Mwangi v Republic (Criminal Appeal E009 of 2023)
[2024] KEHC 4728 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4728 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E009 OF 2023

DKN MAGARE, J

MAY 2, 2024

BETWEEN

ELIJAH MACHARIA MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the Hon. D.K Mahuti P.M. given on 25/8/2023 delivered by Hon. Koskei.

2. It is the duty of this court as the first Appellate court to re-evaluate the evidence and make its own conclusion. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

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

3. The court is not involved in finding evidence to support the conviction. It is involved in wholesome review of evidence and reaching its own conclusions. In Kiilu & Another v Republic [2005]1 KLR 174, the Court of Appeal held that:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

4. As I evaluate the evidence I must bear in mind that the burden of proof is on the prosecution. This burden stays with the prosecution throughout. It is never shifted to the Appellant as an accused person. In the case of Republic v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR, Justice R Nyakundi stated as hereunder: -

> " It is the law in Kenya as entrenched in *the constitution* under Article 50 (2) (a) that an accused person is presumed to be innocent until the contrary is proved. The *evidence Act* Cap 80 of the Laws of Kenya at section 107 (1) provides thus: "whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist."
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> As to what constitutes the burden of proof beyond reasonable doubt the case of Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373 provides as flows in a passage alluded to me considered the greatest jurist of our time Lord Denning:
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> > "That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."
> >
> > In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. That burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person. So likewise at the close of the prosecution case under section 307 (1) of the Criminal Procedure Code the prosecution must satisfy by way of the evidence presented so far that a prima facie case exist to warrant the accused person to be called upon to answer.

5. Section 307 referred above is equivalent to section 210 of the criminal procedure code for lower court matters. Within the context of criminal trials, the burden of proof not only lies with the prosecution, but the standard of proof is equally higher than in civil cases. It is on beyond reasonable doubt. Any reasonable doubt must be resolved in favour of an accused.

6. On the standard of proof, the Black's Law Dictionary, (11th Edition, 2019) at page 1694 defines 'the standard of proof' as '[t]he degree or level of proof demanded in a specific case; a rule of quality of evidence a party must put forward to prevail.

7. In the case of Republic v Ismail Hussein Ibrahim [2018] eKLR, Justice Nyakundi stated as doth: -

> " The well-established jurisprudence on this doctrine that the deceased guilt rests on the prosecution to proof the charge beyond reasonable doubt can be traced way back to the cases of Woolmington Versus DPP 1935 A C 462 and also Miller Versus Minister of Pensions 1942 A C. Whereas in the latter case Lord Denning stated on this phrase of beyond reasonable doubt as follows: "It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."
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> Further in the superior court within the common law jurisdiction Lord Oputa of the Supreme Court of Nigeria in the case of Bakare Versus State 1985 2NWLR adopted the statement as follows at page 465:"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".
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> To give meaning to this concept of burden of proof of beyond reasonable doubt in criminal cases the Federal Court of United States in the case of United States V Smith, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing In re Winship, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) (Harlan, J., concurring) the court stated:
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> > "The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state does not have to overcome every possible doubt. The state must prove

each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration."

8. In the case of Bakare vs. State (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria was of the firm view that:

> " Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability."

9. Our criminal jurisprudence is that where there are two plausible explanations, then the one that points to the innocence of the accused is to be taken. Doubt does not need to be in all aspect. One material aspect is enough. However, fanciful doubt is not to be taken as doubt. In the case of JMN v Republic (Criminal Appeal E017 of 2021) [2022] KEHC 279 (KLR) (7 April 2022) (Judgment) Neutral citation: [2022] KEHC 279 (KLR) Justice Mativo as then he was stated as follows: -

> " reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge. This is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right."

Background and evidence

10. The complainant is said to be a girl of 17 years. The charge was that on diverse dates between 5/4/2020 and 3/2/2020 at Gikondi area in Mukwereini sub county intentionally, and unlawfully caused his penis to penetrate the vagina of MN a child aged 17 years. The Appellant was arrested on 4/7/2002. He had an alternative court of an indecent Act with a minor.

11. The complainant testified that the Appellant was by boyfriend from March 2020. She stated that she left home on 5/4/2020 and went to the Appellant's place. They had sex at night and she went back home. The following day she took clothes and went to the Appellant's house and they had sex. On 1/7/2020, she went with all her clothes to the Appellant's work place. This she did while the parents were asleep. On 1/7/2020 they did not have sex. Both the Appellant and the complainant were arrested. On further, examination, she stated that she did not then the Appellant her age. The mother had

known that they had gone friendship. On cross examination she stated that the girl had 2 wells to turn 18. She was found to have had sex.

12. PW 2 testified that the complainant is her daughter. She stated that in July night she went for short call and on return found the complainant missing. And their door was open. The following day a boy(unnamed) told her that the complainant came and left. She reported to the police as she knew they had some friendship. She suspected the Appellant. The girl was arrested on the road. She stated that the duo, that is the daughter and the Appellant had sex. I don't know whether this was first-hand information or suspicion.

13. Though she was arrested on the road, the witness noted that clothes were found in the house. She was remaining with 2 weeks to 18 years. On cross examination she confirmed that she was not present when the daughter was arrested.

14. PW3 was the investigating officer. He testified and produced the Exhibits. He stated that on 4/7/2020 she was informed of the appellant's arrest for defilement. They went to the police station and collected both the Appellant and the complainant who had been arrested. The complainant was placed in custody as a child in need of care and protection. The minor alleged that they duo had intercourse on 3/7/2020. The intercourse is alleged to haves started on 5/4/2020.

15. He re-produced a birth certificate for 30/7/2002. Though the minor is said to have been born 0n 30/7/2002, the birth certificate was generated on 8/1/2018, 2 years before the alleged offence.

16. PW4 testified that they were called by the mother. She suspected the Appellant. He was fetching grass when he was arrested. They stated that they carried clothes from under a bed, which they stated to be his. They took the items. These were not produced in evidence or identified by any party. They were never identified in court by the complainant. The whereabouts of such evidence is unknown.

17. He stated that on interrogation the girls said she was with Elijah Macharia. On cross examination, she stated that she did not know why the girl ran away from her home at 2.00 am. They booked the minor with a notice of a child in need of care and protection and the Appellant for defilement. They were arrested in 2 separate places.

18. PW5 The clinical officer stated that this was an old case of defilement. There was an old break of the hymen. There were no tears or lacerations. No tender on palpation. There was no blood, no PEP discharge or venereal infections. On urinalysis, there was pus cells. He got an impression of bacterial infection and urinary tract Infection.

19. There was no evidence of examination of the complainant to confirm congruence of infection. On re-examination, the clinical officer indicated that the complainant was engaged sexually.

20. On being put on her defence, the Appellant stated that the complainant came to her his place on 3/7/2020 with her things. He asked the complainant what she wanted, where she replied that she wanted to stay there. He knew the girl was born on 31/7/2020. She told him that she had a waiting card, which the Appellant was shown. On cross examination, he stated that the complainant went to his place at 11 pm. She slept. He stated that he did not have a birth certificate.

21. The court found them guilty and sentenced him to 15 years-imprisonment. He Appealed to this court. The Appellant raised 6 concise grounds of Appeal as hereunder: -

    a. That the learned trial magistrate erred in both law and fact in failing to consider that prosecution evidence was contradicting, inconsistent, and uncorroborated.

b. That the learned trial magistrate erred in law and fact when failing to consider that medical evidence was not done in a fair way thus causing an unfair trial enshrined under article 50(2) of *the constitution*.

c. That the learned trial magistrate again erred in law and fact when he rejected my sworn evidence which was not challenged by the prosecution side.

d. That the learned trial magistrate again erred in both law and fact when the medical examination and the evidence were not done to required standards. I also pray that this is also re-examined.

e. Further grounds to be adduced during the hearing of this appeal. I pray that the Honourable court supplies me with my trial records and a copy of the judgment.

22. The Appellant appeared before me and argued his appeal. He is now 25 years old but was 23 years when the incident is said to have occurred. The state opposed the Appela on both conviction and sentence.

Analysis

23. Section 8 of the *Sexual Offences Act* provides as follows:

> " 8. A person who commits an act which causes penetration with a child is guilty
> (1) 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.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
>
> (4) 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.
>
> 5) It is a defence to a charge under this section if –
>
> (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
>
> (b) the accused reasonably believed that the child was over the age of eighteen years.
>
> (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

24. The offence of defilement has three elements, that is: -

i. age of the complainant

ii. penetration of a sexual organ (in this case the vagina)

iii. using another sexual organ (in this case the penis)

25. On the question of age, the Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR was of the view that:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

26. Reliability of such documents are crucial in cases where there is doubt as to age. It is unnecessary for toddlers who are clearly 0-7 years. The court is also alive to the fact that birth certificates may be made or forged. Changes could be made. In a situation where a birth certificate is a recent one, there needs to be a plausible explanation, especially where a defence under section 8(5) has been raised.

27. This case is unique, in that, if I believe the prosecution witnesses, the case collapses. Section 124 provides for corroboration in sexual offences except in circumstances where, for reasons recorded in writing, the court believes the minor to be telling the truth. The said section provides as follows:-

> " Nnotwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged complainant is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged complainant of the offence, the court shall receive the evidence of the alleged complainant and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged complainant is telling the truth."

28. The Court wrote in a casual way to fulfil the requirement of the said section without giving plausible reasons for finding whether the minor was truthful. Was the minor telling the truth? I will let her speak: -

> " On 5/4/2020 I left home at night and spent with him. We had sex, we had around twice. On 1/7/2020 I went to him with all my clothes and blanket. My parents were asleep. We did not have sex then. The following day we went to the far, we were arrested we had sex the day before we were arrested..."

29. In this short excerpt, there are several lies and in congruencies that are inconsistent with the truth, that is: -

i. The medical evidence shows that the sexual activity was not a recent one.

ii. There were no spermatozoa.

iii. They were arrested the following day. In one line she states that they did not have sex and on another, a day before their arrest they had sex.

iv. medical evidence shows and broken hymen and no tears. This was old defilement.

30. What I gather is that the complainant was virtually stalking the Appellant. She decided to go to his house at night with her things. By her own admission they did not have sex on the day she went there. From the evidence of the witnesses, she was arrested after she moved her things, on her own volition to the Appellant's house.

31. That day on her own evidence they never had sex. I believe the medical evidence that she was sexually active. The evidence does not place any sexual activity around July 2020 when she was traced to the Appellant's house. The period in before 1/7/2020, was solely known to the complainant, whom I have found to be untruthful.

32. As such her evidence needed to be corroborated. Medical evidence does not place the Appellant as the perpetrator. It cannot be true that they had sex in the recent past when the hymen breakage was an old one. The Appellant raised 2 defenced, which the court appears to ignore. There are two aspects of the case that the Appellant raised.

    i. The first question is a defence under section 8(5) of the seual offences act. The said section provides as follows: -

> "(5) It is a defence to a charge under this section if -
>
> (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
>
> (b) the accused reasonably believed that the child was over the age of eighteen years."

    ii. The second question is that the Appellant did not commit the offence.

33. The P3 form does not show any evidence of recent sexual activity including inflammation. There is absolutely no evidence of any sexual activity around June July 2020. The mother's evidence deals with one escape in July 2020. This did not yield evidence of defilement. The sexual activities in May June are not corroborated. This is important in a scenario where the minor is not truthful.

34. The complainant's evidence is clearly not in tandem with medical evidence. It is also not in tandem with the mother's evidence. The minor who appears to have been active went to the Appellants place to lure him. On her own admission, she did not have sex on the day they were arrested. The court wrongly attributed the presence of the complainant in that home to the Appellant. She herself testified that she carried her clothes and moved suo moto.

35. Further, she allegedly only deposited clothes. She was not found in the locus in quo. It Appears that they were caught before the happening of the event.

36. The second defence raised was that the Appellant asked the complainant the age and was given 31/7/2000, making her 19 years. Two things may have happened. First, either the minor actively misinformed the Appellant of the minor was telling the truth, the problem being elsewhere. The idea of having a brand new birth certificate raises suspicion.

37. The suspicions are founded on the ground that the minor was 2 weeks to turning 18 years. She got her national identity card shortly after July 2020. This supports the theory that the complainant already had a waiting card. No wonder the national identity was clothed in mystery and contents therein not being revealed to the court. The court is entitled to make an adverse inference where a crucial document

is not secured. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, justice G V Odunga as then he was stated as doth:

> " Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

38. I note with concern that the birth certificate appeared to have been recently minted for the case. It is not useful for the There was no explanation where the original birth certificate went. The minor took herself as an adult. If I had found the defilement had occurred, I could still have found that the Complainant actively misled the Appellant.

39. In cross examination, the Appellant asked the right questions. The answers that were elicited were not controverted. The court stated that the question off a waiting card was a cock and bull story made by the defence. This is unfair to the Appellant. This was a boy who had just been hired 3 months before in a strange land. Then a girl turns up at midnight. Who cannot ask for an identity card.

40. The girl confirmed that that night they did not have sex. Was that cock and bull story too? This is not he language to describe solid defence evidence. The court should have been alarmed that not a month later, the complainant had a national identity card. Could such a card be without a waiting card. The courts must at all times give the accused persons the benefit of doubt. The benefit of doubt is not shared at all. It belongs to an accused person.

41. The complainant had gotten an ID card 3 months of the happening of the event. She did not disclose the date of birth on the identity card.

42. Further, the P3 form does not indicate any evidence showing recent defilement. There was no testimony that condoms were used. However, there was no spermatozoa, no inflammation or evidence of sexual activity save for the old defilement. This means the minor was lying on alleged defilement in July 2020. An untruthful witness is totally unreliable on any other respect.

43. I agree with the prosecution witness 5 that this was an old defilement. It was not linked to the Appellant at all. It is said to be an old case. The court did not find or have reasons in to find the complainant to be truthful.

44. The evidence of penetration on the diverse dates was not proved. The Appellant insisted that the minor went to his house on 1/7/2020. This is the same time they were caught. This did not generate any medical evidence for defilement.

45. The mother caused the arrest on basis of suspicion. Suspicion cannot be a basis of conviction. In Mary Wanjiku Gichira s. Republic, Criminal Appeal No 17 of 1998, the Court of Appeal held that:

> " suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life."

46. After discounting suspicions and the minor's evidence which is clearly not truthful, what remains is circumstantial evidence. For circumstantial evidence to work, it must be inconsistent with the accused's

innocence. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, Court had this to say on circumstantial evidence:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

47. I find and hold that the complainant having lied regarding her age, sexual on 30/6/2002, her evidence is tainted there is no corroborating evidence that they had sex at any one day. The period covered under the charge is 4 months. The Appellants had been in the employee as a shamba boy for 3 months according to the complainant.

48. The complainant and the Appellant are said to have met in March 2020. Even the mother related only to July 2020. The date of April 2020 was specifically inserted to cover the old case of defilement. The medical documents are also not useful to tell us the whole story and corroborate defilement.

49. In the absence of the finding, with written reasons why the complainant was to be trusted, the evidence required corroboration medical evidence is not useful as it does not place the appellant in the Locus in quo.

50. I also note that there was a major irregularity of threatening to charge the minor for being a child in need of care and protection in order to fine tune evidence to their favour. This must be resisted at all times. This creates evidence that is not free from error.

51. Lastly, the court failed to analyse the import of Section 8(5) defence. The court placed a heavy burden on the Appellant.

52. The court found defilement even where both parties were adamant that it did not occur. Indeed, when cross examined, she did not state that they had sex but a relationship. The evidence in cross examination also brought out another lies the complainant knew the accused for 6 months. This was not factual evidence.

53. I find that the case was not proved. Further I find that the complainant who was almost turning 18 lied that she was indeed 19. She showed the appellant a waiting card. This is a complete defence as a person turning 18 and another already at 18, may not be distinguishable. The test is not what a learned person could do but what steps the Appellant took. He was arrested before effecting his plans. He cannot be convicted for failing to defile. I find that the Appeal is merit on conviction. I quash the same.

54. The sentence is enslaved with conviction it has to go. The Appellant was less than 4 years older than the complainant without a doubt, the parties were borderline Romeo and Juliet has defilement been proved.as it is virtually not possible to distinguish their ages.

55. Finally, I wish the police can take a little more time to question these birth certificates obtained long after birth.

Order

56. The upshot of the foregoing is that I make the following orders: -

    a. The conviction and sentence are quashed and set aside, and in lieu thereof I substitute the said with an order, quashing the conviction and sentence and dismissing the charge against the Appellant. I direct that the Appellant shall be released forthwith, unless otherwise lawfully held.

    b. The file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 2ND DAY OF MAY, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Miss Lubanga or the state.

Appellant present at Nyeri Maximum prison

Court Assistant - Brian/Winnie

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