Munyithia v Republic (Criminal Appeal E052 of 2022)
[2024] KEHC 8605 (KLR) (17 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8605 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL E052 OF 2022

FROO OLEL, J

JULY 17, 2024

BETWEEN

KOKI MUNYITHIA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(BEING AN APPEAL FROM THE CONVICTION AND SENTENCE DELIVERED ON 26th OCTOBER 2022 BY HON L. G RUHU(SRM) IN MWINGI SEXUAL OFFENCE NO 12 OF 2018)

JUDGMENT

A. Introduction

1. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* of 2006. The particulars of the offence were that on the 9th day of October 2018 in Migwani Sub County within Kitui County intentionally and unlawfully caused his penis to penetrate the vagina of LMM, a child of 10 years.

2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* of 2006. The particulars were that on the 9th day of October 2018 in Migwani Sub County within Kitui County intentionally and unlawfully caused his penis to contact the vagina of LMM, a child of 10 years.

3. During trial the prosecution called seven witnesses who testified in support of their case. The appellant was placed on his defence. He gave sworn evidence and called seven (7) witnesses to support his case. The trial magistrate at the conclusion of the trial, did consider all the evidence adduced and found the Appellant guilty of the offence of defilement and proceeded to convict him under section 215 of the Criminal Procedure Code.

4. The Appellant being dissatisfied by the conviction and sentence filed his petition of Appeal on 07.11.2022 and his amended grounds of Appeal on 28.01.2024. The grounds raised were that;

    a. The learned Trial Magistrate erred in law and in fact by convicting and sentencing me yet the charge was incurably defective.

    b. The learned Magistrate erred in law and fact by convicting and sentencing me notwithstanding the fact that the case was riddled with a colossal number of contradictions and inconsistencies.

    c. The learned trial magistrate erred in law and fact by convicting and sentencing me notwithstanding the fact that the witnesses were incredible and uncreditworthy.

    d. The learned Magistrate erred in law and fact by convicting and sentencing me notwithstanding the fact that the key ingredients of the charge were not proved.

    e. The learned trial magistrate erred in law and fact by disregarding the cogent defense put across by the defence.

5. The Appellant therefore prayed that this Appeal be allowed and the trial courts finding on conviction and sentence be set aside.

B. Evidence At Trial

6. The prosecution called seven (7) witnesses in support of their case. PW1 RMM, the complainant underwent Voir Dire examination and was allowed to give unsworn evidence since she did not appreciate the importance of oath. She testified that she was ten(10) years old and was a student at [Particulars Withheld] primary School. She recalled that on 9th October 2018, she had been sent home from school to go get her mathematics book and upon reaching home, her mother told her that she would get the book the following day and sent her back to school. Her mother thereafter left her at home to visit their neighbor and shortly after she had left, the appellant arrived at their home. He grabbed her by her right hand, pulled her to their cow shed, removed her panty, removed his trouser up to his knees and had sexual intercourse with her. While testifying, PW1 pointed at her vagina as part of her body where the appellant inserted his penis, while having sexual intercourse with her.

7. The penetration and experience were painful, she had tried to scream but the appellant covered her mouth and threatened to slap her. It was her further testimony that, this was not the first incident of being defiled by the appellant, as he had earlier defiled her on a earlier date, but she had not disclosed this earlier incident to anybody as the appellant had threatened to kill her if she dared to tell. When the 2nd incident occurred, her mother (PW4) had found the appellant red handed while defiling her and had physically taken him to their home and reported this incident to his guardians. She on her part had left for school, where she disclosed what had transpired to Teacher Njoroge and Teacher Kavindu. Her teachers summoned her mother and later they reported this incident to the area Assistant chief, the police and eventually she was taken to the hospital.

8. She identified the appellant on the dock, as person was well known to her because her father used to call him to their home to do common chores, but on the material, day had come without being called. The Appellant was their neighbours who lived with his grandmother, who was also known to her as “Kokilia”. In Cross examination, she reiterated her testimony and how she disclosed the ordeal to her mother and teacher.

9. PW2, Ruth Muli Kavindu, testified that she was PW1’s teacher and on the material day, PW1 had gone home to get water and her mathematics book, and unfortunately had been defiled by the shamba boy. She had learnt of this incident, when she called PW1’s mother to inform her that her daughter

had left school at break time without permission. She later interviewed PW1 independently and she confessed that the boy who usually tills their farm had defiled her and had threatened to beat her up if she disclosed the incident to anybody. That was the reason why PW1 was reluctant to reveal the ordeal to any third party. Upon cross examination, she testified that the morning break was usually at 9.20 am and that the complainant would usually get back to school before 11 am whenever she went home for the morning break.

10. PW3, Joyce Racheal Nguli, the Assistant chief Kavalaini Sub location, testified that she summoned PW1's parents following rumours that their daughter had been defiled. PW1's mother disclosed to her that she had found the appellant standing half naked with his trouser on his knees in company of PW1, who was lying on the ground at cowshed area within their homestead. The complainant's mother threatened to scream when the accused appellant attempted to run away, and subsequently, there had been a family attempt to resolve the matter amicably, but she had refused and insisted that it be referred to the police.

11. On cross examination she stated that the complainant's mother (PW4) wanted the case terminated but she told them to make a formal report to the police.PW3 was later recalled for cross examination and regurgitated the evidence given earlier during her evidence in chief. She confirmed that PW4 had witnessed this incident from a distance and initially the families had attempted to resolve this issue at home and this explained, why it took a few days before the matter was formally reported to the police and the child examined at the hospital.PW3 denied framing the appellant and was not aware if PW4 examined her child before releasing her to go back to school.

12. In reexamination, PW3 reiterated that the incident occurred on 9th October 2018 and she was told about it on 15th October 2018. PW4 had told her she had to wait for her husband to come from Nairobi as he did not like things done behind his back. She had advised her that her inaction was wrong and prompted them to report the incident to the police. It was also not her duty to punish PW4 for her inaction.PW3 also confirmed that had also known the appellant and his grandmother for a long period of time and had no reason to frame him.

13. PW4, PMM, the complainant's mother testified that on 9th October 2018, she had gone to visit her neighbor's, Kukila Koki and while there she saw someone peeping through her fence and then bending down. She told her neighbor that she could see someone peeping but did not know who it was. After a while she heard noise from her compound, which drew her attention and got up to check what was happening within her compound. As she entered her gate, she saw a person lying on his stomach and though that the intruder was a thief, but upon coming closer, she discovered that it was the appellant, who was half naked with his trouser on his knees and his genitalia was protruding out.

14. To her shocked PW1 who was in her school uniform was on the ground and ran away on seeing her. She chased after PW1 and got assistance from a Good Samaritan to stop her. She then came back and took the Appellant by his arm and went and reported this incident too his grandmother. The Appellants mother too, was called and during the discussions the Appellant asked for forgiveness. She tried to call her husband who was away from home but his phone was not go through. She remained silent and did not make a report to the police because she feared to do the same without informing her husband first. Later when she went back home, she found that her child had gone back to school.

15. Later she was summoned by the Area Assistant chief who sought an explanation as to what had transpired to her daughter. When PW1 father also came back on the 15th October 2018, she informed him of what had transpired and he was mad at her and chided her for failing to report this incident to the police. Eventually they reported this incident after consultation with PW1's schoolteacher and the Assistant chief.PW1 was taken to hospital and eventually after the investigations were complete, the

Appellant was arrested and charged. She produced the complainant's birth certificate and confirmed that she was 10 years old and seven months at the time of the incident.

16. Upon cross examination, PW4 clarified that PW1 had contracted measles, when young and as a result and lagged behind a bit in school and that explained why she was still in class three, yet slightly older for the said class. She denied being a negligent mother, and reiterated that she had found the Appellant red handed defiling the minor, as had removed his underwear and trouser and was lying on her. PW1, too did not have her panty on. The Appellant had admitted sleeping on PW1 but denied penetrating her. Further when she went to discuss this issue with the Appellants grandmother, PW1 had returned to school.

17. PW4 also confirmed that she did not initially report this incident to the police as she had to first tell her husband, who unfortunately was away. Eventually when the matter was reported, the Appellants family offered to settle this matter by giving her money, but she had refused to accept the settlement offered. PW4 also denied framing or setting up the Appellant. In re- examination PW4 affirmed that at the time of the incident, PW1 was 10 years and seven months old and denied trying to extort money from the Appellant and/or his family. She also reaffirmed that she had found the Appellant red handed defiling the minor, his penis was out of his trouser and erect, while her child had no panty.

18. PW5, PN the headteacher of [Particulars withheld] Primary school testified that PW2 informed him that PW1 had been defiled. She had told him that PW1 had reported to school as usual and had asked for permission to go back home to collect her book. While at home, she met the Appellant who defiled her. He requested the senior teacher Mrs Kalyonge to come and witness what PW2 was telling him and told them to summon PW1. She came and, in their presence, confirmed the allegations brought out by PW2. He thereafter requested the teachers to summon PW1's mother (PW4) to his office. She came as requested, and confirmed to him that she was aware of the defilement allegation and had reported the matter to the area assistant chief who was handling the matter.

19. PW5 further testified that he personally went to the assistant chief's office and again called PW1 to the assistant chief's office. She came and recounted the incident as it occurred, the Appellant was present but laughed off the narration made by PW1. They escalated this matter to the police and he eventually recorded his statement. He identified the Appellant on the dock and also confirmed that he had not known him prior to the incident. Upon Cross examination, PW5 confirmed that prior to the defilement incident, he had not known the Appellant and did not witness the defilement incident. Further he had not abdicated his duties by failing to refer PW1, to hospital, but had contacted PW4 to verify the facts.

20. PW6, Dr. Christopher Waihinya of Migwani Sub County Hospital introduced himself and confirmed having a P3 Form filled by his colleague Dr. Mary Kimathi. The P3 form had examination details with regard to PW1, a child aged 10-year-old. The history was that PW1 had been defiled by a person known to her on 09.10.2018 and had been taken to the hospital on 15.10.2018. On examination, clothes had been changed, the thigh was tender with no bruises, approximate age of the bruises was one week. Her hymen was perforated, and no discharge was found. Upon conducting vaginal swab there was presence of epithelial cell, pus cells and gram positive coci (bacteria). The Examining doctor concluded that PW1 had been defiled. PW6 produced the treatment notes, P3 form and post rape care form into evidence.

21. On cross examination PW6, confirmed that no DNA test was performed and was not possible to do so as a lot of time had lapsed from the time of the alleged incident occurred to time of examination. Further he could not confirm if the Appellant was the perpetrator.

22. PW7 Corporal Amina Mohamed No 92666, testified that on 15.10.2018, a defilement case was reported at the Migwani police station by PW1's parents. The minor too had accompanied them to

the police station. She commenced investigations as the child had reported that she had been defiled by the Appellant. She took PW1 to hospital where she was examined and the P3 form and a post rape care form were filled. She visited the scene of crime, which was under a tree near the livestock shed and later on 28.10.2018 after conclusion of the investigations arrested the Appellant and had him arraigned before court.

C. Defence Case

23. The appellant was placed on his defence and opted to give sworn evidence and called five (5) witnesses. He testified that he was 23 years old and would engage in casual labour/work to earn a living. That on 09.10. 2018, he went to the farm and saw their goats had encroached into their neighbor's farm (PW4 farm). He jumped over the fence to remove the goats and saw PW1 in their farm. While in the process of chasing the goats away PW4 appeared and called PW1. He managed to drive their goats back into their farm and proceeded to tie them before continuing with his other errands.

24. Later when he went back home for lunch, he found PW4 and his grandmother working on some sisal. His mother and aunt joined them, and while he was still having lunch they cautioned him against stopping PW1 on the road. The following morning, the village elder and 3 other women also came to their home and cautioned him over the same issue and finally on the third day, Pw1's parents and the village elder also came back again and cautioned him against disturbing PW1 whenever they met on the road.

25. A few days later, on a Friday his mother told him that they had been summoned by the assistant chief and he did honour this summons accompanied by his mother and Aunty. At the chief's office, they found PW1's mother (PW4) and her head teacher (PW5). They again cautioned him against harassing PW1 and the Assistant chief advised that PW1 be taken to hospital for examination. On 28.10.2018 he was arrested and charged with the offence before court. PW4 had warned him three (3) times to leave her daughter alone. These warnings unfortunately had turned into accusations of defilement at the chief's office, yet he had not done so and reiterated that the allegation by PW4 that she had found him defiling the minor were not true.

26. Upon cross examination the Appellant stated that he had known PW1 ever since she was born and their families were neighbours. He denied harming PW1 and averred that this dispute had arisen because his grandmother had refused to help PW1 family with a jerrican, when they came to borrow one. Further he also knew PW2, who had been his teacher and, in his opinion, she was a honest person but did not understand her evidence as she had been crying when she testified and was not audible enough. PW4 could also have held a grudge with him as previously he had hit one of PW1 's sister after she knocked his jerrican and PW4 had vowed to teach him a lesson. The appellant reiterated that PW4 had found him removing goats from their farm and not defiling her daughter as she alleged.

27. DW2, Joyce Kisungwa Koki stated that the appellant was his nephew. That on 09.10.2018 she returned home with Anne and found PW4, her mother (Appellants grandmother) and the appellant. Later the Appellants mother came and PW4 told Appellants mother to caution her son, not to seduce her daughters as she had found him standing with PW1.After discussions, the Appellant promised not to repeat his mistake. On 11.10.2018, PW4 sent the village elder to the Appellants mother and he relied the same information that the Appellant should not in any way interfere with PW4 children and he should specifically not be found standing with them. Upon cross examination DW2 confirmed that she could not tell and did not know if the Appellant had defiled PW1.

28. DW3 Catherine Nzambi Koki, testified that she was the Appellants mother. On 09.10.2018, she had returned home from the local CCF Baraza and found PW4 who requested her to caution her son to

leave her children alone. On 11.10.2018, the village elder went to thier home and told her that he had been sent by PW1's parents, with the same information, requesting her to caution the Appellant to keep off their children. On 12.10.2018, this issue was escalated and she was summoned to the assistant chief's office, where she found PW1's parents and her head teacher who after discussions handed some papers to PW4 and advised her to lodge a complaint.

29. Upon cross examination DW3 stated that on 09.10.2018, she had left the Appellant at home, when she went to attend the CCF Baraza and it was not within her knowledge as to whether the Appellant defiled PW1 or not.

30. DW4 Muingo Muthui stated that he was a village elder and that on 10.10.2018 PW4 had paid him a visit and requested him to go advice the Appellants mother to caution her son and advise him to refrain from disturbing her daughters. He found time and went to the Appellants grandmother home, where he met the Appellants mother (DW3) and relied the massage. The only dispute he was aware of was that the Appellants goats had encroached into PW4 farm. Upon cross examination he confirmed that he was not at PW4 home on 09.10.2018 and therefore could not tell what had transpired on the material day. When PW2 reported the incident to him, she did not mention that her daughter had been defiled.

31. DW5 Mwove Musyoka testified that on 09.10.2018, at about 10.00am, he came across a girl being chased by her mother and she asked him to help her apprehend PW1. He chased after the girl and caught up with her.PW4 then informed him that the Appellant wanted to rape the girl, but when he asked PW1, what had transpired, she told him that she had not engaged in any act. At that moment another woman arrived at the scene and checked PW1 private parts after undressing her. The woman told them that the girl had not been raped. Upon cross examination DW5 stated that he saw PW1 running away from home and her mother (PW4) had alleged that the Appellant wanted to rape her (PW1) but her intervention had rescued her daughter (PW1) from the ordeal.

32. DW6 Patricia Mawia Kimanzi stated that the Appellant was her nephew and she was married to one William Koki his uncle. On 14.10.2018 she had been called by her mother in law who informed her that she had been summoned to the assistant chief office together with the Appellant and they were later briefed that the case, which took them there had been resolved.

33. On 28.10.2018, they received a call that the Appellant had been arrested. They went to the police station and were advised to engage PW1's mother. PW4 called her aside and confided in her that she had been insulted by Sabina and her mother in law and as a result, she had decided to implicate the Appellant in the case, by fabricating the rape conversation. She further testified that PW4 was embarrassed by this turn of events and proceeded to ask for forgiveness. In the process of negotiation her husband William, as head of the family intervened and PW4 placed a call to someone else who spoke to him on loud speaker. The person on the other end of the line told them that PW4 wanted Kshs.50,000/= to settle the matter and that was their irreducible minimum.

34. She reiterated that PW4 had a grudge with the Appellants family, as the Appellant had caned PW1, his grandmother had insulted PW4, and Sabina, who was the Appellants mother had also threatened to sue her for fabricating this case, and it was her belief that, this was the basis as to why PW4 had fabricated this case. Upon cross examination DW5 stated that she was in Nairobi on 09.10.2018 and could not tell whether or not the incident of defilement happened, but based on their conversation she concluded that the rape incident did not occur.

35. The trial court consider the evidence tendered and submissions made and did find the Appellant guilt of the offence of defilement contrary to section 8(1) as read with section 8(2) of the sexual offence *Act No 3 of 2006* and proceeded to sentence him to serve twenty (20) years imprisonment.

D. Submissions.

36. The Appellant filed submissions on 23.01.2024 and alleged that the charge as framed and read did not exist in the statute book. The said charge sheet was not amended and it automatically rendered the entire trial process to be a nullity. The charge sheet stated/ read Defilement contrary to section 8(1)(2) of the sexual offence's Act and it should have read section 8(1) as read with section 8(2) of the *sexual offences Act*. To the extent that the said charge as framed was nonexistent, the Appellant urged court to uphold that the entire trial process was null and void.

37. It was further submitted that the prosecution evidence was riddled with colossal number of contradictions and inconsistencies that affected the veracity of the respondent's case. The inconsistencies, which the Appellant highlighted touched on the evidence of all the key witnesses and the Appellant urged this court to find that the witnesses were unreliable and of doubtful integrity. Reliance was placed on the case of Okethi Okale & others vs Republic [1965] E.A, MTG Vrs Republic (Criminal Appeal E067 OF 2021 (2022) KEHC 189 KLR , Bakare vs State (1987) I NWLR (PT 52)597 & Kimani Ndung'u Vrs Republic (1979) KLR 282, where the courts had consistently held that conviction, could only be based on actual evidence adduced and contradictory/inconsistent evidence would also not be relied upon.

38. The Appellant further submitted that the key ingredients of the offence of defilement had not been proved. Penetration was not proved as PW1 was not medically examined for over one week before being taken to hospital. During this intervening period, anything could have happened to the child and this fact could not be discounted. Secondly the medical report being expert evidence also did not corroborated PW1's testimony and was presented by a person who was not its author. The Appellant urged the court to note that PW4, who was the only person claiming to be an eye witness had testified and stated that "Koki had not inserted his penis. His penis was out." This meant and/or could only be translated to mean that he had not penetrated the minor.

39. As to whether PW1 age was ascertained, reliance was made to the case of Francis Omuroni vs Uganda. It was submitted that PW1 age was not proven, given, that her mother (PW4) had testified that she could not recall her date of birth. PW4 had also alleged in her evidence that the birth certificate had been destroyed by fire, but later tabled a new birth certificate which indicated that PW1 was born on 8th August 2018. The birth certificate produced was questionable and in absence of an age assessment report to verify PW1's age, the same remained unproved.

40. Finally the trial court was also faulted for failing to consider the defence evidence, which was that he only crossed into the neighbour's compound to bring back goats that had gone astray, and was warned severally thereafter against stopping the complainant on the road. The trial Magistrate had wrongly believed the prosecution witnesses' and not to apply his mind to the evidence of the five (5) defence witnesses he had lined up. This was to his detriment and an abrasion which was contrary to the rules of natural justice and section 212 and 309 of the Criminal Procedure Code. Reliance was placed in the case of Ouma vs Republic [1986] Klr & Okethi Okale and others vs Republic (1965)EA 555.

41. The Appellant thus urged this court to find that based on the totality of the evidence adduced and the submissions made, the court be pleased to find that this Appeal has merit and his conviction and sentence be set aside.

E. The Respondents Submissions

42. The Respondent on their part opposed this Appeal and submitted that the duty of the 1st appellant court was to look into the evidence afresh and determine whether the conviction was proper. Reliance

was made to the case of Njoroge v Republic (1987), Okeno vs Republic (1972) and Kiilu & another vs Republic (2005). Age of the Minor, was proved through the birth certificate that was produced as an exhibit showing that the victim was born on 20th March 2008 and was 10 years old as at the time, when the incident occurred. On penetration it was submitted that the victim described the incident in clear and consistent terms and medical examination confirmed that the victim's hymen was perforated an indication of penetration. This ingredient too was thus proved to the required standard.

43. On identification, it was submitted that this was a case of recognition and all the witnesses including the victim were able to identify the Appellant as a person well known to them and also positively identified him on the dock. All of the defence witnesses, had admitted that on the material day, they were far from the scene of the incident and thus offered no assistance to the appellant's case during trial. The sentence melted out by the trial court too was fair, given that the offence of defilement provides a sentence of life imprisonment. The sentenced imposed of 20 years given the circumstances of the case was thus fair. The evidence on record was cogent enough to sustain a conviction as charged and the respondent therefore urged this court to dismiss the Appeal.

F. Analysis and Determination

44. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by The Court of Appeal case of Okeno – VS – Republic (1972) EA 32 where it was stated as follows: -

> " An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

45. Also in Peter's vs Sunday Post(1958) E.A. 424 it was stated that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

46. In the case of Republic Vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

47. Having considered the lower court record, the grounds of appeal and the submissions of the parties, I find the following as issues for determination;

    a. Whether the prosecution proved the case beyond reasonable doubt

    b. Whether the sentence should be reviewed

48. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

49. In this case, the Appellant was charged and sentenced under Section 8 (1) and (2) of the *Sexual Offences Act* No 3 of 2006 which provide as follows:

    (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.

50. The ingredients for the offence of defilement can be summarized as follows;

    a. Age of the victim (must be a minor),

    b. penetration and

    c. proper identification of the perpetrator.

51. On the question of Age of the victim, The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> "... 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." (emphasis added).

52. Similarly, in in Hadson Ali Mwachongo vs. Republic [2016] Eklr;

> "The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In *Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009* (Kisumu). This Court stated as follows;

> "In its wisdom Parliament chose to categorize 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)."

53. Also, in the case of Joseph Kieti Seet v Republic [2014] Eklr the court held that;

> " It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No 2 of 2000, it was held thus:
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> "In defilement cases, 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..."

54. Rule 4 of the Sexual Offences Rules, 2014 which provides that:-

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents."

55. In this case, PW1 in her testimony stated that she was 10 years old at the time of the commission of the offence. PW4, the Complainant's mother also confirmed this fact, that the complainant was born in 2008 and produced her birth certificate as Exhibit 4 confirming that PW1 was born on 20th March 2008.I find that the age of the victim proven to be 10 years as at at the time of the incident.

56. On the issue of penetration, the same is defined in section 2 of the *Sexual Offences Act* as;

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

57. The victim recalled that on 9th October 2018, she was sent home from school to go get her mathematics book and upon reaching home her mother told that she would get the book the following day and sent her back to school. Her mother left to visit their neighbour's and shortly thereafter the Appellant arrived at their home. she asked him who had sent him, the Appellant did not respond, but grabbed her by right hand, pulled her to their cow shed, removed her underwear, he removed his trouser up to his knees and had sexual intercourse with her. She pointed out her vagina a part of the body which the Appellant had sexual intercourse with her.

58. It was her testimony that since it was painful, she tried to scream but the Appellant Covered her mouth and threatened to slap her. She stated that it was not the first time to defiled by the Appellant and previously on a different date when her mother had gone to Migwani to buy medicine, her father had invited the Appellant to help him prepare a place to dry maize. On the said material day, she was asleep as she was unwell and was woken up by the Appellant who had already removed her underwear and was already on top of her and had sexual intercourse with her.

59. PW1 further confided in her teacher PW2 and PW5 and reported what had transpired.PW4 the complainant's mother testified that on 9th October 2018, there was commotion at her homestead which drew her attention and upon going to investigate what was happening, she found the accused half naked with his trouser on his knees and could even see his genitalia and was shocked to see her daughter

lying on the ground.PW1 attempted to run away but she chased after her and got help from good Samaritan to catch her.

60. PW6, Dr Christopher Waihinya of Migwani Sub County Hospital also testified and produced the P3 Form filled by his colleague Dr. Mary Kimathi. The P3 form touched on examination of PW1, a 10-year-old child. On examination, clothes had been changed, the thigh was tender with no bruises, approximate age of the bruises was one week. Her hymen was perforated, no discharge was found, there was presence of epithelial cell, pus cells upon vaginal swab. The doctor concluded that she had been defiled. Accompanying the P3 form were the treatment notes and post rape care form filled by the same doctor and the two bore the same findings.

61. The evidence of penetration was therefore sufficiently proved based on the victim's testimony which was corroborated by that of the, PW2, PW4 and PW5, the medical doctor who testified that there was medical proof of penetration of the child's genitalia.

62. On the issue of identification, the Court of Appeal in the case of Peter Musau Mwanzia Vs The Republic 2008 eKLR expressed itself as follows:-

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness , in seeing that the suspect at the time of the offence can recall very well having seen him earlier on before the incident"

63. This incident occurred at daytime and the parties are well known to each. PW1 stated that the Appellant was well known to her being that he used to help her father within their farm. The Victim's mother PW4 was also able to identify the Appellant when she went home to check the commotion that was there within her home. The Appellant also confirmed that on the material day he was at the minor's home, though according to him he went to remove their goats that had trespassed thereto. The common evidence PW1, PW4, DW1 to DW5 was that the parties were neighbours and were well acquainted with each other. This was a case of undeniable positive recognition and I do therefore find that evidence adduced positively confirmed that the Appellant was the perpetrator.

64. The Appellant in his submissions did urge the court to find that the chargesheet as drawn was defective as it was indicated therein that "Defilement contrary to section 8(1),(2) of the *sexual offences Act* No 3 of 2006". The Appellant averred that under the statute, no law of that nature existed and the charge would have been only acceptable if it read "section 8(1) as read with section 8(2) of the *sexual offences Act*."

65. In determining whether a charge sheet is defective or not the court of Appeal in Sigilani versus Republic (2004)eKLR 480 held as follows;

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

66. On the other hand, section 134 of Criminal Procedure Code provides for what the components/ ingredients of the charge sheet constitutes;

> " Every charge sheet of information shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

67. In the case of Isaac Omambia versus Republic (1995) eKLR the court of Appeal considered the ingredients necessary in a charge sheet and stated as follows;

> " In this regard, it is pertinent to draw attention to the following provisions of Section 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of a charge. Every charge or information shall contain and shall be sufficient, if it contains a statement of the specific offence of offences with which the accused is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

68. Further to court of Appeal in Peter Ngure Mwangi versus Republic (2014)eKLR quoted with approval that Isaac Omambia case or further stated that;

> " A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold Criminal pleadings, Evidence and Practice (40th Edition) page 52 paragraph 53, this court stated in Yongo versus Republic (198)eKLR that "In England it has been said; an indictment is defective not only when it is bad on the face of it but also;
>
> i. When it does not accord with the evidence before the committing magistrate either because of inaccuracies or deficiencies in the indictment or because the indictment charges/offences not disclose in the evidence or fails to charge an offence which is disclosed therein.
>
> ii. When for such reason it does not accord with the evidence given at the trial.

69. Section 382 of the Criminal Procedure Code also gives guidance on whether even with such defect justice could still be met or whether the defect is curable. It provides that;

> " subject to the provision's hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be revered or altered on appeal or revision on account of an error, omission, or irregularity in the complaint, summons, warrant, charge proclamations, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under the code, unless the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question of whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings" .

70. Applying the above test, it is clear that the appellant fully participated in the proceedings and cross examined all the witnessed. This denotes that he understood the particulars of the charge he faced. The appellant also did not raise any objection as to the facts raised in the charge sheet and a such cannot be said to have been prejudiced in any manner. This ground of appeal therefor cannot hold.

71. Secondly the Appellant did at length submit that the evidence presented was contradictory and inconsistent. He particularized several instances where the evidence of PW1 – PW4 had contradictions. This went to show that the witnesses were not truthful witnesses and their evidence had to be taken with a pinch of salt and could not be used as a basis to convict him.

72. In Philip Nzaka Water-Vrs-Republic CA Criminal Appeal No. 29 of 2015 while relying in the decision of Dickson Elia Nsamba shapwater & Anor Vs- Republic CA App No. 92 of 2007 the Court of Appeal of Tanzania address the issue of discrepancies in evidence and conclude as follows

> " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out one sentence and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradiction are minor or whether they go to the root of the matter."

73. The question to be addressed is whether the contradiction mentioned are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. While defining contradictions, the court of Appeal of Nigeria in David Ojeabuo Vs Federal Republic of Nigeria stated that;

> " Now, contradictions 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."

74. Further in Joseph Maina Mwangi vs Republic (2000) Eklr it was held that;

> " In any trial there are bound to be discrepancies. An appellate court in considering these 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 sentence."

75. While indeed it is true that there are some contradictions in the evidence presented, the same were not so fundamental as to be said that the evidence presented by the said witnesses was untruthful. The evidence of what transpired after the Appellant was caught red handed defiling the minor is inconsequential to the core evidence which was presented. PW1 explicitly stated that "He removed his trouser, he did not remove it completely. He removed it to his knees and removed my pant completely. He removed his thing and put it in me......... He put it here (pointing at her vagina). I felt pain..... when I screamed he covered my mouth."

76. PW2 evidence was also consistent and she did testify that "I asked Mawia what was wrong. She did not want to talk. I told other children to stay out on break. I talked to Mawia. She told me that the boy got in as she put water in a bottle. He pulled her out and did "tibia mbaya". PW5 Peter Njoroge evidence corroborated the evidence of PW2 and the minor too was called and confirmed in his presence that indeed the incident of defilement had occurred. This evidence coupled with the evidence of PW4 and PW6 without doubt did prove that indeed the Appellant did defile the minor and the contradiction raised when considered in totality are insignificant and do not erase the veracity of the evidence presented. Further the appellant in his testimony did admit that PW2 had been his teacher and was a honest person, who had played a big role in his life. There is therefore no doubt whatsoever that her evidence was cogent and truthful.

77. Finally, the Appellant faulted the trial Magistrate for failing to give due consideration to his evidence and that of his witnesses. This allegation is not true as the trial Magistrate did consider his evidence, which was to the effected he had been falsely implicated and found that Appellant had failed to rebut or controvert the insurmountable evidence adduced by the prosecution. Indeed, the Appellant testified that the minors (PW1) family had a grudge with him because his grandmother had refused to give them a jerrican when they wanted to borrow one, there was also a day when he hit one of the daughters after she knocked down how water jerrican and PW4 had promised to teach him a lesson.

78. The evidence of their being a family grudge is wishful thinking and no cogent evidence was led to that effect. It was PW4 evidence and corroborated by the appellants own evidence that "he found lakeli's mother and his grandmother working on some sisal. "This was on the material day when the incident occurred and it is unlikely that there was a grudge the basis upon which false allegations would be made as against him. Secondly the evidence of DW2 – DW5 related to issues which occurred after the fact. All of them confirmed that on 9th October 2018, they were not at home and did not witness what occurred. Their evidence of attempted negotiations and there being no clarity as to what occurred does not help the Appellant much as the primary evidence adduced did prove that he defiled PW1.

79. As regards the sentence, This Court is guided by the principles in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

80. The same court in the case of Dismas Wafula Kilwake Vs. Republic [2019] Eklr stated as follows;

> " Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

81. The Court of Appeal in Thomas Mwamba Wanyi Vs Republic (2017)eKLR cited the decision of the Supreme Court of India in Alister Antony Pereira Vs The state of Maharastra at paragraph *70 – 71* where the court held;

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences

commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

82. Having considered the sentence meted out and circumstances of this case and also having considered the punishment provided for by the said Section 8(2) of the *sexual offences Act* No 3 of 2006, I do find that the sentence passed was reasonable given proportionality between the sentence passed and the crime committed. In Republic vs Scott (2005) NSWCCA 152 Howie J Grove & Barn J J it was stated;

> " There is a fundamental and immutable principle of sentencing, that is, sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed... one of the purposes of punishment is to ensure that an offender is adequately punished... a further purpose is to denounce the conduct of the offender.

Disposition

83. Having considered the facts in this case, I hereby find that this appeal lacks merit and is hereby dismissed.

84. Right of Appeal 14 day.

85. It is so ordered.

JUDGMENT WRITTEN, READ, AND SIGNED AT MACHAKOS THIS 17TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 17th day of July, 2024

In the presence of:-

Appellant present from Kamiti maximum prison

Mangare/Otulo for O.D.P.P

Susan Sam Court Assistant