Muriithi v Republic (Criminal Appeal E067 of 2023)
[2024] KEHC 6536 (KLR) (3 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6536 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E067 OF 2023

DKN MAGARE, J

JUNE 3, 2024

BETWEEN

JOHN KIHARA MURIITHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. Angima (PM) in Nyeri CMSO Case No. 30 of 2020 delivered on 26th September, 2023)

JUDGMENT

1. This is appeal from the decision of Hon. Okuche (CM) given on 13/8/2021 in Nyeri SO No. 20 of 2020. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act*. The particulars being that on the diverse dates of March 2020 at Kieni West sub county within Nyeri County he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of S.W.W. a girl aged 7 years.

2. The second count was deliberate transmission of HIV contrary to Section 26(1)(b) of the *Sexual Offences Act*. There was an alternative count of committing an indecent act with a minor, that on diverse dates of March 2020 at Kieni West Sub-county within Nyeri County he intentionally and unlawfully caused indecent act to S.W.W, a girl aged 7 years, by touching her vagina and buttocks using his hands and penis.

3. The appellant was arrested on 2/6/2020 and taken to court on 23/6/2020. He pleaded not guilty. The alternative count was not read. The appellant was released on bond of Kshs.300,000/=. However there were no bond proceedings on record. The appellant was released and absconded. It is noted that the appellant was present on 29/4/2021. The warrants were neither extended nor executed. He stated that he had another matter in another court.

4. A few months into the case the appellant requested for statements. He was to be supplied with documents. He was also informed of the right to legal representation. On 17/6/2021 the matter proceeded before Hon. M. N. Lubia, RM. The first minor S.W. had voire dire evidence given. She was sworn and stated on oath that she stayed with her grandmother. She stated that three boys chased after them. The boys were Gichuru, Tee and Kihara. The witness becomes hostile. PW1 was stepped down and remanded at Mweiga Police Station.

5. PW2 – she stated that there were 3 girls being "caught". The girls refused to talk to her. She went and reported defilement on the minors. On cross examination she stated that she checked her daughter's private parts and reported. She was the mother of the complainant.

6. PW 3 Dr. Joyce Mackenzie testified that she had worked at Nyeri PGH. She had a degree in Medicine and Surgery from the University of Nairobi. She had worked with Dr. Muriuki for one year and 6 months. They examined the complainant then aged 7 years. She was people known to her. She produced PRC and P3. She was defiled by 3 male adult suspects three times. The hymen was old and broken. She received treatment. Semen was not found.

7. PW1 returned. She stated that the Appellant and the two persons was on top of her. He inserted his private parts in both the anus and vagina. This is what I understand parts for urinating and for long call means. The appellant cross-examined and the minor stated that she was taken to Tee's house. She stated that the first inserted the penis into her vagina. She stated that PW4 was inserted with sticks.

8. PW4 testified. He was taken through Voire Dire. He gave unsworn evidence. He was 8 years of age. He stated that Kihara, Gichuru and Tee called them to enter into a house. They threatened them. They removed clothes and stated they will slash the girls and the witness if they reported. They inserted fingers into his anus.

9. He stated that S.W and W the three girls W, S and St were removed clothes. Kihara inserted sticks into the witness' buttocks (anus). The minor said Kihara's penis. On cross examination the wintess stated that the appellant defiled them. He stated that the appellant touched the witness' penis.

10. On 12/1/2022 the appellant wished to have the court recuse herself. The court, without any legal justification recused itself. Courts are not arbitral tribunals where parties choose who is to hear them. Lack of faith is never a duty of the court. Even Jesus's apostles lost their faith when Christ had to ask them where was their faith.

11. The court must guard against parties cherry picking which courts are to hear them. If a party has no faith, it is not for the court to recuse itself. It is for the party to acquire more faith. Banks do not close because account holders have ran out of money in their accounts. It is the account holders who have to replenish their accounts.

12. The baseless recusal led to a further delay leading to prolonged proceedings before Hon. Angima started her hearing on 25/10/2022 after complying with Section 200 of the CPC. The appellant stated that he wanted the case to proceed from where it left. The words of Justice C.B Madan in Butt –vs- The Rent Restriction Tribunal comes in handy. For Judges are said to be gold. Magistrates are not clay but pure refined silver. Its worth is not diminished by lack of faith by parties, but the mettle they are made of. The words of Justice Madan, are hereunder juxtaposed with silver and magistrates in Butt v Rent Restriction Tribunal[1979] eKLR, stated as follows: -

> A judge is a judge whether he is newly appointed or an old fogy. The former has the benefit of his latest learning, the latter the advantage of experience. Both are men of honour and scholarly gentlemen. Both are conscientious and judicious individuals and imbued with

> reason. Both are dependable and do not make wild surmises. Both act upon consecrated principles. Both get a fair share of juristic spills. Both are jealously scrupulous and impartial. Both are 24 carat gold. Both act free from doubt, bias and prejudice. Both carry the conviction of correctness of their decision. Both speak no ill of any litigant. Both are torch bearers for stability of society. Both are strugglers for liberty. Neither should, however, become an advisor instead of an adjudicator. The litigants and their professional advisors are the best judges of their affairs. If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

13. PW5 A.M is a student who was in grade 3. Voire dire was carried out. He gave sworn evidence. He recalled that on 11/3/2020 he was coming from school when they met the appellant and 2 other men. They were told to follow them to get sweets. The Appellant removed the witness' clothes. He inserted his penis in the minor's anus. He threatened to slit his throat. He gave the minor two sweets. He left PW4 in the house and went home.

14. He went home and asked her mother why mucus was coming from his anus. She told the mother and as a result they went to the police station. He identified the suspect. On cross examination he stated that it is the appellant who defiled him and others. He stated that it is the other case, where the witness had been defiled that put the appellant in jail.

15. PW6, PC. W. Susan Wachira testified that the case was reported at Mweiga Police Station. A girl aged 8 years with the company of Alvin, Nyamu, Mercy, Wamugunda and PW4 were met with the appellant and 2 other people. The appellant and 2 other people chased the children, caught them and forced them into Timothy's house. The appellant defiled the complainant. P3 and PRC was filled. PW6 was stood down.

16. She continued that the appellant was on ARV (antiretroviral) drugs. The appellant's ARV case was recovered and produced as exhibit 4. The appellant was taken to PGH where the appellant was found to be HIV positive. On the complainant's age, the witness stated that the minor was born on 23/9/2011. The witness was cross examined. The witness stated the minors were together.

17. PW7 Dr. William Muriuki testified and produced lab results on 3/6/2020. He found that the minor was infected with HIV. He was cross-examined on which case had the appellant testified.

18. The court found the appellant had a case to answer. The appellant testified on oath that he was arrested on 2/6/2020. He stated the complainant's mother had a grudge and framed him before. He stated that they have a land dispute. The case has no date. He stated that it is not Alvin who testified in this case but his brother. On cross examination he stated he did not know Gichuru. He stated that there was a land dispute. However, it is not clear with who and on which land they had a dispute. He said nothing on the ARV cards.

19. The court analyzed evidence and convicted the appellant for both defilement and deliberate transmission of HIV. The appellant was sentenced to life imprisonment in both counts.

Submissions

20. The appellant submitted orally before me that he wanted a retrial. He had filed submissions which are undated. He stated that he was not treated fairly in another matter, being SO 20 of 2020. H complained that that he asked for and was not supplied with the first report or OB book. He stated that the doctor

who testified was different and not the one who examined the minor. He stated that the evidence was that he did not use a condom but that evidence was no available.

21. The Respondent filed submissions on 14/3/2024 stating that the 2 counts were proved. They stated that it is not true that Section 144 and 150 of the Criminal Procedure Code was not complied with.

22. In regard to delay in being brought to court, they submitted that the appellant was already in custody hence delay did not change anything. They submitted that whether the minor got the virus or not the offence was completed. In regard to Section 169 of the CPC they state that the prosecution proved its case beyond reasonable doubt.

Analysis

23. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

24. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the court of Appeal therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

25. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

26. 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."

27. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

28. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

29. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the

party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

30. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 stated that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

31. The court was faced with cogent evidence from various witnesses. In his defence, the appellant chose a grudge with a person who was not a witness. The same was an afterthought. The evidence of the victim was clear on who the perpetrator was. The other victims have the similar evidence. The children evidence was believable. The evidence needed to be corroborated. It was not. Section 124 of the *Evidence Act* provides as follows: -

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim 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 victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

32. The court was satisfied with the truth of the children evidence. PW5, despite being a small boy, was consistent and did not give evidence that could be shaken. What he left out, that is what happened after he left, can from the surrounding circumstances be concluded that what the complainant testified on was true.

33. This is in line with the position relating to circumstantial evidence. For it to work, it must be inconsistent with the accused's innocence. In this case, the minor, PW4 stated that the Appellant penetrated his anus. He was released after being sodomised. He left the complainant in the room with the Appellant. She came out defiled both and infected with HIV.

34. The facts irresistibly point to the guilt of the Appellant. There are no co-existing circumstances that will show the Appellant'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."

35. There are three ingredients for defilement:

a. Age.

b. Penetration of the vagina of the complainant.

c. The perpetrator.

36. In the case of Joseph Kiet Seet v Republic (2014) eKLR while discussing on the aspect of age, the court posited as thus:

" the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni – Versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus: In defilement case, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

37. In Edwin Nyambaso Onsongo –Vs- Republic (2016) eKLR the court stated as doth: -

" ...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."

38. Section 2 of the Sexual Offence Act, defines penetration to mean:

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

39. As regards penetration, the minors were able to show that the offence was carried out. It is settled law that medical evidence is not the only evidence that can prove a sexual offence. In AML -v- Republic (2012) eKLR, the Court of Appeal stated that: -

" It was submitted that there was no medical evidence to connect the appellant with the offence as no DNA test was conducted. The position of the law is that the offences of rape and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily by medical evidence."

The same court in Kassim Ali Vs- Republic, Mombasa Criminal Appeal No.84 of 2005 stated that:

" (The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence."

In the absence of medical evidence to support the offence, the question was whether there was sufficient oral or circumstantial evidence to prove penetration on the complainant."

40. The evidence of PW1, 2, 3, 4 and 5 was that the appellant was in the locus in quo. The minor was penetrated. The appellant was disputing only whether the complainant was 9 or 8 years. It does not matter as the minor was clearly below 11 years.

41. The birth certificate, PRC and P3 showed the minor was 8 years. The age of being below 11 years for purposes of Section 8(1) of the *Sexual Offences Act* was proved.

42. The medical evidence of the minors proved penetration. Even without the medical evidence, the court is satisfied with the truth regarding penetration. There are no circumstances pointing to the innocence of the Appellant. The entire evidence, in totality, irresistibly point to his guilty.

43. There were no contradictions from the evidence of the witnesses. If there were some, then they were minor contradictions. It is irrelevant on who was defiled first. The court is not awarding medals for the first one to defile. The circumstances of molestation of the children cannot be said to be psychologically conducive for through observation. At the point of defilement, everyone is worried about his own safety.

44. In Boaz Nyanoti Samwel v Republic [2022] eKLR, Justice Njagi stated as follows:

> " The way to treat contradictions in a case was stated by the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR where the court cited with approval the Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6 where it was held that:
>
> "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's case".

45. Any discrepancies are natural and cannot be said to vitiate rock solid evidence. I am unable to find anything impeaching the trial or evidence of any of the witnesses.

46. The appellant was the perpetrator in the circumstances. It is clear therefore that the perpetrator was the appellant and the penetration was proved. I dismiss the appeal on conviction.

47. I don't think the appellant is serious on Section 49(1)(f) of *the constitution*. It provides as follows: -

(1) An arrested person has the right—

(f) to be brought before a court as soon as reasonably possible, but not later than-

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

48. The Appellant was not an arrested person. He was already in custody and had already been denied bail. He could only move as a person who is entitled to fair trial Article 49(1) is not available to a person already in custody undergoing a trial.

49. He could as well have been brought a year later. He was already in lawful custody. He was charged while still in prison/remand for other crimes one of which he has already been convicted. He does not enjoy the right to be brought to court quickly, when he is already lawful custody. This came from his own testimony. The ground of Appeal is thus otiose and I dismiss the same in limine.

50. There is no evidence that any of his rights were breached. Even if the appellant had his other rights violated, he could sue. But none of these relate to fair trial. Sections 144 of the Criminal Procedure Code provides as follows: -

> "(1) If it is made to appear that material evidence can be given by or is in the possession of a person who will not voluntarily attend to give it or will not voluntarily produce it, a court having cognizance of a criminal cause or matter may issue a summons to that person requiring his attendance before the court or requiring him to bring and produce to the court for the purpose of evidence all documents and writings in his possession or power which may be specified or otherwise sufficiently described in the summons.
>
> (2) Nothing in this section shall affect the provisions of sections 131 and 132 of the *Evidence Act* (Cap 80)."

51. Sections 144 of the Criminal Procedure Code provides as doth: -

> "A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case: Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness. There are no rights that were violated."

52. Section 169 of the Criminal Procedure Code posits that: -

> "(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
>
> (2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.
>
> (3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."

53. The foregoing were sections said to be violated. There was no scintilla of evidence of violation of the sections. The appellant was clutching to and as he is entitled to straws. There was no breach of any of

the sections as far as the record is concerned. Further, other than section 169, which is post hearing, none raised any of the issues raised herein.

54. On the aspect of transmitting HIV, the court found that the appellant deliberately defiled the minor without use of any protection. There was evidence that the appellant was already on ARVs. This brings him to the actual knowledge. Section 9 of the Penal code provides as follows: -

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

55. Section 43 of the *Sexual Offences Act* provides as follows: -

" An act is intentional and unlawful if it is committed –

(a) in any coercive circumstance;

(b) under false pretences or by fraudulent means; or (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence."

56. Section 26(1)(b) of the *Sexual Offences Act* provides as follows:

" 26.

(1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know –

(a) will infect another person with HIV or any other life threatening sexually transmitted disease;

(b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;

(c) will infect another person with any other sexually transmitted disease, shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less than fifteen years but which may be for life."

57. The evidence of knowledge of infection was known to the appellant prior to the incident. The fact that the appellant inserted his penis into the minor's vagina while knowing that he is infected with HIV virus, with reckless abandon, whether or not the virus will be transmitted or not. The fact that

he penetrated while knowing or being in a position to know that he was already infected, is evidence of intent. I do not find any fact in the court finding the appellant guilty of both counts.

58. In the circumstances, I dismiss the appeal on the 2nd count. The prayer for retrial is untenable. The appellant wants to have a second bite on the cherry. The defence the appellant raised was untenable. It was not even an afterthought. He did not rebut any of the evidence of the witnesses.

59. In this case the evidence irresistibly pointed to the guilt of the appellant. There was no appeal on sentence. This means the appellant was satisfied with the sentence. In the end the court found that life imprisonment is ideal. I cannot fault the court.

60. The sentence was deserving. However, there has been 2 decisions of the Court of Appeal which interpreted what life imprisonment is. In Evans Nyamari *Ayako v Republic Kisumu CACRA No. 22 of 2018* (Okwengu, Omondi & J. Ngugi, JJA)(unreported) translated life imprisonment to 30 years.

61. In the case of *Barasa v Republic (Criminal Appeal 219 of 2019*) [2024] KECA 324 (KLR) (15 March 2024) (Judgment), the court of Appeal stated as follows: -

> "Given the circumstances in which the offence was committed, the complainant being a young girl whom the appellant as the stepfather ought to have protected but instead violated, the appellant deserved a deterrent sentence. The sentence of life imprisonment was an option which was available in the exercise of discretion in sentencing and would in our view have been appropriate.
>
> 13. In accordance with our decision in Evans Nyamari Ayako v Republic (supra), translating life imprisonment to a term sentence of 30 years' imprisonment, we allow the appellant's appeal; on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the appellant with a term sentence of 30 years' imprisonment. The sentence of 30 years shall be calculated from the date the appellant was first arraigned in court in accordance with Section 333(2) of the Criminal Procedure Code.

62. In *Manyeso v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR) (7 July 2023) (Judgment), the Court of Appeal sitting in Malindi Nyamweya, Lesiit and Odunga, JJA) held that life imprisonment unconstitutional substituted the same with 40 years. They stated as follows: -

> "We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature...
>
> ... We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We, therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction."

63. It is therefore my understanding that in each case we shall translate what life imprisonment means. In this case a sentence of 40 years translates to life imprisonment.

64. I therefore substitute the life sentence, with its equivalent, that is 40 years. The period shall run as per Section 333 (2) of the Criminal Procedure Code from date of arrest

65. In the circumstances the appellant's conduct is heinous and deserves rightfully a life sentence. The Court of Appeal has directed that the sentences be translated. The appellant's life sentence in court only is equated to 40 years.

66. The life sentence in the second count is also translated to 40 years.

67. The appellant is already serving sentence in 20 of 2020. The 40 year sentences shall run consecutively from the date after completion of the sentence in Sexual Offence No. 20 of 2020.

68. The court cannot order a retrial in Sexual Offence No. 20 of 2020 as it is not before this court.

Order

69. The consequence upon the foregoing I make the following orders:

    a. The appeal on conviction is dismissed.

    b. The life sentence for count 1 and 2 are translated into 40 years for each count. The 40 years to run concurrently. However, given that the appellant is still serving sentence in Nyeri Sexual Offence No. 20 of 2020, the two sentences shall run consecutively with the sentence he is already serving. This means that these sentences will run from the last day of the sentence he is already serving.

    c. Right of appeal for 14 days.

DATED, SIGNED AND DELIVERED AT NYERI ON THIS 3RD DAY OF JUNE, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Miss. Kaniu for the State

Appellant in person

Court Assistant – J. Wanderi