



**SMK v Republic (Criminal Appeal E004 of 2019)
[2024] KEHC 8160 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E004 OF 2019**

MW MUIGAI, J

JULY 5, 2024

BETWEEN

SMK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the conviction and sentence of the Trial Court (Hon. Ocharo) delivered on 13th January, 2022 and sentencing done on 3rd February, 2022 in Machakos S.O 13 OF 2019)

JUDGMENT

Background

1. The Appellant herein SMK was charged with the offence of incest contrary to Section 20 (1) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars being that on diverse dates between January and February, 2019 in Machakos sub-county with Machakos County, the Appellant, being a male person intentionally and unlawfully caused his penis to penetrate the vagina of VMK a child aged 5 years who to his knowledge was his step daughter.

Trial Court’s proceedings on plea taking

3. From the Trial Court proceedings, the Appellant was arraigned in court on 18/2/2019 where substance of the charge and every element thereof was stated to the Appellant in the language that he understood and he was asked whether he admits/admitted or denied the truth of the charge. The Appellant replied “Not true”.
4. The Trial Court then entered plea of not guilty.



The Trial Court hearing

The prosecution's case

5. The prosecution's case was anchored on five (5) witnesses who gave their sworn testimonies.
6. PW1 was PLG . She testified that the complainant is her first child while the Appellant is her ex-husband whom she separated with because of her daughter VMK was 5 years old born on 8/9/2013. PW1 testified further that she had her birth notification and that PW2 was born at Machakos Level 5 Hospital, on 7/9/2013 at 3:00 am so it was 8th. PW1 told the Trial Court that on 9/2/2019 at about 11, TM went her place of work and asked PW1 to see her once she was through with her work and at 11:30 PW1 went to see T and she told PW1 to see her at 5:00pm.
7. PW1 testified that T asked PW1 if she trusted the person she lived with her children and when PW1 asked her why, she told PW1 that she saw the Appellant in the morning take VMK into the house and locked himself inside while the younger child was crying. That they stayed in the house for 30 minutes. PW1 asked her why she did not inform B the Appellant's father who was working nearby; T did not respond.
8. PW1 went home and she was preparing the bath water to bath VMK, PW1 examined her and noted a scratch. PW1 called a nurse who advised her to take the child to Machakos Level 5 on 11/09/2013. It was her testimony that she took the child to the hospital and after talking to Dr. Mativo, who examined the child, and saw wounds that had pus. Testifying that initially they sent her to the station to make a report which she did. The police called the eye witness who went. According to PW1, on 25/3/2019, she was summoned to the station and was given a bond to serve T which she did but T said she will not come to testify. That at the hospital she was given PRC form, lab request forms and results together with the treatment notes PMF I,2 and 3. PW1 never went back to hospital after the first time but they went for P3 filing on 2/4/2019 PMFI 4. PW1 testified that VMK told her that her dad had come with a sweet then he removed his clothes and hers and inserted his fingers into her. That while he was doing this, she saw something between his legs. He then gave her a cloth to clean herself then told her to throw it in the toilet. PW1 told the child's grandmother who begged her not to tell the Appellant's father so PW1 called her brother then boss who was a nurse. PW1 asked the Appellant if he had defiled their daughter, he asked PW1 that if his penis can penetrate the child. They had problems.
9. That in December, 2018, PW1 had gone to her home then her brother gave VMK a hen, the Appellant kicked it. Testifying that the next day she went to the shamba and when PW1 went back, he told PW1 the hen had died. PW1 told Trial Court that they had problems but this could not be a reason to give false evidence.
10. In cross-examination, she testified that she recorded her statement and signed it and that whatever she recorded was the truth and Trial Court could read it. She further testified that the family lived together in the same homestead and that her house and T's are close as T lives at about 10-11 meters. That the child's grandfather and grandmother are left behind. PW1's husband worked as mason in Katoloni and left home but sometimes PW1 would leave him behind. It was her testimony that the Appellant was arrested at his place of work on 15/2/2019, Iveti and Iluvia her matrimonial home is a distance. That it is the police officer who advised PW1 to collect her clothes. PW1 was not chased away by her husband as indicated in her statement. PW1 first went to Iluvia dispensary before she went to Machakos Level 5 on 11th PW1 did not have document to show she went to Iluvia dispensary. Testifying that her child told her she saw something between her father's legs and her father inserted his fingers in her vagina. That the statement is/was wrong that the Appellant inserted his penis in her vagina. PW1 did not anything



about the events of January and that her statement is wrong on the contents of what happened in January 30th all she knew was the events of 9th as she did not inquire anything from the child as she went her on her own. PW1 disagreed with Tabitha because she told things that were not true about the child. That after the child threw the cloth in the toilet she went to take breakfast at her grandfather's house and she appeared normal. It was PW1's testimony that Tabitha did not tell VMK's grandfather what she had seen affirming that the child was very normal infact she went to the PW1 running. She told Trial Court that the genitalia had wounds and pus. PW1 was not aware the doctor indicated that all the tests were negative. That PW1's name is MM and that she is a catholic so she was given the name VMK at her baptism. PW1 is Peninah but Susan is her baptismal name. PW1 had the baptism cards at home.

11. In re-examination, she told Trial Court that MM is VMK and that VMK is her baptismal name. PW1 had the card and that Susan is also her baptismal name. Further that Peninah is her name in the ID card. PW1 testified that she narrated while someone else recorded her statement and that the date she knows of is 9/2/2019. She took the child to Iluvya dispensary on 10/2/2019 but she was not treated. PW1 did not ask the child why she did not tell her grandparents what her father had done to her.

Voire dire examination

12. The Trial Court conducted a voire dire on the child and found that the child was intelligent and very confident and alive to her surroundings. Trial Court directed that she shall give unsworn testimony.
13. PW2 was VMK . She testified that her dad is SMK and that she is in nursery at [Particulars Withheld] primary school. That her sibling is GW. PW2 is younger and that she has two teachers Moses and Muasya. That Moses teaches them numbers while Muasya teaches them to read. According to PW2 her best friend is Muuo Munyao. She knew that she was in Machakos Court. She was told by her grandmother. PW2 knew what she in Court to talk about. PW2 could see her mother, grandmother and grandfather. PW2 told Trial Court that something bad happened to her. Her dad defiled here (she pointed at vagina) and inserted his fingers inside her. PW2 told Trial Court that he also put in her his 'dudu' (penis). According to PW2 she was outside the house playing with C, A and GW when daddy called her into the house. He then removed PW2's pant. PW2 was wearing a dress which her daddy lifted. That he first inserted two fingers then four then he inserted his penis into her vagina. PW2 was lying on his bed where he sleeps with her mother. Testifying that after he finished he cleaned her using the child's cloth. That he cleaned the blood then he went to throw the cloth to the toilet. PW2 saw him take it to the toilet. He beat PW2 on the back. PW2 felt pain between her legs as her mother was at work. testifying that her mother went at 1:00pm with yoghurt (PW2 cried). She testified that when dad defiled her, aunt C, M, Grandpa and grandma were present. PW2 told her grandpa what the Appellant had done before her mother went but he did not say anything. It was her testimony that after her dad defiled her he went to work, and when she told her mother, her mother checked her private parts then took her to the hospital. That the doctor treated her and gave her medicine. PW2 told the Trial Court that her dad was in court (she pointed the Appellant).
14. In cross-examination, it was her testimony that she does not know the months of the year. PW2 knew Friday and Saturday and that her dad only defiled her once. Her mother had gone to work. Testifying that C is older that her as he is in class 1 so is M. She told Trial Court that all those who were at home were her friends. PW2 told her grandfather what her dad had done to her so did she tell grandma, C and M but they all kept quiet. PW2's mother went home for lunch daily. Testifying that when her mother spoke to her grandfather too spoke to her then she went back to work. That when her mother went back in the evening she asked PW2 what dad had done to PW2 before PW2 told her anything. That it is her dad who threw the clothe he used to clean PW2 as all other people saw him going to throw the clothes.



15. PW2 told them what her dad had done to her after he left. That her dad came back at night as usual then left for work the next day. PW2 saw her grandfather and mother talk to her dad. It was her testimony that the doctor examined her 'dudu' and heard the doctor ask her mother if she washes PW2 well. She testified that she did not know if she had ever been treated in her 'dudu' before. PW2 had ring worms on her head and that she knew that her dad used to 'susu' that she saw him 'susu' in the toilet when he did not close the door. Pw2 knew that her mother and father used to have differences as her mother told her that she did not want to live with dad. That her mother told her to come say her dad defiled her so that they can separate. According to PW2 her mother did not like her dad. PW2 wanted them to separate.
16. In re-examination, PW2 stated that when dad defiled her when her mum was not there and she went home at 1pm and never went back to work. That PW2 was playing when her mother grandpa and aunt C were talking. PW2 is the one who went and told the mother what her dad had done to her. According to PW2, she was not near dad and grandpa when they were talking. She was playing at Abby's home. Her mother told her she wanted to separate from dad another day. Testifying that her dad defiled her. PW2 want her mother to go work and that her mother wanted her to speak the truth and it is what she said.
17. PW3 was TMW. She told Trial Court that her husband and P's are brothers. PW3 had known the Appellant for 10 years. PW3 recalled on 30/1/2019 at about 6:30am, she was doing laundry outside her house when she saw VMK peep from their house then she closed their door. Testifying that VMK has a sister called GW who was also in the house. PW3 heard GW start crying for about 30 minutes. She told Trial Court that VMK opened the door and they got out and that GW is a young child. That their father followed them out and left. She testified that VMK went to the toilet then she went back. According PW3, she was carrying something as she went to the toilet. That VMK entered the house and came out with food which she poured while saying she was feeling like throwing up.
18. According to PW3 she recorded her statement on 14/2/2019. PW3 was called by police officer to record her statement about three times. PW3 did not know the name of the officer. PW3 told the Police what she saw. PW3 was forced to record this statement and that she was not forced to state something that she did not witness. Testifying that GW was inside the house knocking the bedroom door crying telling her father and VMK to open the door.
19. That the child was carrying something she did not know whether it was a piece of cloth or paper. PW3 heard the father of PW2 tell her to remove the clothes she had on and wear clean clothes. PW3 proceeded to testify that GW was in the house as she heard her crying and saying 'nifugulieni mlango'. PW3 testified that she had entered the house of VMK and knows where the bedroom is and that she saw VMK carrying something in her hand which PW3 could not know if it was a piece of cloth or paper and heard him tell VMK to change. It was PW3's testimony that later she went to VMK's mother and told her what she saw, telling her to investigate and know what may have happened to the child. That later when PW3 asked her she told PW3 that she had not seen anything. Testifying that on 12/2/2019, VMK's mother called PW3 to inform her that she was needed at the station to record her statement. And that she did this again on 11th and 14th but PW3 told her she was busy at work. According to PW3 she was called about three times by the police to record her statement which she finally did. PW3 later heard VMK was taken to the hospital and issued with a P3 Form. PW3 claimed that she had never disagreed with the Appellant.
20. In cross-examination, PW3 told Trial Court that it was VMK's mother who left after this incident and she does not know how VMK's mother was relating with her husband. PW3 knew sometimes they had problems and they could hear them. Testifying that from where she was washing to where the



Appellant house is, is about 5-6 meters. She told Trial Court that P had left at 6:00am and that GW is about 2 years old that the mother left GW already awake while VMK was still asleep. She testified further that Peninah always left in the morning leaving the Appellant and the children and that it is normal for a child to cry in the morning. PW3 would not know if GW had eaten before the mother left and she did not know what VMK carried to the toilet and that her father told her to go and change. PW3 kept washing her clothes because GW always cried but was concerned that she was crying while calling them and that the door was locked. According to PW3 VMK and GW were in the house and she did not see their father when she locked the door. That the house three rooms, a sitting room and two other bedrooms. PW3 did not know which door GW was knocking and PW3 believes when the Appellant left the children had fed and when GW is feeding she cries and takes long.

21. It was her testimony that from the Appellant's house to his father's is about 10 meters away while to the toilet is about 5 meters way. That VMK was walking normally as she did not cry neither did she tell PW3 if there was a problem. PW3 stayed for about an hour then she left. PW3 was okay playing and PW3 was suspicious because GW cried for long and they were not opening the door. She claimed that VMK confirmed to PW3 that VMK was okay after examining her. That VMK got angry with PW3 that PW3 was telling her lies. That their parents got to know their disagreements. She told Trial Court that the Appellant was a mason and left home at 7:00am. PW3 did not see anything that seemed abnormal from the day of the incident where the child was crying to 9/2/2019. She proceeded to testify that P asked her to record a statement because she had told PW3 everything was okay with VMK. PW3 did not suspect that VMK was defiled. She understood that she would be arrested if she did not record her statement. PW3 narrated her statement as the police recorded and it was not read to her before she signed as she did not know if the statement was read to her. PW3 was told not to state how Peninah went to abuse her in her house after she told her to examine her child. PW3 did not tell the police that GW was locked outside the house or that VMK was carrying something.
22. That the Appellant told VMK to change her clothes not to change GW's diapers as recorded in the statement. PW3 told Trial Court that some of the things recorded in the Statement were what she said. PW3 did not know Penina's home and that her children have been sick sometimes; that Penina did not let PW3 know that she was taking VMK to hospital.
23. In re-examination, she told Trial Court that she asked Penina to check on her child because GW was crying while asking that the door be opened but nobody was opening. That it was not possible that she was being fed. Further she testified that the police told her that it was not relevant to capture her statement on how P went to confront PW3 in her house. That another part is the piece of the cloth but said VMK was carrying something. According PW3 Peninah would sometimes inform her when her children were sick and that they had disagreed so Penina would not have gone to PW3's house to tell her she was taking the child to the hospital.
24. PW4 was Dr. John Mutunga. He testified that he had P3 form of VM a child aged 5 years and that it is alleged that she was defiled by her father on 9/2/2019. PW4 testified that she had no physically injuries on her body. He proceeded to state that her private parts- normal external genitalia with a healing bruise on the labia minora. Hymen was torn but not fresh. It was not bleeding. PW4 noted a foul smelling whitish vaginal discharge and high swab noted pus cells.
25. PW4 told Trial Court that HIV Negative, VDRL Negative, Hepatitis B and C Negative further that child was calm. It was his testimony that it was 5 days after the alleged incident when he examined the child, claiming that a penile shaft had caused the injuries and that grievous harm was the degree of injury. That P3 and PRC forms are for the same child. It was his testimony that it contains similar observations as the P3 form and that there was complaint of pain around the genitalia. He told Trial Court that the hymen was not visible. Further PW4 observed that there were odours smell and bruise



- on the right side of labia minora. He testified that counseling was by Dr. Mativo who was on leave but PW4 had worked with her for 5 years. PW4 was familiar with her handwriting and confirmed that it was filled by her. PW4 produced the in Trial Court as PRC form PEXB 3.
26. In cross-examination, he told Trial Court that the pus cells was more than 20 which indicated infection that was treated and that it is standard procedure for the suspect to be examined. To PW4's knowledge the suspect/ Appellant was not examined and that the bruise on the right side was caused by a penile shaft. PW4 proceeded further to testify that at the age of five years the hymen should be intact so that if it is missing then it is presumed that there was penetration. According to PW4 semen was not found during the examination. That ordinarily when one has injury, he is rushed to the nearest dispensary and if the situation cannot be handled, the patient is referred.
 27. PW5 was Somonia Tumaiper No. 92156. She testified that she is the investigating officer and that she recalls on 13/2/2019 she noted this matter minuted to her. Testifying that the complainant was a child VMK though her mother was Penina. PW5 called Penina who told her that she was at Machakos Level 5 hospital for treatment and that the Report was made on 12/2/2019.
 28. That she went back with a filled PRC Form. PW5 interviewed the minor through a colleague as she did not understand Swahili. Her colleague recorded the child's statement. Testifying that the child could not recall the date of incident but she stated that her stepfather locked her in the house while her mother was away and inserted his fingers and penis in her vagina.
 29. Testifying that the complainant was injured then her father took a piece of cloth and wiped the blood then gave her the cloth to throw. Testifying that a neighbour T stated that she had seen the younger child GW crying outside the house with the door locked. Tabitha got suspicious when she saw the elder child and her father got out of the house so she called the child's mother and asked her to check on the child her return. That on 30/2/2019 when the mother went back she asked the child who said her father had inserted his fingers, she checked the child's vagina and found bruises and lacerations. That she started spying on her husband and on 9/2/2019 when she returned from work, the child reported that her father had inserted his penis in her. According to PW5, the mother checked and found the child's vagina swollen with lacerations. That she confronted her husband who chased her and the child away; she went to her parent's home and was advised to report to the police which she did.
 30. PW5 told Trial Court that on 11/2/2019 she went to Iluvya dispensary but was transferred to Machakos Level 5 on 12/2/2019 the hospital confirmed defilement. She then reported. PW5 recorded the statement of the mother and T. PW5 issued a P3 form which was filled at Machakos Level 5 Hospital. PW5 arrested the Appellant and visited the scene and noted that they live in two roomed house. That they used to sleep on a mattress at a corner of the room with the children and that this is where the child was defiled. Testifying that the child is a step daughter to the Appellant and that child's age was assessed to be five years, (PW5 charged the Appellant) the piece of cloth was thrown in a pit latrine. According to PW5 the child's mother did not know that inserting fingers is an offence that why she kept quiet. PW5 produced the age assessment report and birth notification as exhibits 1 and 5. PW5 did not know the Appellant until his arrest.
 31. In cross-examination, PW5 testified what she was told by P, the child and what the doctor confirmed. Testifying that the 1st incident was on 30/1/2019 and PW5 did not know why P lied but she must have lied either to court or the police. PW5 did not have information that the child had vaginal infection or that P and the Appellant had been fighting before. That it was not true that PW5 advised P to go to her home. P told PW5 that she had been away.
 32. The report at the station was made after being treated and that normally it is a report that is made first further doctors would not treat a defilement case before it is reported. PW5 proceeded to tell Trial



Court that a child's health comes first so it was not always that a report is made first. The PRC form was filed on 12/2/2019 after the report. PW5 could see PRC form was filled on 11/2/2019. Tabitha was also a sister in law to Penina and Appellant and that Tabitha told PW5 that Penina confronted her as to why she was telling lies. The child's grand parents live in the same compound. PW5 did not know if they were present on the day it was alleged a penis had been inserted. When PW5 visited the scene, there was no adult in the compound. After defilement the child went to her grandparents for breakfast. That if the penetration was not complete nothing could show. According to PW5 grandparents were not willing to record a statement. PW5 did not summon them to the station to record statements. PW5 called them but they refused. PW5 arrested the Appellant on 16/2/2019 at his place of work in Katoloni where he works as a mason. Testifying that it is not true the Appellant was harassed and stripped naked during interrogation. PW5 was with CPL Ramadhan. PW5 did not record any statement under inquiry. The interrogation took 10 minutes and that they did harass the Appellant.

33. In re-examination, it was PW5's testimony that the child's mother was referred to Machakos Level 5 from Iluvya dispensary and that it is normal for a victim to get treatment before making report. Testifying further that the child's grandfather was not willing to talk about the incident. PW5 received the PRC form after the report. PW5 was not aware of P and T disagreeing and becoming enemies. They did not harass the Appellant neither did PW5 receive any complaint. That the Appellant is a casual laborer so sometimes he goes to work and sometimes he does not. PW5 got this information from the Appellant's wife.

Ruling of Trial Court on a case to answer

34. The Trial Court vide its ruling dated 22/7/2020 the prosecution had established a prima facie case against the Appellant and placed the Appellant on his defence.

The Defence hearing at the Trial Court

35. DW1 was SMK . He testified that he knows VMK and that she is his child and he also know PW1, she was his wife. He told Trial Court that it is not true that defiled his daughter on 15th February. He claimed that he had gone to work in Katoloni and him and his wife were not living well. They used to have a lot of disagreements. According to DW1, she would run away to her home and her father even returned dowry.
36. DW1 married his wife with her daughter VMK. That when she ran away in 2018, she left their young child and as at 2019 she had comeback. That they had only lived as husband and wife for 1 year. As per DW1, she came back in January,2019 after leaving in 2018 November. Testifying that it is not true her daughter was seen going to throw something in the toilet. DW1 lived with his brother in his father's compound. DW1's parents are always present. He claimed that on the material day, his mother was present so was his father. DW1 told Trial Court that he left home early at about 6:30am. That at the time DW1's wife was a housewife and there is no day his wife ever left him alone at home with the children.
37. DW1 was arrested 13 days after the alleged defilement from his place of work and harassed to admit so he did not know what was happening at home. After DW1's arrest his wife left with the children and his sister in law also lives in their home. She is PW3 T.
38. Testifying that PW1 and PW3 disagreed because his sister in law was looking for her job then his wife started accusing her of prostitution. They hurled abuses at each other. DW1's sister in law was also not



- straight forward with the Appellant. That Tabitha said she saw something that looked like a pant but she did not know what it was.
39. According to DW1 his daughter was not taken to Kiima Kimwe dispensary as alleged that she said she went to Machakos General Hospital. Testifying that they have a dispensary close to their home. After DW1's arrest he was also examined; he was not given results and that these charges are made up and the Trial Court should not believe them. DW1 prayed to be acquitted.
 40. In cross-examination, he testified that on that day he was at work in Katoloni while the incident was alleged to have taken place at (Particulars withheld) and that one would take about an hour from his home to Katoloni while driving. DW1 did not have evidence to show that on the material day he was not at home. that it his sister in law who told his wife that he had defiled his daughter. DW1 claimed that he had another witness who would testify on the grudge that he had with his wife. DW1's wife told him she will do something to him to ensure he is taken out of the home.
 41. It was testimony that he could not remember the time he is alleged to have defiled the child. He was told it was around 7:30am. Testifying further that the other people in the home live in their houses and it is not true they would not know what others would be doing in their houses and vice versa and there is no possibility of knowing what is happening in someone's house hence they could not testify on what happened in his house. DW1 could not remember the date on which his wife and Tabitha were quarrelling but it was before his arrest. DW1 read the child's medical report which stated that she had been injured by a sharp object but it is not true as a child cannot harm herself. DW1 claimed that he did not commit this offence.
 42. In re-examination, he told Trial Court that the charge sheet does not disclose the specific date he is alleged to have committed the offence. DW1 only knew of the accusations on the date of his arrest. DW1 had left the child with her mother on the date of alleged offense and that Tabitha and his wife disagreed a week before he was arrested. That it was over defilement. DW1 recalls Tabitha testified and she was not supporting DW1's wife.
 43. DW2 was BN. In his testimony, he told Trial Court that he knows the Appellant as he is his son. That the Appellant lives in his home. That in his home there are four houses. Testifying that in 2019 all the houses were occupied. His other son has two children who lived there. According to DW2 the Appellant had a wife and 2 children and that was in DW2's house, DW2 lived with his wife and 3 children. Penina was DW2's wife. She had two children and there was a time she engaged in casual labour while DW2's son is a mason/painter.
 44. That in January/February 2019, DW2's son would leave home early. He was always the first to leave. That the relationship between P and her husband was not good. There was a time they had to appear before the Chief then she left with her father. Testifying that towards the end of 2018 she left and came back in 2019. DW2 did not see any problem in January 2019 until this problem. That on 12/2/2019, DW2 heard for the 1st time that Penina had gone to report that her husband had defiled the child. DW2 was called by the Assistant Chief Anna. It was his testimony that he heard that the police had told her to collect her things from her house and leave.
 45. She alleged that DW2's son had defiled his daughter on 30/1/2019. According to DW2 he left home on 1/2/2019 with his wife for a function in Emali and came back on 3/2/2019 and found there was an argument between P and T as P claimed T had lied to her that DW2's son had defiled his daughter. That P claimed she had checked her daughter and there was nothing wrong. DW2 recalls the morning of 30/1/2019 he saw the Appellant's children and they were okay. They had breakfast with DW2 and he was home the whole day as the children played freely with other children.



46. It was his testimony that on 9/2/2019 he left early and could not say anything about that day save that the Appellant had already left. All through the period alleged, V was fine and playing with other children. DW2 proceeded to tell the Trial Court that there was nothing to suggest that she had been defiled. That after these allegations there was no problem save an argument over food. That on 11/2/2019, the Appellant's wife had left by the time DW2 woke up. DW2 learnt that she had gone to report. The Appellant was arrested on 15/2/2019 at about 1:30pm at his place of work in Katoloni. DW2's son told DW2 that he did not defile his daughter. That on the material date she went to school. DW2 testified that he saw medical report of Veronica which he claimed was not consistent. DW2's son did not commit this offence.
47. Further it was testified that T testified unwillingly as she did not record the statement neither was she allowed to read it. According to DW2 the charges were trumped up and that if someone inserted fingers in that child then it must have been to get at DW2's son. DW2 thought his son's wife wanted to fix him as there was a time she stole DW2's knife. That he was told by V and when DW2 demanded his knife she handed it to him. That since she left on 13/2/2019, she has never come back. DW2 said it could be V's mother who harmed her child to get back at his son. That Penina even denied her statement.
48. In cross-examination, it was his testimony that the Appellant is DW2's second born son. DW2 had a close relationship with him as son and DW2 love him as DW2 love his other children. DW2 was not biased there was a possibility that the child's father may have inserted his fingers in the child's vagina. DW2 told Trial Court that he is telling the truth that week of the alleged offence, the child's mother was a casual labourer. DW2 did not know what Sylvester told the Court. According to DW2 one could not know what happens in another's house so one cannot testify on what happened in the house. Most of the DW2 did not see PW1 leave the home when she had her casual work. DW2 could not control the movement of the Appellant and his wife as they are grownups. DW2 was in the compound that day; he never left. DW2 did not have the evidence to prove that he was in Katoloni. DW2 was not present when Penina and Tabitha quarreled. DW2 was informed by his daughter. DW2 testified that he did not the school register to show that the child was in school on the date of alleged defilement but for that week she was going to school. It is not true that DW2 was biased.
49. In re-examination, he told Trial Court that what he saw and heard and not what is convenient to his son. DW2 would not protect his son if he committed an offence. DW2 said the mother could have inserted the fingers or even the father. That Penina would do casual work just around the area of washing clothes and not daily. Testifying that one cannot see what happens in another's house but one can hear. The child was very free and normal and if there was something wrong DW2 could have seen. DW2's son was arrested at his place of work and DW2 was called. Testifying that it was his daughter who told her mother of the argument between Tabitha and Penina and it was confirmed.

Trial Court's judgment

50. Vide the Trial Court's judgment dated and delivered on 10th January,2022 Trial Court found that the prosecution had proved beyond reasonable doubt that the Appellant inserted his fingers into the vagina of the child and was found guilty of Sexual Assault contrary to Section 5 (1) (a) (i) of the [Sexual Offences Act](#) and convicted accordingly under Section 215 of the CPC.

The Appeal

51. Dissatisfied with the judgment the Appellant vide Petition of Appeal dated 21st February,2022 and filed on 25th February,2022, wherein the Appellant prayed that:



- i. The conviction and sentence of the Trial Court be quashed and/or set aside and the Appellant be set at liberty forthwith.
52. The Appeal was premised on the following grounds that:
1. The Learned Magistrate erred in fact and in law in finding that the Appellant had inserted his fingers into the victim's vagina which finding is not supported by either oral or documentary evidence and hence caused a miscarriage of justice.
 2. The Learned Magistrate erred in fact and in law in finding that the accused had committed the offence of sexual assault contrary to Section 5 (1) (a) (i) as read with Section 5 (2) of *Sexual Offences Act* without any evidence to support the said findings and hence occasioned a miscarriage of justice.
 3. The Learned Magistrate erred in law and in fact in believing the contradictory and inconsistent evidence of the prosecution witnesses as against the consistent evidence of the defence and as such occasioned a miscarriage of justice.
 4. The Learned Magistrate erred in fact and in law in analyzing the evidence in piecemeal and as a result ended up considering evidence that was only supportive of the prosecution's case a result of which the evidence in support of the defense was left out hence occasioned miscarriage of justice.
53. The Appeal was canvassed by way of written submissions.

Submissions

Appellant's submissions

54. The Appellant vide his submissions dated and filed on 1st November, 2023, wherein counsel for the Appellant raised the following issue for determination:
1. Whether the prosecution proved its case beyond reasonable doubt.
 2. Whether there were material and irreconcilable contradictions in the prosecution case.
55. Counsel while submitting on the above issues took issue with the testimonies of PW1, PW2, PW3 and PW4 and submitted the Trial Court relied on the Doctor's testimony when it entered its conviction against the appellant. Contending that if the Trial Court had not attached undue and undeserved weight to the state of PW2's hymen, it would have been less confident about the strength of the prosecution case against the Appellant. Counsel relied on the case of P.K.W Vs Republic (2012) eKLR to buttress his position on the proper view that court ought to take on the fact of the broken hymen.
56. It was submitted by counsel that from the witness testimony it can be presumed that he was basing his argument on mere assumptions as it is clear that the doctor was confident that the child had been defiled. opining that it is interesting to note that a child seemed and appeared normal after the alleged incident. Submitting that it is also interesting that upon examination the mother only noted a scratch.
57. Counsel argued that PW5 the investigating officer testified that the incident had been reported on 12/2/2019 though the child could not recall the date of the incident. That according to the child the father had locked her in the house while the mother was away and inserted his fingers and penis in her vagina, she was injured and her father took a piece of cloth and wiped the blood then gave her the cloth to throw under his escort.



58. It was the Appellant's case that the contradictions and inconsistencies on the accounts of the events in the prosecution's case are very clear and one cannot tell when this particular incident took place as the witnesses herein contradicted each other on the dates and even on accounts of what really transpired. Contending that no evidence was adduced in court to vindicate the Appellant as the alleged perpetrator of the offence. Positing that the child was also heard to say that her mother had her to testify against her father.
59. Averring that the Trial Magistrate erred in convicting the Appellant on evidence that was clearly inconsistent, untruthful and contradictory and that in order to convict the Appellant, their ought to have been no doubt in the mind of the court that Appellant committed the offence based on the evidence before the court.
60. Counsel submitted that the contradictions go to the root of the case for they cast doubt as to whether the Appellant committed the offence that he is charged of. Opining that the said contradictions cannot be cured hence a finding of guilt was erroneous. To buttress this position counsel placed reliance on the case of Felix Luwambe Gonzi Vs Republic [2006] eKLR, Philip Nzaka Watu Vs Republic (2016) Cr App 29 of 2015 and Daniel Ojeabuo Vs Federal Republic of Nigeria [2014] LPELR-22555 (CA).
61. Counsel submitted that it important note that the Trial Court took note of these contradictions but nonetheless went on to convict the Appellant on the offence of sexual assault. Contending that prosecution's case casts doubt in the mind of the court, the benefit of this doubt must be resolved in favour of the Appellant. Positing that the Appellant denied committing the offence as he left home for work early leaving his wife at home since she was then a house wife and that the charges were meant to frame him since he had marital disagreements with his wife and the testimony was backed by that of Benjamin Kilonzo DW2.
62. It was contended that on evaluation and scrutiny of the evidence with the greatest care on appeal there are sufficient reasons to interfere with the impugned judgment. To cement this position counsel relied on the Malawian case of Chanya & Another R CRIM Appeal No. 9 of 2007.
63. It was the Appellant's case that the burden of proof was not discharged beyond reasonable doubt as postulated in Miller Vs Minister of Pensions [1974] ALL ER 373 and opined that the prosecution failed to discharge their duty of proving the case beyond reasonable doubt.

Respondent's Submissions

64. Respondent's in its submissions dated and filed in court on 4th December, 2023, wherein the state council submitted on the grounds of this appeal;
65. On the first ground of the appeal, it was submitted that the victim testified that the Appellant inserted his two fingers, then four into her vagina. He then proceeded to insert his penis thereafter while in the house. Averring that PW4 in the P3 Form PEXH-4 noted that the victim had a healing bruise on the labia majora. That the hymen was torn but fresh. Submitting that he further noted a fowl smelly whitish vaginal discharge, upon vaginal swab, pus was noted and accordingly he concluded that a penile shaft had caused the injuries. State counsel relied on Section 2 of the [Sexual Offences Act](#) on the definition of penetration.
66. To cement his position, counsel placed reliance on the case of FOD Vs Republic [2014] eKLR and submitted that the medical evidence adduced by PW4, clearly shows beyond a shadow of doubt that the victim was defiled by the Appellant.



67. Regarding the second ground of appeal, counsel contended that the Trial Court acted within the law by sentencing the Appellant to the offence of Sexual Assault contrary to Section 5 (1) (a) (a) as read with Section 5 (2) of the *Sexual Offences Act*. Further counsel relied on Sections 186 and 179. Reliance was also placed on the case of Rashid Mwinyi Nguisya and Vs Republic. Submitted that the Trial Court has the power under Sections 179 & 186 of the CPC to convict the Appellant of a lesser offence which was proved by the oral and documentary evidence adduced by prosecution.
68. As to third ground of appeal, it was the contention of the state counsel that the oral and documentary evidence adduced by prosecution was consistent and valuable as PW2 testified how she was defiled by the Appellant corroborating the evidence with the testimony of PW1 PW3 PW4 and PW5. Counsel placed credence in the case of Richard Munene Vs Republic [2018] eKLR, to buttress his position on contradiction and inconsistency on the evidence of the prosecution witness.
69. With regards to the fourth ground, counsel submitted the Trial Court evaluated the evidence adduced by the Prosecution vis-a vis the Appellant's defence. That the Appellant testified as DW1, together with his biological father as DW2. Contending that the evidence adduced by Appellants could not shake the cogent evidence adduced by the prosecution. Opining that the Appellant was properly identified by PW2 and PW3 as being in the house with the victim. Opining that the medical evidence proved that indeed the victim had been defiled by the healing bruise on labia Majora.
70. On proof beyond reasonable doubt, it was posited that the relevant provision would be Section 5 (1) (a) (i) as read with Section 5 (2) of the *Sexual Offences Act* under which the Appellant was convicted and sentenced which conviction and sentence of the Appellant according to state counsel was sufficient and appropriate.

Determination/analysis

71. The Court has considered the Record of Appeal, Memorandum Grounds of Appeal and written submissions filed on behalf of respective parties in this Appeal.
72. This Court being the 1st Appeal Court, its duty is as set out in the case of Okeno vs. Republic [1972] EA 32 as follows:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

73. In criminal case the burden of proof solely rest with the Prosecution. In the celebrated case of H.L(E)Woolmington vs. DPP [1935] A.C 462 pp. 481, Viscount Sankey L.C held 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.”

74. The standard of proof is proof beyond reasonable doubt. According to Lord Denning on what is proof beyond reasonable doubt in *Miller vs. Ministry of Pensions*, [1947] 2 ALL ER 372 stated that:-

“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 proved beyond reasonable doubt, but nothing short of that will suffice.”

75. In evaluating the evidence on record afresh, this Court finds as follows;

76. PW1 mother of the child/victim stated her daughter was aged 5 years she was born in 2013 and produced birth notification, she was told by PW3 that on 9/2/2019 her child was taken by her step father the Appellant into his house and left the younger child GW crying. She went home and as she washed her she noticed a scratch. She took her to Machakos Level 5 to be examined.

77. PW2 VMK testified unsworn statement after voir dire examination testified that the Appellant defiled her, he put in 2 fingers first and then his ‘dudu’ after he called her when she was playing with other kids and put her on the bed. After he defiled her, he cleaned her and gave her the cloth to throw in the toilet. In cross examination she said that her mother had told her she did not want to live with her father, the Appellant and told her to say that the Appellant defiled her so that they could separate. She stated that her Mum did not like Dad and she also wanted them to separate.

78. PW3 TMW who stated that she heard PW2’s younger sister crying, and V was in the house for 30 minutes and after she came out her father also came out. V was carrying something that she went and threw in the toilet. From the Court record, the evidence of PW1 was stated to be different from the statement she recorded with the police earlier. At that point the witness retracted her testimony and the record shows the Prosecutor sought to have the witness stood down and Defense Counsel refused.

79. PW4 Dr John Mutunga produced P3 Form stated that on examination of the child the P3 Form shows Normal Female external genitalia healing bruise on labia minora, right side hymen torn and that the child had pus cells in the vagina.

80. In *PKW vs Republic* [2012] eKLR Court of Appeal Nyeri (Maraga & Rawal JJA) the Court stated;

Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle



riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of *The Queen Vs Manual Vincent Quintanilla*, 1999 ABQB 769.

81. This Court finds the evidence of PW1 is hearsay as far as the events of incest, sexual assault is concerned. Her testimony was that she was informed by PW3 the goings on the day in question, that PW3 saw PW2 come out of the house after she was locked in with the Appellant and the younger sibling GW was crying.
82. PW2 aged 5 years upon examination she gave unsworn statement that she was defiled by her step father, the Appellant who first inserted 2 fingers and then there was penile penetration in her vagina by the Appellant. In cross – examination PW2 was contrite that she was told to implicate her step Dad on defilement so that they Pw1 and the Appellant (her parents) would part ways.
83. The Informer, PW3 retracted her version, testimony in Court and had refused/delayed to record statement and when she did halfway through her testimony retracted the version in Court from what she recorded in her statement.
84. The evidence of PW1 & PW3 is unreliable even as the Trial Court observed and relied on PW2’s evidence that was corroborated by medical evidence of the doctor PW4.
85. The totality of the evidence on record is tainted by doubt and is not credible in light of the honest submission by PW2 that she was told by her mother to implicate her stepfather and PW3 the source of the information was reluctant to record her statement and retracted her testimony in Court that was different from her statement. The evidence does not satisfy the burden and standard of proof beyond reasonable doubt that should be proved by the Prosecution. There is ample doubt and any doubt ought to be exercised in favour of the Appellant. The evidence has contradictions and inconsistency that goes to the root of the matter and proof of the offence of sexual assault as evidence of PW2 is not concrete and seems motivated by malice that she was told by her mother to implicate her step father so that they part ways.
86. The Court considers the above offences serious and must/shall be pursued through/by law to ensure justice to the aggrieved party and in maintenance of law & order within social norms and minimum conduct. However, if there is suspicion or any whiff suggesting that the justice system is being used by presenting evidence not of actual offence but to use the force of law for other ends unknown to law it amounts to abuse of the Court process. This attempt must curtailed at the earliest opportunity. The evidence adduced before the Trial Court of this offence was/is tainted by evidence of ulterior motive and interferes with the standard of proof beyond reasonable doubt.
87. In *MTG vs Republic Criminal Appeal E 067 of 2021* HCT Voi Mativo J (as he then was) referred to the case of *Theophilus vs State* {1996 } Inwlr PT 423.139 which stated;

“Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.⁷ It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before



the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.”

88. Taking into account what PW2’s testimony about the defilement and at the same time that her mother told her to fix her stepfather, the Appellant vitiates her credibility as a witness and the veracity of her testimony in proving the offence. In addition to PW3’s retraction of her statement, she is not a credible witness, I find the conviction unsafe in the circumstances and in compliance with the law, the Prosecution did not discharge the burden of proof to prove the offence due to the above-mentioned contradictions and inconsistencies in the evidence of PW2 the child and PW3 the informer who retracted her statement.
89. The Appellant is discharged/acquitted and the charge withdrawn and if no other conviction and sentence, he is released forthwith.

It is so ordered.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 5/7/2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

In the presence of:

SMK – The Appellant

Ms Koech – For The State

Geoffrey/patrick – Court Assistant(s)

