did not show up in school.

59. PW3, a Welfare Assistant Officer received a report of a missing child (the complainant) on 9/11/2021 and upon later interrogating the complainant, learnt from her that she had been at the Accused's place. Sylvester Onyango (PW4) who is the brother and host of the accused told the court that the complainant was at his house on 8th and 9th November, 2021 and he reported to her parents who said that she had left home and failed to get to school. That together with PW1, they went and reported at the Police Station. PW5 the arresting officer testified that the accused was arrested on 9th November, 2021.

60. The above evidence was corroborative on the date of the offence being 8th November, 2021. I therefore find that there was no contradiction when the complainant stated that they had sex on 25th October as she also confirmed that they had sex again in November. They had a continuing sexual relationship and the Appellant was only charged with the offence of 8th November, 2021.

61. I have carefully gone through the victim's evidence. Her testimony was vivid and cogent. She described the Appellant as her boyfriend and that the Appellant had promised to marry her. That she was with the accused on 24th October, 2021 up to 8.00pm when she went back home. That on Monday she did not go to school but instead went to the accused's home and spent the night there. She told the court that she had sex with the Accused on the night of 25th October, 2021 and did not use protection. That they had had sex before 25th and also later in November.

62. After keenly analysing the victim's evidence, it is my finding that there was nothing to indicate that the victim (PW2) could have been untruthful.

63. In light of the above, I find the victim's testimony as truthful and I find that there she was penetrated by the Appellant. As stated earlier, the medical evidence clearly corroborated the complainant's testimony. I therefore find that penetration was proved to the required legal standard.

64. It was a ground of the Appeal that crucial witnesses like baba Juma and Sylvester's (PW4) wife were not brought to testify. The Appellant submitted that their testimonies could have exonerated him.

65. This court has always held the position that the Prosecution has the discretion on the number of witnesses it wishes to call. A court cannot therefore dictate or compel the Prosecution on the number of witnesses it should avail as long as the Prosecution proves its case through the witnesses it presents. This is the import of Section 143 of the *Evidence Act* which provides as follows:-

    No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.

66. I also take guidance from the case of Julius Kalewa Mutunga v Republic Criminal Appeal No. 31 of 2005 where the Court of Appeal held as follows:-

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

67. As already demonstrated above, the Prosecution was able to prove the age of the complainant, proof of identification and penetration through the witnesses they availed. This ground of appeal is therefore dismissed.

68. Having found all the ingredients of the offence, it is my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

iii. Whether the Appellant's defence placed doubt on the Prosecution's case.

69. I have already laid out the Appellant's (DW1) defence earlier in this Judgment. In summary, he stated that on 7th November 2021 he travelled to Kericho from Nairobi and on 8th November 2021, he worked the whole day. That as he prepared to leave for Nairobi on the 9th of November 2021, he was informed that his brother was in the police station. The Appellant further testified that when he went to inquire what the problem was at the Police Station, he was arrested.

70. In his submissions, the Appellant contradicted himself as he submitted that he was in Nairobi during the period of 7th to 9th November 2021. He further submitted that he had been framed up and that the trial court did not consider his alibi defence.

71. It is a principle of law that an alibi defence should be raised at the earliest opportunity. The former Court of Appeal for Eastern Africa in R v Sukha Sign S/O Wazir Singh & 7 Others [1939] 6 EACA 145, explained this principle thus:-

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the interval, secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into the alibi and if they are satisfied as to its genuineness, proceedings will be stopped".

72. It is also trite that once the Appellant raised an alibi defence, the onus was on the Prosecution to displace the defence of alibi after the defence raises it at the trial. This was held in the Court of Appeal case of Victor Mwendwa Mulinge vs Republic [2014] eKLR as:-

> " It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution".

73. In the persuasive South African case of R v Biya 1952 (4) SA 514 (A) at 521C - D Greenberg JA said:-

> " If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime."

74. Similarly in S v Sithole 1999 (1) SACR 585 (W) it was held that:-

> " There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken."

75. In the present case, the Appellant stated that he was at work in Kericho for the whole day on 8th November, 2021 and later went to his brother's house. This did not amount to an alibi at all as the offence was committed the same day and his brother and host, PW4 confirmed that he was at his place (PW4's) house on the material date. It was in the same house that PW4 found the complainant when he returned home. Therefore there no alibi worth considering by the court.

76. After analysing the Appellant's defence as a whole, it is my finding that his defence was weak and did not create any doubt on the Prosecution's case which I have already found proven.

iv. Whether the Sentence preferred against the Appellant was severe.

77. The penal section for this offence is found in section 8(4) of the *Sexual Offences Act* which states that:-

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

78. From the wording above, the sentenced was couched as mandatory terms. However, this court is keenly aware of jurisprudence in which superior courts have hesitated to affirm the mandatory sentences where the justice of the case so demanded. This was the Court of Appeal's position in Dismas Wafula Kilwake v Republic [2019] eKLR in which it expressed itself as hereunder:-

> "Here at home in a judgment rendered on 14th December 2017 in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015, the Supreme Court concluded that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional. While appreciate that the decision had nothing to do with the *Sexual Offences Act*, we cite it because of the pertinent observations that the apex Court made regarding mandatory sentences.....
>
> ..... In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing."

79. In this case the evidence has shown that the complainant and the Appellant were in a secret and consensual relationship which had gone on for a while before her mother discovered when she left her home and slept out in the Appellant's home. She stated in her testimony that the Appellant was her boyfriend and they had sex on several occasions. That the Applicant had promised to marry her.

80. I have also observed that the complainant was 4 months' shy of 18 years. This court believes that both the Appellant and the complainant laboured under the mistaken belief that they were both ripe for and began exploring the prospect of marriage while engaging in sex as a prelude. Indeed the record shows that when the Appellant was first arraigned in court on the charge on 15th November 2021, he readily pleaded guilty. The Court explained to him the consequences of pleading guilty after which the charge was read again and he still pleaded guilty. The Prosecutor read the facts and also exhibited the P3 Form (Exh.1), PRC Form (Exh.3) which confirmed penetration and Birth Certificate serial No.1xxxxx which showed that the complainant was born on 26th March 2004 meaning she was 17 years at the time. The Accused admitted the facts. The record shows that instead of the court proceeding to convict, it deferred the matter to 17th November 2021 for directions.

81. This court observes that the trial court was in error in failing to convict the Accused at that point because the record shows that plea had been taken in a lawful and procedural manner. As would be

expected, the Accused pleaded not guilty when he returned to court on 17th November 2021 hence the trial.

82. I am aware that the Accused was within his trial rights to change plea. I have however set out what is contained in the Record to show that in the first instance, the Accused admitted to have penetrated the complainant because that was the plain truth as in their minds, they were pursuing a consensual relationship.

83. In the circumstances of this case therefore, while I uphold the conviction, I find it just and fair to interfere with the sentence. A long jail term would in the circumstances neither be useful nor meet the ends of justice.

84. I reduce the sentence to the period already served. The Appellant is set at liberty forthwith unless otherwise lawfully held.

85. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 13TH DAY OF MARCH, 2024

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R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of the Accused, Mr. Njeru for the State and Siele (Court Assistant)