Wachira v Republic (Criminal Appeal E024 of 2023)
[2024] KEHC 5972 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5972 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E024 OF 2023

AK NDUNG'U, J

MAY 24, 2024

BETWEEN

JAMES GACHEHU WACHIRA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM's Sexual Offences Case No.E032 of 2022– L. Gakii, RM)

JUDGMENT

1. The Appellant, JAMES GACHEHU WACHIRA was charged with Defilement contrary to Section 8 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 16th day of May, 2022 during evening hours at Kamburaini Location in Kieni East Sub – County within Nyeri County intentionally and unlawfully caused his penis to penetrate the vagina of O.W.G a child aged 3 years. After trial he was sentenced to life imprisonment.

2. Aggrieved by the conviction and sentence, the Appellant has filed this appeal based on the following grounds;

    i. That the learned trial magistrate erred in matters of law and fact by failing to note that penetration was not proved to be as a result of penile penetration due to lack of blood or any discharge.

    ii. That the learned trial magistrate erred in matters of law and fact by not appreciating that the charge sheet was fatally defective contrary to Section 214 and 134 Criminal Procedure Code for not conforming.

    iii. That the learned trial magistrate erred in matters of law and fact by failing to note that the outer Genitalia was normal.

iv. That the learned trial magistrate erred in matters of law and fact by failing to note that the case was not proved beyond reasonable doubt.

v. That the learned trial magistrate erred in matters of law and fact by failing to note that the clothes which is alleged to have been changed were not availed as evidence.

vi. That I pray to be present during the hearing of this appeal in order to adduce more grounds and may this appeal be given the earliest date possible. (sic).

vii. That I pray this appeal to succeed, sentence quashed and I be set at liberty.

3. The appeal was canvassed by way of written submissions.

4. In a nutshell, the Appellants submission is that penile penetration was not proved. He urges that a finger or any other object inserted into the vagina of a minor victim can cause the same result. It is his case that the mother to the minor could have inserted her finger in DW1.

5. It is the Appellant's case that even though under Section 124 of the *Evidence Act* a court can convict on the evidence of the victim alone, the court in doing so must be satisfied that the victim was telling the truth and it must record reasons for that belief. It is urged that nowhere on record in the trial proceedings did the trial magistrate invoke Section 124 or record anything on the credibility and demeanor of the minor complainant on the matter of penetration.

6. The medical evidence is attacked on the basis that the medical officer closed his mind to contemplate any other cause of the broken hymen and he stuck to his opinion. Again, the absence of spermatozoa or blood at the genetalia was not explained.

7. The Appellant challenges his identification as the perpetrator. He places reliance on the case of G.O.A. *V Republic Criminal Appeal No. 32 of 2017*. The evidence of the minor is challenged on the basis that she never alluded to have been penetrated by a male penis. It is urged that she repeatedly said that she was touched.

8. Further, the procedure through which PW1's evidence was received through PW2, an intermediary flouted the law.

9. The Appellant further submits that he was subjected to an unfair trial in contravention of Article 50 (2) (g) (h) and (k) of *the Constitution*. He avers that he was not provided with an advocate despite requests to be provided with a pro-bono advocate to defend him against complexities of a serious case where he faced a 3 year child who was incoherent in her testimony.

10. Lastly, it is submitted that the Appellant's defence was quashed without cogent reasons and the judgment of the trial court was non-compliant with Section 169 (1) and 169 (2) of the Criminal Procedure Code. The sentence, is challenged as being harsh and excessive thus contravening *the constitution*.

11. The Respondent's case is summed up in their submission dated 24/1/2024. On the ground of appeal that the charge sheet before the court was defective, it is contended that this matter was raised for the 1st time in this appeal. It is a fresh issue that the court should not entertain.

12. It is submitted that the evidence adduced formed such a complete chain of events that the only inference when considered in totality is that PW1 was defiled. That penetration was proved both through direct and circumstantial evidence and reliance was place on the case of Sammy Chero Kirau V Republic [2020] eKLR.

13. On identification, it is submitted that the complainant mentioned 'uncle Simu' as the person who defiled her. Before the incident, the Applicant had interacted with the complainant and was questioning her over his phone. PW2 had witnessed the Appellant asking for a phone from PW1 and had indeed warned him never to give a phone to PW1 as she could lose it.

14. Further, it is submitted that when questioned by PW3 about who was the perpetrator of the act, PW1 pointed at the house of the Appellant. It is urged that in the intervening period between when the Appellant was with PW1 and when PW2 noted pain in PW1's genital, no one else had interacted with PW1.

15. On absence of spermatozoa on PW1 is genetalia, it is submitted that penetration can be partial or complete and it is not necessary that the Appellant must have ejaculated to prove that defilement had taken place.

16. On the contention that there was breach of legal safeguards applicable when an intermediary was used in this case, it is urged that despite the request being made by the prosecution, that request was not acceded to as the record is silent on the matter.

17. Addressing the challenge mounted against sentence, counsel submits that the sentence prescribed for the offence as per Section 8 (2) of the *Sexual Offences Act* is life imprisonment and though the court is not to consider itself bound by the minimum sentence prescribed, the court balances between mitigation of the Accused vis – a -vis the aggravating factors.

18. A submission is made that the Appellant has raised additional grounds of Appeal without leave. It is urged that he is barred from submitting on the grounds that were not in the petition of appeal in accordance with Section 350 (2) of the Criminal Procedure Code. No leave was sought and the same ought to be disregarded in line with Section 350 (2) of the Criminal Procedure Code.

19. I have had occasion to consider the grounds of appeal, the evidence adduced at the trial court and the submissions filed. This being a first appellate court, I am obliged to analyze and evaluate afresh all the evidence adduced before the lower court and draw my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses testify. See Okeno vs. Republic [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

> " 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."

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

> 8.

(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.

(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.

.....

21. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013, where it was stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

22. In the case of Kaingu Elias Kasomo vs. Republic Malindi, the Court of Appeal in Criminal Appeal No. 504 of 2010 stated as follows:

> " Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

23. The importance of proving the age of the complainant in sexual offences was emphasized in Alfayo Gombe Okello vs. Republic (2010) eKLR where the Court stated that:

> " In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)...proof of age of a victim is a crucial factor in cases of defilement under *Sexual Offences Act*. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."

24. Therefore, the issues for determination before this court are whether the 3 ingredients were proved to the required degree and secondly, whether the charge sheet was defective, whether the proceedings before the trial court breached the Appellant's constitutional rights and lastly whether the judgement delivered by the trial court complied with the law and the effect thereof.

25. It is obvious that this court should answer the questions of the regularity of the trial as a preliminary issue as if the trial is vitiated by any form of irregularity, then the issues of merit of the trial court's

finding would be moot and appropriate orders would have to follow, be it orders for a retrial or otherwise as the case may be going by what is permitted by law.

26. I need to mention at the earliest that the issues surrounding the preliminary points of law that I have elected to deal with first are new grounds raised outside the Appellant's Petition of appeal and without leave of court. Counsel for the respondent submits, and rightly so, that the Appellant is barred from submitting on grounds that were not in his Petition of appeal in accordance with Section 350 of the Criminal Procedure code. No leave was sought and granted to amend the grounds. Those grounds ought to be expunged from the record.

27. In deference to the court's primary duty to do justice to the parties noting that the Appellant was acting in person and was therefore disadvantaged in knowledge of legal procedures, and in view of the fact that the Respondent was served and has submitted on the new grounds, I admit the same and deem them as properly filed and proceed to make findings thereon the irregularity notwithstanding.

28. Ground one raises the grouse that the Appellant was not accorded a fair trial. This fact is not borne out of record. The Appellant participated in the trial and was accorded an opportunity to cross- examine all witnesses. For reasons not known to this court, he did not cross examine PW1. This cannot be visited on the trial court for blame. The dictates of Article 50 of *the constitution* were complied with and there is no evidence of breach discernible from the record.

29. The 2nd extra ground is on the alleged failure of the court to comply with the provisions of Section 169 of the Criminal Procedure Code. I defer to the sentiments of the Court of Appeal in the case of Hawaga Joseph Ansanga Ondiasa Vs Republic, Criminal Appeal No. 84 of 2001 where the court in addressing the application of Section 169(2) of the section held as follows:

''It is true that the trial magistrate may be criticized for the perfunctory way in which he expressed himself in his judgment. However, even if we were to hold that he did not prepare his judgment strictly in accordance with Section 169 of the Criminal Procedure, this would not, of itself mean that the conviction of the appellant was wrong or is to be invalidate.''

And in the case of Samwiri Senyange V Republic [1953] 20 EACA stated as follows:-

''Where there had not been a strict compliance with the provisions of Sections 168 and 169 of the Criminal Procedure Code that will not necessarily invalidate a conviction and the Court will entertain an appeal on its merit in such a case if it can be done with justice to the parties.''

30. In view of the above, it is the law that non-compliance with the provisions of section 169 of the Criminal Procedure Code does not necessarily vitiate a conviction and an appellate court should proceed to consider an appeal on the merit should there be no threat of injustice being occasioned to either party. I would add that whereas trial courts must be reminded of this legal requirement and the need for compliance when writing judgements, so long as there is clarity of facts and discernable reasoning and clear findings in the judgement, the judgement should not be invalidated merely on the basis of the procedural lapse. I take the view that Article 159 (2)(d) of *the constitution* was designed as a cure to such eventualities.

31. In any event a perusal of the judgement of the trial court clearly shows that the judgement meets legal muster.

32. The 3rd ground relates to the right to be afforded a pro-bono counsel, this right is not absolute. An accused person who desires that a pro bono counsel be appointed for them must demonstrate impecuniosity that he may not be in a position to afford counsel and that substantial injustice will result if counsel is not appointed for him.

33. If it were to be the case that every Accused person must be given counsel at the state's expenses, finite resources notwithstanding, the criminal justice system would be harmstrung.

34. In Republic v Karisa Chengo & 2 others [2017] eKLR, the Supreme Court (Maraga, Mwilu, Ibrahim, Ojwang, Wanjala, Njoki; and Lenaola- Justice of the Supreme Court) had this to say on the matter;

'' In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the *Legal Aid Act*, various other factors which include:

The seriousness of the offence;

The severity of the sentence;

The ability of the accused person to pay for his own legal representation;

Whether the accused is a minor;

The literacy of the accused;

The complexity of the charge against the accused;"

35. 10. In Owidi v Republic (Criminal Appeal E054 of 2022) [2023] KEHC 21977 (KLR) (23) August 2023) (Judgment) Wendoh J. persuasively stated as follows;

'Article 50 (2) (h) requires that an accused be informed of the right to be assigned counsel at the State expense if substantial injustice would otherwise result. He is also supposed to be informed of this right promptly. From the record, the appellant was not informed of the said right. However, the said right is not absolute. One has to demonstrate that substantial injustice would result to him if the right is not complied with".

36. Going by the pronouncements of the Supreme Court and my sister Judge with whom I agree, this right is not automatic. It is one that will be achieved progressively within the available means and adequate numbers of legal counsel. In Kenya today only persons charged with murder or children in conflict with the law are entitled to automatic legal representative at State expense. Other people have to prove that they will suffer substantial injustice. This ground of appeal fails.

37. Coming back to the merits of the appeal, the age of the victim is not contested and I need not belabour the point.

38. On whether there was penetration of the victim's genital organ, it is now well settled that penetration can be proved by direct or circumstantial evidence. The Supreme court of Uganda put it succinctly in Bassita v Uganda S.C. Criminal Appeal No. 35 of 1995 which was quoted with approval in Sammy Charo Kirao v Republic [2020] KLR where the court stated;

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to proved sexual intercourse or penetration. Whatever evidence

the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

39. Unlike other crimes where invariably eye witness evidence is available, it is seldom that eye witness accounts would be available in a sexual offence as the act will always be perpetrated in secrecy away from the public eye. That explains why the evidence to be relied upon more often than not will be the evidence of the victim corroborated by medical evidence (where available) and circumstantial evidence.

40. In our instant case, in support of the fact of penetration, we have the evidence of the minor victim (PW1), PW2, and PW4 (clinical officer). The evidence of PW2 was to the effect that she noticed that Pw1 was complaining of pain in her private parts. This was about 3 hours after PW2 had left PW1 interacting with the Appellant who was asking PW1 for his phone. On questioning PW1, she told her "uncle simu" pointing to her mouth and private parts. On checking her private parts, she found the same reddish.

41. PW4 examined PW1. His medical findings were that PW1's vagina was inflamed and hymen freshly broken. He made a conclusion that there was forceful penetration. He tendered the P3 form and PRC forms filled in evidence.

42. Section 2 of the *Sexual Offences Act* defines "penetration" as:

'the partial or complete insertion of the genital organs of a person into the genital organs of another person'.

Therefore, for the offence of defilement to be proved evidence must show that the appellant inserted his penis into the vagina of the complainant. It is not sufficient that the said organs came into contact. However partial insertion suffices for the purposes of penetration as the said insertion need not be complete.

43. An issue may be raised about the words used by PW1 to describe the act done to her by the perpetrator and in relating to penetration of her vagina. In her evidence she said that the Appellant put a stone in her. He put a stone in her mouth. He also touched her private parts. He had removed all her clothes and he also removed his.

44. In Abdulsalim v Republic (Criminal Appeal E005 of 2023) [2023] KEHC 25863 (KLR) (30 November 2023) this court citing relevant precedents stated;

> "Proof of penetration can be either by way of medical evidence or other evidence (See Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa). The Appellant claimed that penetration was not proved to the required standard. He submitted that the words that were used by the complainant to describe what happened were not clear and that the complainant did not state what she felt, what she saw, heard or even experienced. That a broken hymen and reddening of the vagina could not prove defilement. Further, the doctor did not mention when the hymen was broken. He submitted that the medical evidence did not corroborate the charge in that the P3 form indicated that the sexual intercourse was habitual as from 23/10/2021 to 28/10/2021 whereas the charge sheet indicated that the offence was committed on 28.10.2021.

45.The Appellant's view is that the words used by the complainant that 'akachukua mdudu wake akawueka hapo kwangu kwa kwenda haja ndogo' left doubt as to what was inserted. The Court of

Appeal in acknowledging the use of euphemisms by children when describing acts of sexual intercourse in Muganga Chilejo Saha v Republic [2017] eKLR had this to say;

> "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 like, "alinifanyia tabia mbaya", (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M V R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her."

47. Going by the above cases, the terms used by the complainant are thus acceptable terms to mean defilement when used by child victim".

48. What is the rationale of acceptance of such euphemisms? I think the answer may not require any scientific research. The evidence of a child in a sexual offence case presents obvious discernible peculiar difficulties. Number one, the level of communication skill is still at its development stage and one may have to be extra keen to decipher what the child is communicating and certainly the trauma arising from the incident and the expected timidity of a child among strangers in a court setting cannot be ignored.

49. Secondly, the child does not appreciate as yet the description of sexual organs and/or sexual intercourse generally.

    It therefore behoves on the court to be extra vigilant in reception of such evidence to ensure that the communication from the child is understood and put in context.

47. No wonder the *Sexual Offences Act* allows for the use of intermediaries under Section 31(4)(b) where the challenge on the child or other vulnerable person so demands. Amidst all these challenges, one indisputable strength and reliability in the evidence of a child is the natural innocence of a child of tender years. Such a child is difficult to coach to adopt a particular desired narrative. A child will tell things as they perceived them by way of seeing, hearing and feeling. As a common joke goes around in the country where a hiding debtor instructs his child to tell a creditor that the father is not at home, only for the child to innocently answer 'dad told me to tell you he is not at home', a child's propensity to lie is remote.

48. Despite the frailty and vulnerability of this class of citizens, a child victim of a sexual offence is entitled to equal treatment before the law and i wouldn't hesitate to state that the constitutional protection should be applied and guarded by prosecutors and courts alike with extra care given the disadvantaged position of such victims all the while aware of the need to protect the constitutional rights of the accused in any particular matter.

49. That should not be understood by any way to mean that the burden of prove in a criminal case involving a child is in any way lessened by the situation of a child. Not at all. What it means is that the

prosecution must go an extra mile to ensure that the child's evidence is meticulously presented to the court and with clarity even where the child may communicate in euphemisms.

50. In that context, the submission by the Appellant that the minor did not allude to having been penetrated by a male penis is watered down. Any element on incoherence or disjointed manner of her evidence is explained away by the above exposition. In the present appeal, evidence abounds that there was actual penetration of PW1's vagina as there is medical evidence that the vagina was inflamed and the hymen freshly broken. Further, it has been shown by way of circumstantial evidence that the Appellant had the opportunity to commit the act which circumstantial evidence corroborates the direct evidence of the minor.

51. For avoidance of doubt, and in answering a concern raised by the Appellant about the procedure used in deploying an intermediary at trial, I confirm from the record that no intermediary was ever used at any time of the trial.

52. As regards the identification of the Appellant as the perpetrator of the act, the evidence adduced is that of PW1, PW2 and PW3. PW2 gave evidence that he left the Appellant interacting with the Appellant and he heard him asking PW1 for his phone. When PW2 later found out that PW1 had been defiled when the later complained of pain, PW1 explained that it is "uncle simu" who had done the act. When PW3 asked PW1 what had happened, PW1 told her that it is uncle who had touched her on her private parts and on the mouth. When asked which uncle, she pointed at the Appellant's house.

53. On her part, it is quite apparent that PW1 testified with a lot of difficulties and she had to be stood down twice. That in my view was understandable given her very tender age of 3 years and this is not uncommon from this court's long experience in sexual offences. The challenges faced by such a child have been enumerated above. PW1 however clearly identified the Appellant to her mother as the person who touched her. The same information was relayed to PW3. PW1 was living in the same plot with the Appellant. She pointed out his house. PW1 confirmed the identification of the Appellant in court. There is the circumstantial evidence that it is only the Appellant who was with PW1 and was engaging her over a phone prior to the incident. PW1 knew the Appellant. Hers was evidence of recognition.

54. It is clear from the judgement of the trial court that the trial magistrate was aware of and addressed the application of Section 124 of the *Evidence Act* and applied it complete with reliance on the decision in J.W.A. v Republic [2014]eKLR.

55. It should be noted that in the intervening period between when the Appellant was with PW1 and when PW2 noted the pain in PW1's genital (Between 5 and 8 PM), no one else had interacted with PW1. This evidence was the evidence of PW2. This is circumstantial evidence that irresistibly point towards the Appellant as the perpetrator of the offence as he was the last person with her before the mother noticed her pain. In Salim Issa Abdalla V Republic [2021] eKLR, Nyakundi J. accepted as evidence of identification a similar factor when he stated thus;

> ''In the instant case, there is evidence of the victim (PW1)connecting the appellant with the actual penetration as he was positively identified as the one who lured her to the house to commit the crime some distinct features arise from the evidence of PW1 evaluated in conjunction with that of PW2. First is the characteristic of evidence when PW1 went to the house of the Appellant. Secondly, as seen from PW2 evidence she was able to recognize the victim (PW1)coming out of the appellant's house. A presumption therefore arises on the evidence that the appellant was the last person to be seen with the victim and therefore expected to explain the circumstances on the defilement of PW1.''

47. In Anjere v Republic (Criminal Appeal E028 of 2022) [2024] KEHC 2855 (KLR) (20 March 2024) (Judgment) the court stated;

> " On the final element of identification, it was the evidence of PW1 that the appellant was a neighbour and she was able to identify him as "Machungo". The complainant led PW2 and the Assistant chief to the Accused's house. It was the defence of the accused that he was in the community policing unit and that he visited families in the community. He seemed to suggest that that might explain why the child knew him. However why would the child lead the chief to the Appellant's house and not any other house, yet there was no suggestion of any acrimony between her guardian and the Appellant. Not only did the complainant lead the chief to the house but she pointed out the place where the defilement took place. The complainant identified the Appellant by telling the chief: " chief ni huyu" The complainant had no reason to lie about the person who had defiled her. It is evident that the two knew each other well. This was therefore a case of identification by recognition. It is trite law that recognition of an attacker is more satisfactory, more assuring and more reliable than identification of a stranger as it depends on personal knowledge of the Assailant by the complainant.(see Ajononi & others vs Republic (1980) KLR 54. It is my finding that the Appellant was positively identified as the perpetrator".

47. I have looked at the defence proffered by the Appellant at trial. He asserts that he had given the complainant's mother Sh3000 and when he demanded the same she threatened that she would take him to court. He asked for the money and she reported him to the police. He raised this issue on cross examination of PW2 and the same was denied. I have weighed the evidence from both divides. In light of the weight of the prosecution's evidence and especially the evidence of PW1 and PW4, the medical officer, the Appellant's defence cannot possibly be true.

48. On the whole and through my own evaluation of the evidence in totality, am satisfied that the Appellant was the perpetrator of the offence.

49. As regards sentence, the sentence prescribed for the offence as per Section 8(2) of the *Sexual Offences Act* is life imprisonment. Though the court is not to consider itself bound by the minimum sentences prescribed, the court balances between the mitigation by an Accused person vis-a- vis the aggravating factors.

50. It is trite law that sentencing is at the discretion of the trial court. Like all discretionary power, it must be exercised judiciously. A proper basis must be laid for the court to interfere with the sentence of a trial court. The court can only interfere when there is evidence that the discretion was exercised injudiciously, or that the sentence was manifestly harsh, or that the court considered extrinsic factors to sentence, or omitted to consider material factors

51. In MMI v Republic [2022] eKLR, the court stated thus;

> ''...The principles guiding interference with sentencing by the appellate court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at paragraph *12* where it was held that:
>
> ''A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court ..... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed

had been the trial court is so marked that it can properly be described as ''shocking'', ''startling'' or ''disturbingly inappropriate.''

47. Similarly, in Mokela Vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

''It is well- established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.''

47. The fact that a sentence is manifestly excessive is a factor for consideration by an appellate court and it is good ground for interfering with the discretion of the sentencing court. (See R -v – Shershowsky (1912) CCA 285 TLR 263) and Shadrack Kipkoech Kogo -vs- R. Eldoret Criminal Appeal No. 253 of 203)

48. In this case, the victim was of a very tender age (3 years). This is an aggravating factor which called for a deterrent sentence. The trauma and impact of this incident on her life will live with her forever. Life imprisonment is provided for in respect of the offence under Section 8(1)(2) of the *Sexual Offences Act*. It is a legal sentence. No basis is laid for this court to interfere with the sentence.

49. With the result that I find no ground upon which to fault the judgement and findings of the trial court. The evidence adduced supported the charge and the degree of proof required in law was met. The appeal has no merit and is dismissed.

Dated signed and delivered virtually this 24th day May 2024

A.K. NDUNG'U

JUDGE

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