Musyoka v Republic (Criminal Appeal E020 of 2022)
[2024] KEHC 8608 (KLR) (17 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8608 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E020 OF 2022

FR OLEL, J

JULY 17, 2024

BETWEEN

KELVIN NZUMA MUSYOKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal of the conviction and sentence arising in Mavoko CMCR (SO) NO E008 of 2021 delivered on 28.04.2022 by Hon R.W. GITAU, Resident Magistrate)

JUDGMENT

A. Introduction

1. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006.The particulars of the offence were that on diverse dates between 11th April 2021 and 3rd May 2021 within Machakos county, he intentionally and lawfully caused his penis to penetrate the vagina of IM a child aged 14 years.

2. In the alternative he was charged with an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006. The particulars of the offence were that on diverse dates between 11th April 2021 and 3rd May 2021 within Machakos County, he did unlawful intentional act which caused contact of his hands with the vagina of IM a child aged 14 years.

3. The Appellant took plea, and denied the charges. The prosecution called four witnesses and on being placed on his defence, the Appellant gave sworn evidence. The trial magistrate did consider the evidence proffered, and found the Appellant culpable of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *sexual offences Act* No 3 of 2006. She proceeded to convicted the Appellant and sentenced him to serve 20 years imprisonment.

B. Evidence At Trial

4. PW1 IM was sworn and testified that she was a student in form 1 at (Particulars Withheld) secondary school, she knew the Appellant as her boyfriend and had got to know him, while she resided with her Aunty at (Particulars Withheld). After becoming friends, she would visit the Appellant at his uncles place and would at times spend the night there and would not tell anyone. In March 2021 after disagreeing with her mum she decided to go stay with the Appellant. They did stay together for three weeks and during that time engaged in sex on three occasions.

5. Later, after the three weeks, her mother came with the police and they were arrested and taken to Mlolongo police station. PW1 clearly stated that they had consensual sex and had used protection. For good measure she added that her relationship with the Appellant was good and that she expected the same would lead to marriage. She identified the medical reports and birth certificate and stated that she was 14 years old. Upon cross examination she confirmed that she did move into the Appellant's room and they resided there for three weeks. She had disclosed to the Appellant that she was still a student in form II but never told the Appellant her age as she did not want him to know that she had just cleared class eight.

6. While staying with the Appellant she would not wash cloths or cook, but would help him out at the shop, and once back at home it was the Appellant who would do the house chores. She reiterated that the Appellant never forced her to have sex and that they had lived together as boyfriend and girlfriend. She had a facebook page known as "mtoto wao" and had posted a picture of her hugging the Appellant. She suspected that is how her mum got to trace her, but it was her intention to have this relationship to end into marriage as they had lived peacefully with the Appellant. Further she also confirmed that for the three weeks they resided together, she had the option to leave if she had so wished but preferred not to do so.

7. In Re-examination, PW1 stated that she did not want the Appellant to know that she had just cleared class 8 and he had asked her about her age, but she did not respond. On 10.04.2021 she had disagreed with her mum and left for Mlolongo on the 11.04.2021. while at the Appellant house, his uncle never saw her, and she had decided to lie about her education level because she was afraid that the Appellant would reject her. During the time the resided together, they had sex three times and the reason, why she had run way from home was that her mum did not want her to stay at her uncle's house in (Particulars withheld), and she had stayed there against her wish. When she went back home at (Particulars Withheld), her mum had beat her up and that was the source of their disagreement.

8. PW2 PK stated that she was a business lady and resided at (Particulars Withheld). She was married and was bless with two daughters and one son. In April 2021, she had gone for a business trip/ to work in the shamba at Narok for five days as it was rainy season and when she returned home, she found her daughter PW1 was missing. She called her uncle to inquire he had seen her, but he too had not seen her. Subsequently she went to the police station and report her child missing. They started searching for her and on the third week, she saw her post on "facebook". She wrote a massage to her on her in box, but she did not respond. She sent her 2nd born son to Mlolongo to ask her uncle if she knew the man in the facebook photo and it turned out that he knew the Appellant and where he worked.

9. She went to Mlolongo police station and reported the incident and was given two policemen to help her trace the duo. When they went to the shop, the Appellant locked the door and switched off the light. He refused to open the door, and they had to summon his uncle who came and opened the door. Therein she found her daughter and the Appellant lying under a seat. They were arrested and taken to Mlolongo police station where they spent a night. PW1 used to study in Kitui, but when covid

broke out she transferred her to Imara daima primary school in Nairobi, but currently was a student at (Particulars withheld) Girls School.

10. She had severally cautioned PW1 against being in this relationship but she was adamant about it despite being disciplined several times to stop her from continuing with the same. She had even called her school teachers to counsel PW1 but that too did not work. Her further disagreement with PW1, was because PW1 never wanted to stay in the house and would always move around. When they arrested the "duo", the Appellant uncle had confessed that he had never seen PW1 at his house and she believed him. After the arrest PW1 had also confessed that the Appellant forced her to having sex with him, but also clarified that the Appellant was her boyfriend.

11. Upon cross examination, PW2 confirmed that she had three children and when she went for business trip, she would leave the children under the care of her eldest son, Simon, who lived on his own house near where they resided. PW1 accessed facebook through her account as she had her password and it was through the photographs posted by PW1 which lead to them finding out where she was. PW2 insisted that PW1 cousins and uncle never knew where she was and indeed if they knew, that would surprise her. PW1 had issues and had run away from home severally before KCPE and after KCPE and as a result She had sat down with her and counselled her. She confessed the PW1 was a truant and at some point, she would beat her and also take her to the police station for punishment but all that was to no avail.

12. PW2 further confessed that at one point before PW1 did her KCPE, she had taken poison and had to be rushed to hospital for medical care. Also, after the Appellant had been charged in court, she again ran away from home for three days, but on this occasion went to her Auntie's place in Roysambu. Further PW1 had told her she had been locked in the house by the Appellant but did not scream for help. She could not tell if her daughter had been held captive by the Appellant or not.

13. PW3 John Njuguna, testified that he was a clinical officer at Nairobi women hospital and he had examined PW1 and filled in the P3 form. She had a history of having rum away from home and stayed with her boyfriend for three weeks. On examination she was calm and stable. No injury was noted on the external genitalia, the hymen had a cleft, which had healed and she also had curdy discharge from her vagina. She was screened at the lab and no pregnancy or any other abnormality was detected. He proceeded to produce the P3 form, GVRC form and PRC form into evidence.

14. PW3 also examined the Appellant, who was reported to have been leaving together with PW1 for three weeks. He reported that the minor had declined to go home to her auntie's place within (Particulars Withheld) and had told him that she was 17 years old. The Appellant had no injury on his body and/or genitalia. Screening for STI was done and the returns were all normal. In cross examination the doctor, confirmed that PW1 had a history of running away from home and had stated that she had engaged in sexual intercourse with the Appellant on three occasions. The two, the Appellant and PW1 had also given contradictory information as to the age of the girl.

15. PW4 P.C Estevina Cheptoo testified that on 05.03 2021 at about 16.00hrs she was called by the OC Crime and told her to assist PW2 as she had traced her missing daughter within Mlolongo area. They undertook the mission and arrested PW1 together with the Appellant. She took both PW1 and the Appellant to Nairobi woman Hospital where they were examined and she prepared the file and later had the Appellant charged in court. PW1 had informed her that they had started their relationship with the Appellant through social media and later she had moved in with the Appellant from 11.03.2021 to 03.04.2021 when they were arrested. PW1 was moderately tall, light skinned and from her physical l0oks she was a teenager, but she had not established if PW1 had told the Appellant that she was still a student in school.

16. The initial report of a missing child had been made at Mukuru Kwa Njenga police station and during the investigations she had discovered that PW1 did not have a very good relationship with her mother (PW2). PW1 had confessed to her that the Appellant was her boyfriend and as per the birth certificate which she produced into evidence, PW1 was 14 years old. Upon cross examination PW4 confirmed that PW1 had told her that she had run away from home and went to visit her boyfriend because the boyfriend had called her and she had stayed with him until they were eventually arrested. PW1 had visited her boyfriend voluntarily and had sex with him severally. In her statement recorded, PW1 did not state that she had been held captive and had the option to leave. PW1 was underage and had no capacity to give consent.

17. The Trial Court found that the accused person had a case to answer and placed him on his defence on the main charge. The accused person gave sworn evidence and stated that he was a shopkeeper within Mlolongo area, where he was helping his uncle run his cereal shop. One of his customers was Lillian and one day she had come to the shop accompanied by PW1, she introduced her and stated that she had finished form 4 the previous year. Thereafter on a different date in February 2021, PW1 had gone to the shop alone, where they spoke and became acquainted with each other. PW1 told him that she had finished form 4 in 2020 and also used to work for her mum at Mkuru kwa Ruben selling groceries. During this period PW1 used to stay with her cousin Lillian and thereafter would visit the shop on daily basis and also assist him in serving his customers.

18. On 11.04.2021, PW1 called him and requested to know where he stays. She came and they went to his house. He asked her when she would leave and go back but she insisted on not going back. Initially she did house chores and later would come to the shop and help him serve the customers. They stayed together until 3rd May 2021, when they were arrested. PW1 had told him that she had been a student at St Bakhita in Kitui and had scored a mean grade of C in her KCSC exams. During the period when they resided together, they engaged in sex several times as PW1 had told him that she was 18 years old and had a National Identity card, which she had misplaced it.

19. PW1 conduct of calling him to insist on visiting him at home, insisting that they share the same room, removing her cloths and his cloths made him believe that PW1 was over 18 years old. Her physical Appearance too made him believe she was over 18 years old. He was not aware that she was a minor until they were arrested. Upon cross examination the Appellant stated that one could not know a person age by looking at his/her face but could only estimate. Some people were well built but were very young. Lillian, PW1 cousin who had introduced them had told him that PW1 had finished school and she was over 18 years old. He did ask PW1 for her National identity card, but she informed him that she had misplaced it.

20. His uncle was not aware that PW1 was staying within his residence and he wanted to get to know PW1 better before introducing her to his uncle. He did not detain PW1 as she was free and would also accompany him to the shop. He believed what Lillian had told him as PW1 had also told him that she had scored a C grade in her KCSE exams and her mother had no ability to finance her further studies. He also wanted to get married and decided to start a relationship with PW1 and had the intention of later informing his parent's. He reiterated that he was not hiding PW1 and that she was the one who voluntarily came to visit him. His uncle did not live in the house on daily basis as he worked in town and at times would only come home after a week or so. He saw no need to introduce PW1 to his uncle as he wanted to first study her behaviour,

21. After the hearing, trial court did consider all the evidence adduced and found the Appellant guilty of the offence of defilement and after mitigation, sentenced him to serve twenty (20) years in prison.

C. The Appeal

22. Dissatisfied by the conviction and sentence, the Appellant filed the following grounds of Appeal that;

    a. That the learned trial magistrate erred in both matters of law and in fact in convicting the Appellant by relying on documents that were never produced as Exhibits and/or relying on document's that did not form part of the court record.

    b. That the learned trial magistrate erred in law and in fact by holding that the Appellant's defence under section 8(5) of the *sexual offences Act* was an afterthought.

    c. That the learned trial Magistrate still erred in law and fact by convicting the Appellant on contradictory testimony.

    d. That the learned trial Magistrate erred in law and fact by sentencing the appellant to 20 years in prison which sentence was too harsh and excessive taking into account the entire circumstances of the case particularly the conduct of the complainant.

23. The Appellant urged this court to allow this Appeal, and to quash the conviction and sentence. The Appeal was canvassed by way of written submissions.

D. Analysis & Determination

24. I have considered the trial court record, the grounds of appeal and the submissions filed by both the Appellant and the respondent to this Appeal and find that the following issues for determination;

    a. Whether the ingredients of the offence of defilement were proven.

    b. Whether the trial Magistrate misconstrued the provisions of section 8(5) of the *sexual offences Act* and therefore failed to properly apply the same while analysing the Appellants defence.

    c. Whether the sentence should be interfered with.

25. This being the first appeal, this court is as a matter of law enjoined to analyze and re-evaluate a fresh all the evidence adduced before the lower court and to draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno versus Republic* (1072) EA 32 where the court of appeal set out the duties of the first appellant court as follows;

> " An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination (Pandya versus Republic (1957) EA 336) and the appellant court own decision on the evidence made. The 1st appellant court must itself weigh conflicting evidence and draw its own conclusion (Shantital M Ruwala versus Republic (1957) EA 570). It is not the function of a first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court and collect finding and conclusion. It must make its own finding and draw its own conclusion. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact the trial court has had the advantages of hearing and seeing witnesses. See *Peters versus Sunday Post* (1958) EA 424."

(i)Whether the ingredients of the offence of defilement were proven.

26. Section 8 (1) and (3) of the *sexual offence Act* No 3 of 2006 provides that;

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 between age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

27. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator.

28. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo v. 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)

29. From the evidence on record the age of the minor in this case was proved to be 14 years. PW1 and PW2 confirmed the same and PW4 the investigating officer produced the birth certificate Exhibit 4, which confirmed that the minor was born on 15.02.2007 I have no doubt in my mind that this element has been proven.

30. The second element is the second ingredient is penetration which is defined under Section 2 of the *Sexual Offences Act* as follows:

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

31. The same section defines "genital organs" to include;

> " the whole or part of male or female genital organs and for purposes of this Act includes the anus."

32. The minor in her evidence in chief did testify and confirmed that she stayed with the Appellant for three weeks and had sex with him three times. It was consensual sex and they used protection. The Appellant too in his evidence in chief did confirm this fact and testified that they had engaged in sex several times because they lived together. Finally, based on the confession by both parties that they had engaged in consensual sex, the issue of identification does not arise as both parties were known to each other and lived together as boyfriend and girlfriend

33. The offence of defilement was thus proved, but then the Appellant raised in his defence that he believed that PW1 was an adult and so behaved and by her action and physical Appearance he believed that she was over 18 years old.

34. Section 8(5) and 8(6) of the *sexual offence Act*, No 3 of 2006 avails a defence to a person who is charged with the offence of defilement. The said provisions provide that;

Section 8(5) of the *sexual offence Act*

> " It is a defence to a charge under this section if- (a) It is proved that such child deceived the accused person into believing that he or she was over the age of 18 years at the time of the

alleged commission of the offence; and (b) the accused reasonably believed that the child was over the age of eighteen years."

Section 8(6) of the *sexual offences Act* also provides that ;

"The belief referred to in subsection 8(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

35. In *Irene Atieno Ochieng Vrs Republic* (2017) the High court in Migori held that :-

"whenever the accused opts to rely on the defence under section 8(5) of the *sexual offences Act*, the evidential burden of proof shifts to that accused person to satisfy the conditions attached to that defence. It therefore remains the duty of an accused person to demonstrate that:-

a. That it was the child who deceived the accused person into believing that he/she was over the age of 18 years at the time of the alleged commission of the offence;

b. That the accused person reasonably believed that the child was over the age of eighteen years; and

c. That when all the circumstances are brought on board and duty interrogated, they point to the conclusion that the belief on the part of the accused person was reasonable."

The accused person will first have to prove deception by the child in respect of the child's age. That deception can be by way of words or action on the part of the child. (Emphasis)

36. The Court of Appeal in the case of *Eliud Waweru Wambui Vrs Republic* (2019) eklr also had the opportunity to discuss the issue of the Defence provided under section 8(5) and (6) of the *sexual offences Act* and stated thus;

"Subsection (5) states that it is a defence to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. We think it is rather curious provision in so far as it sets in conjunctive as opposed to disjunctive terms which seem to be more logical as opposed to the current rendition. We would think that once a person has actually been deceived into believing a certain state of things, it adds little to the require that his such belief be reasonably held. Indeed, a reading of subsection (6) seems to add a qualification to subsection 5(b) that separates it from the belief proceedings from deception in subsection (5)(a). we would therefor opine that the elements constituting a defence should be read disjunctively if the two sub sections are to make sense.

..... we would find merit in the Applicants contention that in all circumstances of the case he reasonably believed that the complainant was over the age of 18 years. The burden of proving that deception or belief fell upon the Appellant, but the burden is on a balance of probabilities as is to be assessed on the basis of the appellants subjective view of the facts. Thus whereas indeed the complainant was still in school in form 4, that alone would not rule out a reasonable belief that she would be over 18 years old. It is germane to point out

that a child need not deceive by way of actively telling a lie that she is over 18 years. We would give the term deceive the ordinary dictionary meaning which is to;

> " Deliberately cause (someone) to believe something that is not true or (of a thing) given a mistaken impression to" (As per the concise *oxford English Dictionary*, 12th Edition).

So understood, we would think that had the two courts below properly directed their minds to the Appellants defence and the totality of the circumstances of this case, they would have in all likelihood have arrived at a different conclusion on it. It was a non-direction that they did not do so, rendering the conviction unsafe.

We need to add as we dispose off this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of a age younger than 16 years old. We think it is rather unrealistic to assume that teenagers and maturing adults in the since employed by the English house of lords in *Gillick Vrs West Norefolk & Wisbech Area Health Authority* (1985) 3 ALL ER 402, do not engage in, and often seek sexual activities with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process and not a series of disjointed leaps. As lord scarman put it in that case (at page 421);

> " if the law should impose on the process of, "growing up" fixed limits where nature knows only a continuous process, the price would be artificially and lack of realism in an area where the law must be sensitive to human development and society change." At page 422

The law also referred to the judgment of chief justice Lord Parker in *R vrs Howard* (1965) 3 ALL ER 684

> " .... Where he ruled that in the case of prosecution charging rape of a girl under the age of 16 the crown must prove either lack of her consent or that she was not in a position to decide whether to consent or resist and added the comment that, " there are many girls who know full well what it is all about and can properly consent".

Where to draw the line for what is elsewhere referred to as statutory rape is a matter that calls for serious and open discussion. In England for instance, only sex with persons of less than the age of 16 years, which is the age of consent, is criminalized and even then the sentences are much less stiff at a max of 2 years for children between 14 to 16 years of age. See Archbold criminal pleadings Evidence and Practice (2002) page 720.The same goes for a great many jurisdiction's. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is ling over due. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation.

37. The Appellant did testify that PW1 was introduced to him by her cousin Lillian who told him that PW1 had finished form four at [Particulars Withheld] Girls school and had scored a mean grade of C

plain. Thereafter they had become friends. In their subsequent meetings, PW1 herself confirmed to the Appellant that she had finished form four and on 11.04.2021 called him and requested if she could visit him, which request he acceded to. Eventually she came and overstayed her visit.

38. The trial Magistrate did exhaustively consider the defence offered and rejected the same on the basis that ones level of education did not determine Age, the Appellant had told the examining doctor that the minor had told him that she was 17 years and was in form three, he could not state with precision the age of PW1, the Appellant was hiding the minor from his uncle and his conduct betrayed him and that Although the accused person testified that from physical Appearance the complainant looked like she was over the age of 18 years, he was fully aware that looks can be deceiving.

39. With tremendous respect to the trial magistrate, the parameters which she ought to have considered was whether the accused person proved deception by the child with respect to her age, which deception could be by way of the minors words or action and secondly if the accused person reasonable believed the child was overage and all circumstances, when brought on board and interrogated pointed to the conclusion that the belief of the Applicant was reasonable.

40. The minor in her evidence before court admitted to lying to the Appellant about her age and schooling level. She also admitted to the being in a comfortable boyfriend/girlfriend relationship, with the Appellant, which she believed would lead to marriage. While there are two different versions as to whether it was the Appellant who invited her to stay over, or if she was the one who invited herself, the weight of evidence based on the evidence of PW4 points to the latter position, that it was PW1 who went and deliberately overstayed her visit without any coercion.

41. That being so, it was an error on the part of the trial court to hold that the minor's level of education could not be used to determine age, for if she had stated that she had finished fourth form, by implication and common knowledge such a person would have reached the age of maturity. Secondly the Appellant further could not be faulted and/or penalised for not knowing the age of the minor for the law only expected him to reasonable believe that the minor was over 18 years. In this instant PW1 in her own evidence at cross examination expressly stated that "I lied about my level of education. I never told kevo my age. He asked me of my age. I did not want him to know that I had completed class 8"..... I lived with kevo for three weeks as boyfriend and girlfriend. I wanted the relationship to continue into marriage."

42. The trial magistrate also relied on the evidence of the clinical officer PW3, who testified that the Appellant had informed him that the minor was aged 17 years and was in form three. This information could not be verified as the minor had explicitly stated that she had not told the Appellant her age, and the Appellant on the other had had also had explained at length the inquires he made to ascertain the minors age, but she had told him that she had attained the age of 18 years but had lost her National identity card. On balance of probability the evidence of both PW1 and DW1 represented a more accurate presentation of facts as they occurred than what PW3 alleged that he was told by the Appellant. Further PW3 at the end of cross examination also remarked that " The two gave contradicting information as to the age of the girl" , signifying lack of clarity as to PW1 age.

43. The trial Magistrate further faulted the Appellant for hiding PW1 within his uncle's house and stated that this conduct betrays him. Again, with due respect to the trial magistrate, the conduct of PW1 and the Appellant was merely indicative of young adults enjoying the fruits of their illicit affair. Hiding the relationship from the uncle had nothing to do with proving the conduct of PW1 and misrepresentation made as to her age by her deeds and words. Finally, the trial magistrate also wrongly found that the appellant had to be aware that "looks can be deceiving". That could hold true but again must be examined in line with the facts presented in the case by the Appellant to prove deception.

44. When the totality of the evidence is brought on board, the complainant though a minor acted and behaved as if she was a person of age. She even confessed that the Appellant did not force her to have sex, the sex was consensual and they used protection. It was her further testimony that she believed their relationship would lead eventually to a marriage. The Appellant also gave detailed testimony as to what he did to inquire into the minor age and why he believed she was over 18 years old, which evidence corroborated PW1 assertion that she did not want the Appellant to know her age or schooling level. The investigating officer PW4, also testified, with regard to PW1 that "she ran from home and went to live with her boyfriend. I think she was very specific with her intention. Her height is almost that of the accused. She does not have a well-built body. She is slim.....it was not the accused who went to pick the complainant at Mukuru Kwa Njenga. She visited him voluntarily..... She did not state that she was threatened by the accused person not to leave his house. She was free to run away if she wishes.

45. Interrogating all the evidence adduced during trial, the irresistible conclusion points to the fact that the belief of the Appellant was reasonable under the circumstances. PW1 by her conduct and action specifically lead the Appellant to believe that she had attained the age of majority, and under the circumstances of this case, he must be given the benefit of doubt.

D. Disposition

46. Given the full circumstances of the case and for the reasons I have set out herein above, I do find that the Appellant's conviction was not safe, and the sentence imposed on the basis of mandatory minimum sentence was clearly harsh and excessive.

47. The upshot, is that this Appeal has merit, the conviction is hereby quashed and sentence set aside. The Appellant shall be set free forth with unless otherwise lawfully held.

48. It is so ordered.

JUDGMENT WRITTEN, DATED 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