



**Njau v Republic (Criminal Appeal E009 of 2021)  
[2024] KEHC 5082 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5082 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL E009 OF 2021  
SM MOHOCHI, J  
MAY 8, 2024**

**BETWEEN**

**DAVID KAREGA NJAU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being and Appeal originating from the Judgement of Hon R. Yator  
Principal Magistrate delivered on 2<sup>nd</sup> March, 2021 in Molo Chief  
Magistrate's Criminal Court, Sexual Offences Case No 113 of 2019)*

**JUDGMENT**

**Introduction**

1. The Appellant was arrested on 19<sup>th</sup> September, 2019 and charged on 20<sup>th</sup> September, 2019 with three (3) Counts of Defilement and two (2) counts of Attempted Defilement contrary to the [Sexual Offences Act](#) No. 3 of 2006 as follows;

Count I: Defilement contrary to Section 8(1) (2) of the [Sexual Offences Act](#), No. 3 of 2006. The particulars of the offence were that:-

On diverse dates between 10<sup>th</sup> September, 2019 and 19<sup>th</sup> September, 2019 in Rongai Sub-County within County, intentionally caused his penis to penetrate the vagina of SN a child aged 7 years.



Alternative Charge: Committing an Indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that:-

On diverse dates between 10<sup>th</sup> September, 2019 and 19<sup>th</sup> September, 2019 in Rongai Sub-County within County, intentionally touched the vagina of SN a child aged 7 years with his penis.

Count II: Defilement contrary to section 8(1) (2) of the [Sexual Offences Act](#), No. 3 of 2006. The particulars of the offence were that :-

On diverse dates between 10<sup>th</sup> September, 2019 and 19<sup>th</sup> September, 2019 in Rongai Sub-County within County, intentionally caused his penis of KK to penetrate the vagina and anus of OW a child aged 4 years.

Alternative Charge: Committing an Indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that:-

On diverse dates between 10<sup>th</sup> September, 2019 and 19<sup>th</sup> September, 2019 in Rongai Sub-County within County, intentionally touched the vagina and anus of OW a child aged 4 years

Count III: Defilement contrary to section 8(1) (2) of the [Sexual Offences Act](#), No. 3 of 2006. The particulars of the offence were that:-

On diverse dates between 10<sup>th</sup> September, 2019 and 19<sup>th</sup> September, 2019 in Rongai Sub-County within County, intentionally caused his penis to penetrate the vagina of FN a child aged 5 years.

Alternative Charge: Committing an Indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that:-

On diverse dates between 10<sup>th</sup> September, 2019 and 19<sup>th</sup> September, 2019 in Rongai Sub-County within County, intentionally touched the vagina of FN a child aged 5 years with his penis.

Count IV: Attempted Defilement contrary to section 9 (1) (2) of the [Sexual Offences Act](#), No. 3 of 2006. The particulars of the offence were that :-

On diverse dates between 10<sup>th</sup> September, 2019 and 19<sup>th</sup> September, 2019 in Rongai Sub-County within County, intentionally attempted to caused his penis to penetrate the vagina of NC a child aged 6 years.

Alternative Charge: Committing an Indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that:-

On diverse dates between 10<sup>th</sup> September, 2019 and 19<sup>th</sup> September, 2019 in Rongai Sub-County within County, intentionally touched the vagina of NC a child aged 6 years with his penis.

Count V: Attempted Defilement contrary to section 9 (1) (2) of the [Sexual Offences Act](#), No. 3 of 2006. The particulars of the offence were that :-



On diverse dates between 10<sup>th</sup> September, 2019 and 19<sup>th</sup> September, 2019 in Rongai Sub-County within County, intentionally attempted to caused his penis to penetrate the vagina of BW.

Alternative Charge: Committing an Indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that:-

On diverse dates between 10<sup>th</sup> September, 2019 and 19<sup>th</sup> September, 2019 in Rongai Sub-County within County, intentionally touched the vagina of BW a child aged 5 years with his penis.

2. The Appellant pleaded not guilty to all the main charges and the alternative charges before the Trial Court. A full hearing was conducted. The prosecution called eleven (11) witnesses.

## **Trial Court**

### **Prosecution's Case**

3. Before the Trial Court PW1 was OW and testified that together with PW4 and PW2 while coming from school the Appellant asked them to go to his house, made them lie on the chair and gave them what he said to be alcohol mixed with urine. He removed her clothes, applied condom into her anus and vagina as she lay on the back. She felt pain. She used to see the accused when going to school. That he had defiled her before and threatened them with a knife saying he would cut their throats. After that particular incident he threatened to throw them in the water. She informed her mother who reported to the police. That she did not go to hospital
4. On cross examination she stated that PW3 was not around and reiterated that he applied condom on them.
5. PW2 was SN she stated that one day from school together with PW1, PW3, PW4 and PW5 they met the Appellant hiding in the maize. They had seen him twice before. He held their hands gave them money each, took them to his house asked them to sleep on the chair, gave them alcohol and she saw him urinate in a bottle and gave them to drink. He then covered their eyes and mouths so that they do not scream. He removed all their clothes as well as his. He put on the condom and inserted it into her vagina and anus. That he started with PW2, then PW5, then PW3, then PW4 and then PW1. That she peeped and saw him insert his penis in the vaginas of the other girls. He threatred to hit them with a rungu and cut them with a knife. He told them to go and if they said anything he would strangle them with a knife. She went home told her grandmother, Mama Ben lied to the Appellant to stay there as Baba Ben called the Police who came and arrested him. They were taken to hospital. She added that the Appellant had defiled her twice before. That another time she was with PW1, PW3, PW4 and PW5. He defiled them on two consecutive days.
6. On cross examination she stated that she saw several condoms on the table and stayed in the room with the chair. The second time they were defiled on the grass near his house. She reiterated on cross examination that when they were all defiled they were on the chair and the second time was on a Tuesday. That the Appellant lives with two other people but on that day he was alone. And she did not tell her grandmother as she feared the accused would kill them.
7. PW3 was NC and testified that together with PW2, PW4, PW5 and PW1 while from school, they met the Appellant coming out of a maize plantation who told them to go to his house. He gave them money then alcohol and urine to drink. He did bad manners to her. That he started with PW2. He tied bother their arms and legs and covered their eyes with clothes. He had a condom which he put in his penis and inserted in her vagina and she felt pain. When he finished he defiled PW4 then PW5. That they put on their clothes and he told them to go buy sweets with the money he had given them



- he threatened to kill them and throw them in the water if they told anyone. He had a knife. She went home and told her mother. That it was the first time he was defiling her. She knew him and used to see him on her way to school.
8. PW4 was FN. She testified that together with PW2, baby, PW5 and PW3 they met the Appellant who took them to his house, made them lie on the chair and locked the door. He gave them money and poison in a bottle which they all drank and he then did bad manners. He removed their clothes. For her he removed he pant. He covered her eyes with a cloth and then that of two other girls. He did bad manners to her vagina. He had put on a condom. He started with PW2, then PW3, then PW4, then Baby and then PW5. She did not see what he did with the others as their eyes were covered. They dressed and he threatened to kill them if they told anyone. He had a panga. She told her mother who called the chief and they were taken to police and then hospital. That it was the first time he defiled them.
  9. On cross examination she stated crying and stated that the accused held their hands and took them to the house.
  10. PW5 was BW. She testified that one day while from school together with PW4, PW3, baby and PW2 they met the Appellant who was coming from a maize plantation. He told them to go to his house, held their hands and took them to his house and locked the door. He sat them on a chair gave them poison in a bottle to drink and after they drank it he did bad manners to her. He removed her pant and also the others. Covered their eyes. He showed them a condom. He did tabia mbaya on her anus but not her vagina. He used a condom that he had put on. She did not feel pain. It was the first time he had defiled her. He threatened to kill them if they told anyone. He had a knife. She went home and did not tell anyone. Her mother was told by mama Mary. They went to the police station with her parents and also went to hospital. She stated that she would see the Appellant standing by the road on her way to school. She knew him.
  11. PW6 was BWM, mother to PW1 born on 28<sup>th</sup> April, 2015. That on 17<sup>th</sup> September, 2019, she sat PW1 in a basin and she screamed that she felt pain in her private parts. She said she sat on a stone. The following day she asked her to take a bath with the sister and again screamed that she felt pain. She pleaded with PW1 to tell her what happened and she pleaded with her mother not to tell anyone she said that the Appellant had defiled her with other children and proceeded to narrate. She stated that the Appellant had threatened to kill them if they told anyone. She confirmed she knew the Appellant. The girls were taken to the police station then to hospital.
  12. On cross examination she stated that the children said he had defiled them with the finger, she noticed blood stains but it was on 17<sup>th</sup> September, 2019 that the Appellant defiled her with his penis and noticed the injury. That her daughter knew the Appellant's house and had been there and her fellow children witnessed the Appellant defile all the other girls.
  13. PW7 was ANN grandmother to PW2. She stays with the minor who was born on 26<sup>th</sup> August, 2012. She was called by the mother of PW1 who informed that the children had been defiled by the Appellant who she knew as a neighbour. With PW6 they called the children and asked them questions. PW2 narrated what the accused would do to them and that he had done it severally and she still felt pain in her private parts. That the accused would put wood on her neck and strangle her and threaten to kill them if they told anyone. The girl still was terrified and traumatized. At first she had said she had been pricked by a stick and felt pain while urinating but later stated she had been defiled by the Appellant for a while.
  14. On cross examination, she stated that, the child had been in fear as the Appellant had threatened them and that the child had complained of pain for long and it did not register in her mind to check her. That the child cried a lot when she was coming to Court to testify



15. PW8 was Tabitha Waithera mother to PW5 born on 31<sup>st</sup> January, 2014. On 18<sup>th</sup> September, 2019 Mama Wangari and Mama Tabitha asked her to interrogate her child as she might have been one of the victims of defilement by the Appellant. On interrogation she confirmed the same and narrated what the Appellant had done. They reported to the police upon further interrogation. On cross examination she said she learnt of the offence at 7.00pm but it took place at 4.00pm that the Appellant had attempted to defile the child. And the Appellant gave them a drink and threatened to kill them.
16. PW9 was Mildred Naswa Nyongesa mother to PW4 born on 7<sup>th</sup> March, 2014. She testified that the child arrived home on 13<sup>th</sup> September, 2013 and complained of pain in her private parts. She thought she had urinated on herself and applied Vaseline. On 18<sup>th</sup> September, 2019 while from work she saw PW6 standing at the police station together with all the children. She called her daughter and upon interrogation she narrated how the Appellate had defiled her together with other children by inserting a long thing in her vagina after putting on something like paper. She checked to find the girl had bruises.
17. PW10 was Dr Njoroge Luka a medical practitioner at Nakuru Women's Hospital. He examined all the children and filled the PRC forms and the P3 forms for all of them which he produced in evidence. PW3's hymen and anus were intact; all lab results were negative. Her history suggested sexual assault thus a case of attempted defilement he produced PRC forms and the P3 forms filled as PEXB 13 a and b.
18. As for PW2, he found that she had broken hymen and had lacerations around the outside of the vagina. All test results came back negative. No spermatozoa present as time had lapsed and opined she had been defiled as hymen was broken and had lacerations. He produced PRC and P3 forms filled as PEXB 5 and 6.
19. As for PW4, had abrasion on labia majora, broken hymen and bacterial infection from the urinalysis. She had no injuries on her anus. He opined that she had been defied from the injuries on the labia majora and minora he produced the PRC and P3 forms filled as PEXB 11 and 12.
20. PW5 examination was that, she had normal genitalia as the Appellant had touched her vagina with his penis with no penetration. This was Attempted defilement. He produced the PRC and P3 forms filled as PEXB 8 and 9.
21. PW1 had injuries on the vagina. She had abrasions on labia majora and abrasions on her. She had a broken hymen and anal oryfix. There were no spermatozoa with all tests being negative. Due to her injuries on her vagina, broken hymen, bruise on anus and had a lot of faeces which had accumulated at anal region he opined that there had been penetration in her vagina and anus. He produced PRC forms and the P3 forms filled as PEXB 1 and 2 .
22. On cross examination he confirmed that it was possible for a penis to be partly or fully inserted in a child's vagina and that a hymen can be broken by other objects other than a penis but all the children stated that he used his penis. The children were taken after 24 hours and there were instances where he used a condom hence the absence of spermatozoa. Some of the children sustained injuries to prove they were defiled. The children identified him by names and as a neighbour even if he was not examined.
23. PW11 was No. 72446 CPL Joash Mosira attached to Summit Police station and the Investigation Officer. He testified that on 18<sup>th</sup> September, 2019 they received a report that five children had allegedly been defiled at Rigogo village by a person they knew on different dates in the month of September. They arrested 3 suspects who lived together and out of the 3 the children identified the Appellant. The children were taken to hospital and upon examination and filing PRC and P3 Forms it was confirmed that the children had been defiled. The Appellant would waylay the children on their way from school



and take them to his house or pulling them to the grass nearby. He used condoms. That he had liquid in a bottled which they suspected to be alcohol but the children called it urine due to its sour taste. He arrested the accused and identified the ages of the children and produced their birth records as exhibits as PW2 PEXB6, PW1 PEXB1, PW4 PEXB10 PW3 PEXB14 and PW5 PEXB7.

24. On cross examination, he confirmed that the children identified him and gave them his name. They all witnessed him defiling them as he was not defiling them separately, he took them on their way from school lured them with money and they all witnessed as he defiled them one at a time. The offence was between 10<sup>th</sup> and 19<sup>th</sup> September. That he also threatened them.
25. At the close of the prosecution case, the Trial Magistrate in the Ruling of 18<sup>th</sup> November, 2020 found that the prosecution had established a prima facie case and that the Appellant had a case to answer. The Appellant was placed on his defence. He made an unsworn statement and called one (1) brief witness.

### **Defence Case**

26. DW1 was David Karega Njau, the Appellant, he stated that he left home on 13<sup>th</sup> September, 2019 for his grandmother's burial in Eldoret and returned on 17<sup>th</sup> September, 2019. That upon his return he went to the shops where he was arrested and at 7pm children were brought and claimed that he defiled them. That he had had differences with PW2's mother after her cows grazed and destroyed his beans. PW1's father had refused to pay him Kshs 400 as a mason and had a grudge with the people and that is why he was framed. That his house was near the road and that anyone would have noticed. He also wondered how a 4-year-old would be defiled with no traces of blood and also how he would have defiled five children without them screaming.
27. DW2 was Mary Nyambura the sister to the Appellant. She testified that she was with accused for a funeral in Nyeri from 10<sup>th</sup> September, 2019 and returned on 17<sup>th</sup> September, 2019. That he was framed as he was arrested when they returned. That he be forgiven as they were orphans.
28. On cross examination, she reiterated that she met the accused on 10<sup>th</sup> September, 2019 and they proceeded for a funeral and only came back on 17<sup>th</sup> September, 2019 and at the time he used to live at their brother's place. That she did not come with anyone from the funeral or eulogy and that she could not have known what the accused did on 18<sup>th</sup> and 19<sup>th</sup> September had she had returned to Nairobi
29. In the ensuing judgment, the Trial Magistrate found the Prosecution had proved its case as against the Appellant and convicted him accordingly. The Trial Magistrate then sentenced the Appellant to one hundred (100) years' imprisonment on Counts 1, 2 and 3 each and in relation to Counts 4 and 5, the Appellant was to serve 10 years imprisonment on each count. The sentences were to run concurrently from 20<sup>th</sup> September, 2019, the day the Appellant was taken into custody.

### **Appeal**

30. Aggrieved by the conviction and sentence of the Trial Court, the Appellant preferred the instant Appeal against both sentence and conviction in the Memorandum of Appeal dated 10<sup>th</sup> March, 2021. The Appeal was argued based on the four (4) Amended Grounds of Appeal dated 28<sup>th</sup> July, 2023 where the Appellant asked this Court to quash the conviction and set aside the sentence: -
  - i. That the Learned Trial Magistrate erred in law and in facts by convicting the Appellant herein to a harsh and severe sentence without considering the age of the Appellant and circumstances surrounding the offence.



- ii. That the Learned Trial Magistrate erred in law and fact by not taking into account the inconsistencies and contradictions in the case which went into the root of the prosecution case.
  - iii. That the Learned Trial Magistrate erred in law and fact by not considering the charge of defilement contrary to Section 8(1)(2) of the *Sexual Offences Act* was not proved beyond reasonable doubt by the prosecution that.
  - iv. That the Learned Trial Magistrate erred in law and fact by not considering the Appellant's defence.
31. By directions of 17<sup>th</sup> July, 2023, the Appeal was canvassed through written submissions. The Appellant's submissions are dated 28<sup>th</sup> July, 2023 and were filed on 1<sup>st</sup> March, 2024 while the Respondent's submissions are dated 16<sup>th</sup> March, 2024 and filed on 18<sup>th</sup> March, 2024.

### **Appellant's Submissions**

32. The Appellant submitted on each of the grounds of appeal. Firstly, he contended that the sentence was excessive and harsh and that it given the current life expectancy of 67 years. Reliance was placed in *Ali Abdalla Mwanza v Republic* (2018) eKLR and *Shadrack Kipkoech Kogo v R Eldoret Criminal Appeal No 253 of 2003*. It was also submitted that the he ought to have benefited from a less severe sentence as per the Sentencing Policy Guidelines and that the Court misdirected itself by finding that the Appellant was not remorseful in mitigation and relied on the pronouncement in *MMI v Republic* (2022) eKLR Criminal Appeal no. E043 of 2021.
33. Secondly, it was submitted that there were contradictions and inconsistencies with the testimonies which prejudiced the Appellant. It was submitted that PW1 did not state when she was defiled, that the testimony of PW2 was contradictory in that PW2 stated that when he defiled them the second time she was with PW3 and PW4 but both PW3 and PW4 told Court that it was the first time he was defiling them. He questioned how PW2 would have peeped and saw him defiling the other girls if her hands were tied and eyes covered. He relied in *Richard Munene v Republic* [2018] eKLR and *Dickson Elia Nsamba Shapwata & Another v Republic* (Criminal Appeal No. 92 of 2007) Tanzania.
34. Thirdly, the Appellant submitted that the offence of defilement had not been proved that the victims had their eyes covered and would not have been possible to see what was used to defile them. That the prosecution failed to prove that his genital organ caused the act of penetration and that the children could not see what the Appellant inserted. He contended that the case should have been treated as sexual assault and not defilement.
35. Finally, that his testimony was not considered despite providing an alibi to confirm that the dates when the offences were allegedly committed he was not around

### **Respondent's Submissions**

36. Ms. Kisoo, prosecution counsel, submitted that the Prosecutions case was proved beyond reasonable doubt. She submitted that the elements to prove defilement as cited in *Kyalo Kioko v Republic* (2016) eKLR were proved. All the victims were below the age of 11, that aside from the oral testimony of the victims the same was corroborated by the testimony of PW10 and the medical records produced in evidence and finally all the victims identified the Appellant by recognition.
37. Regarding the inconsistencies and discrepancies, she submitted that each victim gave an individual account, they identified the Appellant who removed their clothes and he himself took off his and that



if there were any contradictions or inconsistencies they do not go to the root of the prosecution as they were minor.

38. On the issue of whether the Appellants defence was considered she submitted the Court considered his evidence and noted that the Appellant stated that he had attended his grandmother's funeral in Eldoret while DW2 testified that the funeral was in Nyeri. That the Court noted the inconsistencies and correctly dismissed their testimony as having material contradictions. That the grudges of the parents of SN and OW were an afterthought as it was never raised during trial.
39. Finally, the prosecution implored on the Court to uphold the sentence as there were multiple victims and all below the age of 7.

### **Duty of the Court**

40. The duty of the first Appellate Court is to carefully and critically examine and analyze afresh the evidence presented in the Trial Court and draw its own individual conclusion on the evidence. (See *Pandya v Republic* (1957) EA 336).
  41. This Court is equally alive to the fact that it has not heard or seen the witnesses who testified in the subordinate court

### **Analysis and Determination**

42. With regards to ground of appeal that, the Sentence imposed was harsh and severe and failed to consider the age of the Appellant and circumstances surrounding the offence did not take into account the Sentence Guidelines that allow rehabilitation and integration back into society, this Court is unpersuaded and it is trite that the Court cannot hear an appeal on the severity of sentence. However, the Court can hear an appeal on sentence if it is erroneous in law.
43. An error of law can arise, inter alia, from the manner in which a Trial Court exercises its discretionary jurisdiction on sentencing. If in imposing the sentence the Court acted on the wrong principle of law or committed some errors of law or misdirected itself in some respect, or the exercise of discretion is plainly wrong in the sense, inter alia, that no reasonable Court could exercise its discretion in such a way an Appellate Court can interfere with the exercise of judicial discretion on the principles stated in *Mbogo v Shah* [1968] EA 93.
44. In *Evans v Bartlam* [1937] AC 473, a decision of the House of Lords cited by Sir Clement De Lestang V.P. in *Mbogo v. Shah*, (*supra*) Lord Atkin said in part at p. 480-481:

“...and while the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that it will not interfere with the exercise of the judge’s discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and duty to remedy it.”
45. Lord Atkin’s dictum is to the effect that, the power of an Appellate Court to interfere with the exercise of discretion by a Trial Court is not limited to only consideration of the ground of error of law and can interfere on other grounds to avoid injustice, has often been cited as representing the modern thinking.



46. Section 26(2) of the *Penal Code* provides:

“Save as may be expressly provided by the law under which the offence concerned is punishable a person liable to imprisonment for life or any other period may be sentenced to any short term”.

47. Applying the above legal provisions and reasoning to the instant case, it is apparent that the sentence imposed by the Trial Court was not illegal. This is so because the one hundred (100) years’ imprisonment on Counts 1, 2 and 3 and ten (10) years imprisonment on Counts 4 and 5, to be served concurrently is the less severe sentence from the life-imprisonment sentence prescribed and contemplated in Article 50(2) (1) of *the Constitution*. The Article provides that:

“Every accused person has the right to a fair trial, which includes the right-

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

48. The sentence imposed on an offender must be commensurate to his blameworthiness. *Macharia v Republic* [2003] 2 E.A 559. The Appellant subjected five minors all under the age seven (7) to a bizarre and inhuman sexual attack. The orgy of sexual violence and threats of physical harm against the five children resulted in serious and permanent trauma scars for which they shall remain, for the rest of their lives. In this case, justice can only be served by a deterrent imprisonment term.

49. The trite law with regards contradictions and discrepancies of evidence is that, inconsistencies unless satisfactorily explained, would usually but not necessarily result in the evidence of a witness being rejected. (See *Uganda v Rutaro* {1976} HCB; *Uganda v George W. Yiga* {1979} HCB 217). In trying to shade light as to why there might be minor discrepancies between two witnesses testifying on the same case, the High Court of Kenya in *Philip Nzaka Watu v Republic* (2016) MISCCR APP 29 OF 2015, had this to say:

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”



50. Furthermore, in the case of *Joseph Maina Mwangi v Republic*, Criminal Appeal No. 73 of 1993, the court *inter alia*, held that: -

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences”

51. This court is bound by the Court of Appeal decision in *Erick Onyango Odeng’ v. Republic* [2014] eKLR citing with approval the Uganda Court of Appeal case of *Twehangane Alfred v. Uganda* Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 in which it was held as follows:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”

52. The role of an appellate court in the circumstances as spelt out in numerous cases is to assume the role of the trial court, reconcile these and then determine whether they were prejudicial to the appellant and therefore fatal to the prosecution case or were inconsequential to the appellant’s conviction and sentence. See the case of *Josiab Afuna Angulu v Republic*, Nakuru CR Appeal No.277 of 2006 (UR) and *Charles Kiplang’at Ngeno v Republic* Nakuru CR. Appeal No.77 of 2009 (UR).

53. “Contradiction” was defined by the Court of Appeal of Nigeria in the case of *David Ojeabuo v Federal Republic of Nigeria* {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA. Where the court stated as follows: -

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.”

54. In light of the above decisions, the ground of Appeal that, the inconsistencies and contradictions (if any) was not considered and that the same were such that would tilt the entire case into an acquittal fails on its face, this court is unpersuaded when considering the overwhelming implicating evidence presented by the prosecution in this instance the contradictions by the minor victims PW1, PW2, PW3 and PW4 were minor and inconsequential and did not prejudice the Appellant in any way.

55. Finally, with regards to the Appellant assertion that the trial magistrate was in error and did not consider the defence case, this court finds that while the trial court did consider the defence case the same was met and could not in any way displace the prosecution’s case on the five (5) charges which the prosecution proved the offence.

56. The upshot is that the conviction and sentence of one hundred (100) years’ imprisonment on Counts 1, 2 and 3 and ten (10) years imprisonment on Counts 4 and 5, to be served concurrently is hereby upheld and the Appeal is accordingly dismissed for want of merit.

It is so Ordered



**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 8<sup>TH</sup> DAY OF MAY 2024.**

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**MOHOCHI S. M.**

**JUDGE**

