Mutembei v Republic (Criminal Appeal 6 of 2020)
[2024] KEHC 3130 (KLR) (13 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3130 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL 6 OF 2020

RL KORIR, J

MARCH 13, 2024

BETWEEN

EUTICUS MUTEMBEI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number 18 of 2020 by Hon. Aduke P. in the Magistrate's Court in Bomet)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 28th March 2020 in Bomet East sub-county within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of EC, a child aged 7 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 on 28th March 2020 in Bomet East sub-county within Bomet County, he intentionally and unlawfully touched the vagina of EC, a child aged 7 years with his penis.

3. The Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case and the Appellant called one witness in aid of his defence.

4. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. The Court of Appeal in the case of Mark Ouiruri Mose v Republic [2013] eKLR, held that:-

> " That this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always

bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that"

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 EC (PW1) on 28th March 2020. PW1 testified that on the material day, the Appellant approached her mother (PW2) and asked her if PW1 could accompany him home to help him babysit his young child. That PW2 allowed PW1 to go to and assist the Appellant in babysitting. PW1 further testified that later in the evening, the Appellant removed her clothes and inserted his private parts into her private parts.

7. AC (PW2) who was the victim's mother testified that on the material day, at the Appellant's request, she allowed PW1 to go babysit the Appellant's toddler. PW2 further testified that PW1 returned home on Monday (30th March 2020) at around 11 am and she noticed that PW1 was not walking well. That upon inquiry, PW1 told her that the Appellant "alimfanyia tabia mbaya". PW2 further testified that she reported the matter to Nyumba Kumi and later to the Police.

8. Dr. Mutai (PW5) testified that he was a doctor attached to Longisa Hospital. He testified that PW1 was examined on 4th April 2020 and was found to have a swollen vulva, bruises on the labia majora and a raw broken hymen. He further testified that the injuries were approximately 5 days old.

9. It was PW5's testimony that the raw broken hymen was consistent with penetration of the vagina.

10. 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.

The Accused/Appellant's Case

11. The Appellant, Euticus Mutembei gave unsworn testimony and denied committing the offence. He stated that on the material day, he was arrested and told that he had defiled PW1. The Appellant further testified that the child that PW1 and PW2 referred to was born while he was in prison and that PW1's testimony was false as it showed that the alleged defilement took place a month before the material date (28th March 2020).

12. Caroline Chepkoech (DW2) testified that she was the Appellant's wife. She stated that she had had a disagreement with the Appellant and left their home for two days. She testified that the Appellant did not commit the offence as he had been faithful to her.

13. In a Judgment dated 18th September 2020, the trial court convicted the Appellant of the charge of defilement contrary to section 8(2) of the *Sexual Offences Act*. On 7th October 2020, he was sentenced to serve life imprisonment.

14. Being aggrieved with the Judgment of the trial court, Euticus Mutembei through a Petition of Appeal dated 9th October 2020 appealed against his conviction and sentence on the following grounds:-

    i. That the Honourable Magistrate erred in law and fact by arriving on the wrong premise to convict the Appellant.

    ii. That failing to take into account the mitigation given by the Appellant.

    iii. That the Honourable Magistrate erred in law and fact by harshly sentencing the Appellant.

15. In his undated Petition of Appeal filed on 7th February 2023. The Appellant filed additional grounds of Appeal reproduced verbatim as follows:-

    i. That the learned trial Magistrate erred in matters of law and fact when he convicted the Appellant in this instant case yet she failed to note that the charge sheet was defective under section 214 of the Criminal Procedure Code.

    ii. That the learned trial Magistrate erred in both law and fact when he convicted the Appellant herein in the instant case yet she failed to note that the evidence of the Prosecution was not corroborated.

    iii. That the learned trial Magistrate erred in both law and fact when he convicted the Appellant in the instant case yet she failed to note that the voire dire of the complainant was not done as required under section 19 of the *Oaths and Statutory Declarations Act*.

    iv. That the learned trial Magistrate erred in both law and fact when he convicted the Appellant in the instant case yet the age of the complainant was not proved.

    v. That the learned trial Magistrate erred in both law and fact when he convicted the Appellant in the instant case yet she failed to note that penetration was not proved.

    vi. That the learned trial Magistrate erred in both law and fact when he convicted the Appellant in the instant case yet she failed to consider the Appellant's defence.

    vii. That the learned trial Magistrate erred in both law and fact when he convicted the Appellant in the instant case yet she failed to note that the trial against him was unfair.

16. On 23rd January 2023, parties took directions to canvass the Appeal by way of written submissions.

The Appellant's Submissions.

17. In his undated submissions filed on 7th February 2023, the Appellant submitted that the Charge Sheet was defective as he was charged with the offence of defilement yet the doctor's (PW5) testimony was that of sexual assault. It was his further submission that he ought to have been charged with the offence of sexual assault which attracted a sentence of 10 years and not defilement which attracted a life sentence.

18. It was the Appellant's submission that the Prosecution witnesses failed to give testimonies that corroborated each other. That the court should treat the contradictory testimonies by the Prosecution's witnesses as untrustworthy. He relied on R v Asumani Logani S/O Muza [1943] 10 EAC 92; Canisio S/O Walwa v R [1956] 23 EAC 453 and Chila v Republic [1967] EA 722.

19. The Appellant submitted that the Prosecution did not prove penetration. He stated that if PW1 had been penetrated, the medical examination conducted by PW5 would have shown tears in her genitalia and not minor bruises. He relied on Nyasa S/O Bichana v Republic [1958] EA.

20. The Appellant submitted that the Prosecution failed to prove the age of PW1. That there was nothing to indicate PW1's birth year and that PW2 being PW1's mother neither mentioned anything about PW1's age nor did she produce any documentary evidence to prove PW1's age.

21. It was the Appellant's submission that the Prosecution did not prove penetration. That a broken hymen in small girls heals quickly and that it was not possible for him to penetrate PW1 yet the only injuries suffered by PW1 were bruises on the labia majora and not any tear on her genitalia.

22. The Appellant submitted that the doctor (PW5) failed to test the whitish discharge so as to confirm if the discharge came from the victim, PW1.That the findings of a swollen vulva and epithelial cells could be caused by other things other than sexual activity. He relied on Michael Odhiambo v Republic [2005] eKLR.

23. The Appellant submitted that part of PW1's testimony was not credible as she exaggerated her testimony to distance herself from her guilty conscience and made false allegations against him. He relied on Maina vs Republic Criminal Appeal Number 955 of 1969.

24. It was the Appellant's submission that the Prosecution had failed to discharge its burden of proof.

25. The Appellant submitted that the trial court did not consider his defence. That there was something sinister behind the charges he faced. The Appellant further submitted that it was the duty of the trial court to not only reject or allow his defence, but to also give the reasons as to why it had rejected or allowed the defence.

26. The Appellant submitted that he did not undergo a fair trial and that the sentence meted on him was harsh. He faulted the trial court for not informing him of the contents of the Probation Report and for failing to acquit him.

27. He urged this court to re-assess and re-evaluate his sentence as he was a first offender and had a duty to take care of his family.

The Prosecution's submissions.

28. In submissions dated 8th November 2023, the State did not oppose the Appeal. They stated that although the court recorded that voir dire had been conducted, the vital questions put to a minor of tender years was not recorded and that the absence of such questions was fatal.

29. It was the Prosecution's submission that the trial court did not formulate the age of the victim as an issue for determination and in the end, the victim's age was not properly established.

30. The Prosecution discredited the evidence of PW1 that she had gone to take care of the Appellant's minor and when according to DW2, she had not given birth at the time. They urged this court to carefully evaluate the Appellant's defence.

31. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal dated 9th October 2020, the Supplementary Petition of Appeal and Appellant's written submissions both filed on 7th February 2023 and the Respondent's written submissions dated 8th November 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 harsh and severe.

i. Procedural issues affecting a fair trial

a. Whether the Charge Sheet was defective.

32. 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.

33. In determining whether a charge sheet was defective or not, the Court of Appeal in Sigilani v Republic [2004] 2 KLR, 480 held as follows:-

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence".

34. The Appellant faulted the Charge Sheet on the ground that it stated a charge of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* when he ought to have been charged with sexual assault contrary to section 5 of the *Sexual Offences Act*. He stated that the evidence of Dr. Mutai (PW5) revealed that the nature of the victim's injury had been sexual assault.

35. I have looked at the Charge Sheet and the Appellant was charged with defilement contrary to section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006 which provides that:-

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

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life

36. 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 28th March 2020 at [Particulars Withheld] in Bomet East Sub County within Bomet County. It was plain from the Charge Sheet what charge the Appellant faced. There was no ambiguity at all.

37. 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 v 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. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

38. 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."

39. 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 and his witness. This demonstrated that the Charge Sheet had been properly drawn and that the Appellant fully understood the Charge he faced. His argument that PW5 stated in the P3 Form that the complainant had suffered sexual assault does not hold water. I therefore dismiss this ground of appeal touching on the charge sheet.

b. Whether failure to conduct a voire dire was fatal

40. It was a ground of the Appeal that a voire dire examination was not conducted on PW1 as required by the law. That the trial Magistrate did not comply with the provisions of section 19 of the *Oaths and Statutory Declarations Act*.

41. Section 19 of the *Oaths and Statutory Declarations Act* provides:-

(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

(2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.

42. Voire dire was explained by the Court of Appeal in the case of Macharia v Republic [1976] KLR 209, as:-

> " It [voir dire] must be a preliminary examination of a witness by the magistrate in which the witness is required "to speak the truth" with respect to questions put to him, or her, so that the magistrate can discover if he, or she, is competent (e.g. she is not too young, or she is not insane) to give evidence and should be sworn or affirmed (according to whether or not she is a Christian, or of any other, or no, faith, and understands the nature and obligation of an oath to tell only the truth)....."

43. In the present case, the court record shows that on 4th August 2020, the trial court conduced a voire dire examination on the victim, PW1 and recorded as follows:-

> " Voi dire conducted on minor EC (aged 7 years old). I have interviewed the minor and it is my considered view that she possesses sufficient intelligence to give sworn evidence."

44. The conventional method of conducting a voire dire examination is for the court to interrogate the minor and record the questions asked and the answers given by the minor. However, courts have

allowed the procedure in conducting voire dire to be varied. In Maripett Loonkomok v Republic [2016] eKLR, the Court of Appeal held that:-

> "Although this decision, through section 19 of *Oaths and Statutory Declarations Act* underpinned the legal practice in relation to children's testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath."

45. Flowing from the above, it is my finding that the trial court conducted a proper voire dire examination on the victim and recorded the same. Accordingly, this ground of appeal is dismissed. On the same vein, I must dismiss the Respondent's submission that failure by the court to adhere to the question/answer method in the voir dire examination was fatal.

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

46. 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.

47. The Appellant submitted that there was no documentary evidence to show that PW1 was aged 7 years and consequently that the Prosecution failed to prove her age. In conceding the Appeal, the Prosecution faulted the trial court for not formulating the age of the victim as an issue for determination and concluded that the age of the victim was not established.

48. 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.

49. 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.

50. EC (PW1) testified that she was 7 years old and that she was in standard 2 in [Particulars Withheld] School. The Appellant did not cross examine the victim (PW1) on her age.

51. Similarly, AC (PW2) who was the victim's mother testified that the victim (PW1) was aged 7 years as she had been born in October 2013. The Appellant did not cross examine PW2 regarding the age of PW1.

52. It is true that there was no documentary evidence to prove that PW1 was aged 7 years. However, the testimony of a parent in regards to their children's age is given due consideration by courts. 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?....."

53. Similarly in E K v Republic [2018] eKLR, Githinji J. held that:-

> " .....The best evidence in relation to age of a person is a Birth Certificate. In absence of it, the parents would know, more so the mother....."

54. Furthermore, the court is allowed to make its own observation on the estimated age of the victim. In this case, the court by conducting a voir dire must have observed that the victim was a young child. The Court of Appeal in Mwalango Chichoro Mwanjembe v Republic [2016] eKLR held:-

> " The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. 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....."

55. I have no reason to disbelieve the testimony of AC (PW2) in relation to the age of PW1. Consequently, it is my finding that at the time of the commission of the offence, EC was aged 7 years. The Prosecution had no basis for throwing its hands up stating that the age was not proven. The least it could have done was to urge the court to give the Appellant the benefit of a higher age for the minor. To say, let the Accused go because there was no proof that a child victim in class 2 was a minor is to defeat justice.

56. With regard to the issue of identification, the Court of Appeal in the case of Cleophas Wamunga v Republic[1989]eKLR expressed itself as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger....."

57. The victim (PW1) testified that on the material day, the Appellant removed her clothes and did "bad manners" to her. While giving her testimony, PW1 identified the Appellant as the person who did bad manners to her. PW1 also testified that the Appellant approached her mother to seek her permission to allow her go and babysit the Appellant's child. She stated that he knew the Appellant because it was not the first time that they had met.

58. AC (PW2) who was PW1's mother testified that he knew the Appellant as he was a watchman and a neighbour to her elder daughter called Chebet. PW2 corroborated PW1's evidence that the Appellant came to ask her if PW1 could assist in babysitting his child.

59. John Kipkorir (PW3) and Joseph Kirui Kitur (PW4) who testified as members of Nyumba Kumi, all stated that the Appellant worked as a watchman. More importantly, Caroline Chepkoech (DW2) who was the Appellant's wife testified upon cross examination that she knew EC because her sister was their neighbour.

60. From the evidence above, it is clear to me that the Appellant and the family of the victim were familiar and knew each other well. That would explain why PW2 would allow him to take her child to his house. This evidence in my view is more of recognition than identification. There was no possibility of mistaken identity.

61. It is my finding therefore that the Appellant was positively identified by PW1 as the perpetrator.

62. 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.

63. 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.

64. In the instant case, I shall carefully evaluate the victim's testimony and the medical evidence tendered.

65. EC (PW1) testified that on the material day (28th March 2020), the Appellant removed her clothes and asked her if she had ever had sex to which she said no. PW1 testified that the Appellant removed something that looked like a balloon and put it on his private parts and "akanifanyia tabia mbaya kwa kitanda" (and penetrated on the bed).

66. For victims of defilement who are of tender years, courts have accepted the use of the words "bad manners" or "tabia mbaya" as definitions of defilement. In the case of Muganga Chilejo Saha v Republic [2017]eKLR, the Court of Appeal held:-

> "Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms such as "alinifanyia tabia mbaya".

67. Regarding the medical evidence, Dr. Mutai (PW5) testified on behalf of Julius Magut. He testified that PW1 had been examined on 4th April 2020 and stated that the injuries were approximately 5 days old. That PW1 was found to have a swollen vulva, bruises on her labia majora and a raw broken hymen. It was his opinion that the raw broken hymen was consistent with penetration. PW5 produced a P3 Form and a PRC Form and the same were marked as P.Exh 1a and 1b respectively.

68. I accept the medical evidence presented by PW5 that there was penetration. He observed bruises on her labia majora and broken hymen which in his professional opinion showed vaginal penetration.

69. While accepting the medical evidence of penetration above, I must observe that the victim was examined 5 days later and not immediately after she reported the incident to her mother. According to the evidence of PW1 and PW2, the Appellant approached PW2 requesting that PW1 should go and babysit his child on 28th March 2020 which was a Saturday. She was defiled on that night. She went back home on Monday, the 30th and it was not until 4th April 2020 that she was taken for medical examination.

70. This court wonders what was happening between the time the mother learnt of the defilement of the daughter and the time she took her to hospital and made a report. It is this court's view however that the omission to seek immediate medical attention did not negate the firm findings of the doctor (PW5) that the victim had been penetrated.

71. To rule out the possibility that the victim may have been defiled by any other person between the time she left the Appellant's home and when she was taken for medical examination, I have carefully gone through the victim's evidence. Her testimony was vivid and cogent. She was able to describe to the trial court in detail how the Appellant defiled her and even stated that the Appellant put something like a balloon (condom) on his private parts before he penetrated her. She testified that she was in a lot of pain after the ordeal. Her testimony was unshaken even after cross examination.

72. The trial court which had the benefit of seeing the victim testify and the chance to observe her noted that the victim was visibly angry at the Appellant and kept turning away from the Appellant in a scared fashion. There was nothing to indicate that the victim (PW1) could have been untruthful.

73. In light of the above, I find the victim's testimony as truthful and I find that there she was penetrated by the Appellant on the material day.

74. Based on the totality of the evidence before me, it is my finding that the Prosecution satisfactorily established the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt. I am unable to agree with the Prosecution that the case was not proven.

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

75. The Appellant (DW1) denied committing the offence. He testified that the victim's (PW1) and her mother's (PW2) testimonies regarding the child she (PW1) came to babysit were false as the child was born while he was in prison and the said child did not exist on the material day. He further alleged that his businesses had been taken over by the arresting officer.

76. Caroline Chepkoech (DW2) who was the Appellant's wife testified that the arresting officer wanted her as he had told her to look for another husband. DW2 further testified that she gave birth on 9th May 2020. She vouched for the Appellant that he did not commit the offence as he had been faithful to her.

77. I have considered the defence of the Appellant and his witness, DW2. They state that the child that PW1 came to babysit did not exist on the material day and hence the testimony of PW1 should be discarded by this court. I have gone through the court record and I have noted that when DW2 was cross examined, she testified that she knew a child by the name AC who was the daughter of the Appellant and his first wife. DW2 testified that she left Ashley in her home on 28th March 2020.

78. In my analysis of the above evidence, it is my finding that the child that the Appellant wanted help in babysitting was AC and not the unborn baby that DW2 was carrying on the material day. The Appellant and DW2 were engaged in a futile attempt to mislead this court in an effort to discredit the testimony of the victim and AC (PW2).

79. The allegations of the Appellant's business being taken over by the police or that the police made overtures to his wife were unsubstantiated and are accordingly dismissed.

80. It is my finding that the Appellant's defence was weak and as a whole, did not cast any doubt on the Prosecution's case which I have already found proven.

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

81. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. The Court of Appeal in the case of Ogolla s/o Owuor v Republic, [1954] EACA 270, held as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

82. The penal section for this offence is found in section 8(2) of the *Sexual Offences Act* which states that:-

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life

83. As earlier stated, the trial court sentenced the Appellant to life imprisonment.

84. The Appellant submitted that this sentence was severe and that this court should re-assess and re-evaluate the sentence bearing in mind that he was a first offender. That he wanted a chance to take care of his family and create awareness to the community.

85. Section 8 (2) of the *Sexual Offences Act* provided for a mandatory sentence of life imprisonment. In recent jurisprudence, superior courts have shunned from applying the mandatory sentences. The ratio decidendi has been that the nature of the mandatory sentences tied their hands and took away their discretion in sentencing. That the courts should have discretion in sentencing after considering the circumstances of the case and the Accused's mitigation.

86. 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."

87. Similarly in Jared Koita Injiri v Republic [2019] eKLR, the Court of Appeal held that:-

> " In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu &

Another v Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

88. In finding a life sentence unconstitutional, the Court of Appeal in Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) pronounced itself as follows:-

> " We note that the decisions of this court relied on by the appellant, namely Evans Wanjala Wanyonyi v Rep [2019] eKLR and Jared Koita Injiri v Republic Kisumu Crim App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in Francis Karioko Muruatetu & another v Republic [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code. This fact notwithstanding, we are of the view that the reasoning in Francis Karioko Muruatetu & another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

89. I have considered the circumstances of the case and the Appellant's mitigation in his written submissions filed on 7th February 2023. I have also considered the Probation Officer's Report dated 5th October 2020. It is clear to me that the circumstances of the case were aggravated. The Appellant being a man in his mid-life years took carnal advantage of E.C who was a child of tender years and who did not understand the gravity of what happened to her. The Appellant must be held accountable for his actions and must serve a deterrent sentence as a punishment and to discourage others who want to perpetuate this vice.

90. In light of the life sentence being declared unconstitutional, the Appellant's life sentence is substituted with 35 years' imprisonment.

91. In the end, I uphold the Appellant's conviction. His sentence is reduced from life imprisonment to 35 years imprisonment. The sentence shall run from 4th March 2020 being the date of his arrest.

92. Orders accordingly.

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

.....

R. LAGAT-KORIR

JUDGE

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