Kahihia v Republic (Criminal Appeal 124 of 2023)
[2024] KEHC 10650 (KLR) (13 September 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 124 OF 2023

RC RUTTO, J

SEPTEMBER 13, 2024

BETWEEN

STEPHEN MUIRU KAHIHIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. C. K. Kisiangani (PM) at Ruiru Senior Principal Magistrate's Court Sexual Offence Case No. E052 of 2021 delivered on 20th September, 2023)

JUDGMENT

A. Introduction

1. The Appellant being aggrieved by the trial court decision that convicted him for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* Cap 63A has lodged this appeal. He seeks that his conviction be quashed and the life imprisonment sentence set aside.

2. The appeal is premised on the following grounds, that:

    a. The Learned Magistrate erred in fact and in law by convicting the Appellant of defilement despite the lack of proof by the prosecution on the essential elements of the charge.

    b. The Learned Magistrate erred in fact and in law by convicting the Appellant in the absence of testimony of the complainant/minor.

    c. The Learned Magistrate misdirected herself in fact and in law by finding that identification of the Appellant as the perpetrator was proper.

    d. The Learned Magistrate misdirected herself in fact and in law in allowing hearsay evidence to be admitted.

e. The Learned Magistrate misdirected herself in fact and in law in failing to consider the veracity of the accused person's sworn defence.

f. The Learned Magistrate erred in fact and in law in sentencing the Appellant who was at the time of the alleged offence, a minor; to a sentence of life imprisonment.

g. The sentence herein is manifestly harsh and excessive.

B. Background

3. Before the trial court, the Appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. The particulars of the offence were that Stephen Muiru on 13th day of September 2021 within Kiambu County intentionally and unlawfully caused his penis to penetrate the anus of PMG a child aged two (2) years old. In the alternative, he was charged with the offence of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that Stephen Muiru on the 13th day of September 2021 within Kiambu County, intentionally and unlawfully committed an indecent act with a child namely PMG aged two years old by touching her private parts namely anus.

4. The Appellant pleaded not guilty and to prove its case, the prosecution called 6 witnesses. Notably, the prosecution applied to court to have the victim testify through an intermediary. In his defence the Appellant gave sworn evidence and although he had indicated that he would call two witnesses, he closed his case without calling any witness.

C. Prosecution case

5. The trial court upon examining the victim found that she was unable to speak properly, her speech had not formed well and the court could not get any clear evidence from her. This prompted the prosecution to rely upon the provisions of section 31 of the *Sexual Offences Act* to apply to have the victim testify through her mother as an intermediary. The Appellant did not object to this application and the court proceeded to allow the application.

6. The victim's mother, PW1, testified that the victim was born on 31st December 2018 and, was 2 years and 8 months old at the time of the incident. The victim's notification of birth was marked as PMFI1. She testified that on 14th September, 2021, the child disappeared from the house at around 3 p.m. when she went outside to play in the plot. She was taken near the gate. She stated that a lady who was washing clothes near the gate told her that she saw the child sitting on a slab and another lady, P, told her that the Appellant was the one who took the child. She had known the Appellant for a period of one month.

7. PW1 further testified that the lady washing clothes informed her that the Appellant used to visit P, who was the caretaker of their plot and had four children. She was told that the Appellant took her child when leaving P's house, and they took a long time to come back. The Appellant brought back the child at around 5:30 p.m., carrying her while she was sleeping. The child did not wake up until 11:30 p.m., at which point she woke up holding her back.

8. PW1 further testified that upon asking the child what was wrong, the child said "Stevo hapa" while holding her buttocks. PW1 did not understand at first, but as the child kept repeating the same thing and pointing at her buttocks, she checked and found that the child was no longer wearing the underpants she had on earlier. Her vagina looked normal, but her anus was expanded and red. Since it was around midnight, she decided to sleep, and in the morning, she called her aunt. The child repeated to her aunt, "Stevo hapa," while pointing at her buttocks.

9. PW1 then took the child to a clinic within the estate. The examiner noted that the anus was expanded. They were referred to Kiambu Sub-County Hospital, and subsequently to MSF Hospital in Mathare. She identified the treatment notes from Kiambu Hospital (MFI2), treatment notes from MSF Hospital in Mathare (MFI3), the post-rape care (PRC) form (MFI 4), the P3 form (MFI 5), and the post-rape care form filled at MSF Hospital (MFI 6).

10. PW2, LW testified that on 14th September 2021, PW1 went to her house and informed her that her child had been crying the whole night and was bleeding from the anus. Upon checking the child, she observed that there was blood coming out of the anus. She advised PW1 to take the child to the hospital, and they went together to a clinic near their houses. From there, they were referred to Kiambu Hospital. At Kiambu Hospital, they were advised to take the results to the police station, so they went to Githurai Kimbo Police Station and were subsequently directed to a hospital in Mathare. The witness testified that the child told her "S hapa." She identified S and further testified that she knew him as they had lived in the same plot before she moved out.

11. PW3 Doris Kerubo Ongeri, a clinical officer at Medicines San Frontiers (MSF) Hospital, told the court that she examined the complainant on 14th September 2021 and prepared a medical certificate PExh3 and a post-rape care form as PExh6. She testified that her genitalia was normal and hymen intact, the anus had fresh lacerations at the 6 and 7 o'clock positions, indicating trauma, and reddening of the anal opening, which was tender on touch, no spermatozoa were found in the anus as the patient had taken a bath. She further stated that the problem was on the anus.

12. PW4 Dr. Dennis Omondi Odhiambo, a doctor at Ruiru Sub County Hospital, told the court that the victim's P3 form was filled out by Dr. Koome on 21st September 2021, eight days after the alleged defilement. He stated that Dr. Koome was transferred to Lari Level 4 Hospital and he was conversant with his handwriting and signature having worked together. On genital examination, it revealed that the hymen was intact and there was no discharge from her genitalia, the anus had fresh lacerations at the 6 and 7 o'clock positions, with reddening around the anus, indicating evidence of anal penetration. He explained that the lacerations and reddening suggested that something hard had entered the anus, although hard stool could also cause lacerations. He produced the P3 form as PExh5.

13. PW5, Police Constable Christine Okumu, the investigating officer (I.O) of Githurai Kimbo Police Station stated that on the 15th September 2021, a case of defilement was reported and she was assigned to investigate. The complainant had treatment card and PRC from Kiambu Hospital. She then referred the child to Medicine San Frontiers for examinations. She testimony corroborated what had been stated by PW1 and PW2. She stated that the child was just saying "stevo hapa" while pointing at her anus. That the subject(appellant) and victim were neighbours. She produced the Birth Notification of the victim as Pexh1 and Birth Notification of the Appellant as Pexh8.

14. PW6, Dr. Wangechi Irungu of Kiambu Level 5 Hospital, produced the post rape care form and treatment card from the hospital as Pexh4 and PExh2 respectively. She told the court that the child complained of anal bleeding. She told the court that when the child was examined, she had no tears in her vagina and that there were tears on the 6 o'clock and 7 o'clock positions on her anus. The examination was in tandem for sexual offence to the anal side of the minor.

15. Upon the close of the prosecution case, the court found that the prosecution had establish a prima facie case and the Appellant was placed on his defence. The Appellant chose to give a sworn statement and called 1 witness.

D. Defence case

16. DW1, the Appellant, stated that he knows the complainant. That his uncle was a caretaker in the house where they previously lived, which is where he met the complainant. He stated that on 13th September 2021, at 11.00am he received a call from his uncle requesting him to open the taps as two ladies wanted to fetch water. He proceeded to do so. On returning, he found the victim alone and asked a tenant who was washing utensils where the victim's mother was. The tenant said that the mother had left, leaving the victim and her containers there. Since he knew the victim, he took her to her mother.

17. He further stated that he was arrested on 15th September 2021 and was released in April 2022 after he took a plea. He stated that in August, PW1 had asked him to talk to his uncle to give her a one-bedroom house for Kshs 5000. When he told her that he was not the owner, their relationship soured. However, his uncle used to buy sweets and yogurt for him to take to the complainant's house. He stated that he has never had disciplinary issues in school nor has he ever been reported to the Chief. He also mentioned that he used to go to the shop with the complainant, and it was not the first time he carried her since his uncle used to send him with the child to Githurai to buy items.

18. On cross-examination he was almost 20 years old and still in school. That he had known the victim for a month and since she could not talk, he was not sure whether the victim knew him. He further testified that when he took the victim at 11:28a.m to open the taps, he took her to her mother.

19. Upon hearing all parties, the trial court delineated the following issues for determination: was the victim a child? Was there penetration? Was the penetration by the subject? Whether or not the prosecution has proven the alternative count beyond reasonable doubt, and whether the prosecution has proved its case beyond reasonable doubt.

20. The court first addressed itself on the age of the victim. It held that the mother's victim produced a birth notification as Pexh1 indicating that she was born on 31st December 2018. The incident is said to have occurred on 14th September 2021 when the victim was aged 2 years 8 months.

21. On penetration, the court stated that the same day that the Appellant confirmed to having been with the child is the same day that the child had no under pant and that her anal hole had expanded.

22. On the third ingredient of identity of the perpetrator, the trial court observed that weighing the prosecution's evidence on record with the defence, the prosecution's evidence is overwhelming and that there is no doubt in the identification of the perpetrator since he used to go to PW1's plot. The court stated that the evidence was circumstantial.

23. On the alternative count, the trial court found that the prosecution had not proved its case to the required standard and proceeded to acquit the appellant on this count.

24. Ultimately, the appellant was convicted under section 215 of the Criminal Procedure Code on the first count of defilement. On sentencing the trial court considered the accused mitigation and noted that the offences under *Sexual Offences Act* are mandatory. The accused was sentenced to life imprisonment.

E. The Appeal

25. The appeal is as set out in the earlier paragraphs of this judgment. The appellant seeks that his conviction be quashed and sentence set aside. The appellant relies on his written submissions dated 8th May 2024, while the respondent sought to rely on its submissions dated 4th June 2024. The parties' submissions are as follows:

Appellant's Submissions

26. On the first ground, that there were contradictions and inconsistencies, the appellant submits that the charge sheet states that the incident occurred on 13th September 2021, yet PW1 testified that it occurred on 14th September 2021. Furthermore, PW1 testified that when the child was brought home at 5:30 p.m, she was sleeping and continued to sleep until 11:30 p.m when PW1 woke her up. This contradicts PW2's testimony, that PW1 told her the child cried the whole night. The appellant submits that it is contradictory and inconsistent for a mother to check on her daughter for one and a half hours until 1 a.m. He argues that it is impossible for a child to bleed to the point of soiling her clothes without any blood being spotted on her bedding. He further submits that a child of two years could not articulate the words "S hapa" and "S hapo," suggesting that these words were concocted by PW1 and PW2. He relies on the case of MTG v Republic Criminal Appeal E067 of 2021 (2022) and Criminal Appeal No. 76 of 2012 Phillip Muiruri v Republic among others.

27. On the second ground, concerning the credibility of witnesses, the appellant reiterates the inconsistencies in PW1's testimony as mentioned above and further questions why PW1 chose to call her relative to examine the child instead of close neighbors. Regarding PW5, the appellant submits that PW5 gave a different account of the facts from other witnesses. PW5 stated that the child slept the whole night and almost half the following day, but this time she was not woken up by her mother. Instead, the mother noticed that she had wet the bed and asked her what was wrong. The mother then called a neighbor, and they checked the child, finding her anus bleeding, and took her to Kiambu Hospital. That upon cross-examination, PW5 stated that blood particles were seen in the complainant's clothes, yet none were presented in court. Additionally, PW6, who reviewed the treatment notes from Kiambu Hospital, could not explain the findings, which the appellant argues is callous and irresponsible. Summarily, the appellant submitted that all the prosecution witnesses were liars and impersonators, and their evidence ought not to be relied upon and should therefore be expunged.On the third ground, concerning the essential elements required to prove the offence of defilement, the appellant submitted that, regarding penetration, the trial court erred in relying on the evidence produced by PW3, namely the medical report. The report stated that "lacerations can also be caused due to constipation, frequent diarrhea, and nerve damage, not just penetration", indicating that other factors could cause lacerations. Furthermore, the doctor mentioned that the mother had reported the child had diarrhea before visiting Kiambu Hospital. Additionally, the appellant submits that PW4's P3 form does not demonstrate any permanent damage the child suffered or any function she cannot perform as a result, thus suggesting that the report is exaggerated. The appellant argues that the medical reports do not specify the causes of the lacerations, making it erroneous for the trial magistrate to assert that the reports connected him to the offence. He relied on the case of Criminal Appeal No. 155 of 2011 and urged the court to find that penetration was not proved. He concluded by submitting that, with penetration not being established, the other elements become peripheral.

28. On the ground of being framed, the appellant submits that, firstly, the child's mother, PW1, had previously requested him to talk to his uncle to allow her to stay in a two-bedroom house for Kshs 5,000, which he did not do, and this did not sit well with PW1. Secondly, PW1 kept asking him about a lady named P, whom she believed was receiving money from the appellant, but the appellant refused to answer, which enraged PW1 and led her to plan her revenge, which is this case. Thirdly, the appellant submits that PW1 selectively informed only her relatives, not neighbors, about her child's predicament, which is a clear indication of a frame-up. Fourthly, the appellant claims that PW1 asked his mother for Kshs 50,000 for the child's treatment in exchange for dropping the case. Finally, the appellant categorically submits that he did not defile the child and that whatever happened to her was done by her own mother to get back at him and to extort money from his family.

29. On the ground that the case was not proved beyond reasonable doubt, the appellant submits that the contradictions and inconsistencies create doubt and that a case in which witnesses are proven to be not credible cannot be said to have been proved beyond reasonable doubt. He further submits that at the time of the incident, he was a minor, and therefore he ought to have been issued a sentence in accordance with Section 8(7) of the *Sexual Offences Act*, which he referred to in this court. Regarding the presentation of medical evidence by officers who are not the makers, the appellant submits that their evidence and the documents they produced offend the *Evidence Act* and should therefore be expunged from the court record, as they do not add value to the prosecution's case but rather contradict it.

30. The Appellant lastly submits that the sentence was harsh, excessive and unconstitutional. In urging the court to set it aside, the appellant relied on the case of Evans Wanjala Siibi v Republic (2019) among others.

Ultimately, the appellant urged the court to allow the appeal and set aside the conviction and sentence.

Respondent's Submissions

31. The respondent opposed the appeal in its entirety on grounds that the prosecution established and proved beyond reasonable doubt the ingredients of defilement namely; age, penetration and identification of accused.

32. On the ingredient of age, the respondent sought to rely upon the case of Mwalango Chichoro Mwanjembe v Republic (2016) eKLR and submitted that documentary evidence was adduced to prove the age of the complainant. The birth notification as Pexh 1 and the birth certificate as Pexh 7. Further that the trial court had the benefit of seeing the victim and was satisfied that the minor was indeed a child. That the Appellant did not bring any new material facts to dispute the age factor.

33. It was the respondent's submissions that on penetration the evidence by PW1 was corroborated by that of PW2. The evidence clearly proved the element of penetration to the required standards. As for the identity of the perpetrator, the Respondent submit that the evidence of the victim was well corroborated by other witnesses and medical evidence which was clear that the Appellant defiled the victim and there was no possibility of mistaken identity as the appellant was well known to the victim having lived in the same plot. The Appellant was placed squarely at the scene of crime hence his alibi cannot stand. The Respondent relied on the case of Michael Saa Wambua & Another v Republic (2017) eKLR .

34. It was the respondent's submission that when an application was made to have the minor testify through an intermediary, the same was allowed with no objection from the Appellant and therefore the ground that it was illegal to convict the appellant in the absence of the minor's testimony is an afterthought and a misuse of the court process. The Respondent relied on the case of M.M v Republic (2014) eKLR.

35. The respondent submits that the evidence of PW1 is admissible evidence and was properly corroborated through the production of the relevant medical records hence the said evidence cannot be said to be hearsay. Further, the Respondent submitted that the trial court considered the sworn defence but determined that the prosecution's evidence was overwhelming and had established its case beyond reasonable doubt.

36. In urging the court to dismiss this appeal, the respondent stated that the sentence handed to the appellant was sufficient and commensurate to the offence as established under Section 8 (2) of the *Sexual Offences Act*. Further the court was urged to find that the prosecution established all the

requisite elements for the offence of defilement which were not discredited by the defence during cross-examination.

F. Analysis and determination

37. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of Pandya v R {1957} EA 336; Ruwalla v R {1957} EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR where the Court of Appeal held that:

> '' the duty of the first appellate court is to analyse and re- evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.''

38. Having considered the record of appeal as well as the submissions by parties, I discern the following as the main issues for determination:

    a. Whether the offence of defilement was proved;

    b. Whether there were contradictions and inconsistencies; and

    c. Whether the sentence was harsh

Whether the offence of defilement was proved

39. Section 8(1) of the *Sexual Offences Act* provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement". While 8(2) states: 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.

40. In the case of George Opondo Olunga v Republic (2016) eKLR the ingredients for the offence of defilement were set out as:

    a. Proof of the age of the victim;

    b. Proof of penetration or indecent act;

    c. Identification of the perpetrator.

41. On the issue of age, the prosecution relied on the evidence of PW1 who informed court that the victim was 3 years 5 months old as at the time of testifying and was 2 years 8 months old at the time the offence occurred. This was collaborated by a copy of the birth notification which was produced in evidence as Prosecution Exhibit 1. I note that the appellant did not contest on the age of the victim, and there was no objection to the production of the Birth Notification. I therefore find and hold that there was sufficient evidence to proof the age of the victim as being 2 years 8 months at the time the offence was committed.

42. In M M v Republic [2018] eKLR the Court demystified the computation of age as follows:

> " [20] It is instructive to remember that the months following the last birthday do not count for purposes of determining the age of a child so long as they are less than one year. This was reiterated by the Court of Appeal in Hadson Ali Mwachongo vs. Republic [2016] eKLR as hereunder:
>
> "Section 2 of the *Interpretation and General Provisions Act* defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus, a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year."

43. Consequently, as the child victim, herein was 2 years, 8 months, the chargesheet correctly stated her age as 2 years.

44. On penetration, PW1 testified that the victim was brought home by the appellant at around 5: 30p.m carrying her while she was asleep. PW1 put the victim to bed until 11:30p.m when she woke her up. That when the victim woke up, she held her back and upon being asked what was wrong, she answered, "S hapo" while holding her buttocks. On checking, she realized that the victim did not have her underpant, her vagina looked normal but upon checking her anus, she noticed that it had expanded and was red.

45. This evidence is collaborated by PW2 who also stated that upon being called by PW1 to check on the victim, saw blood come out of the anus. The foregoing testimony was corroborated by PW3 through the production of the medical certificate produced as Pexh 3 and a Post Rape Care Form produced as Pexh 6. The medical certificate showed that the vagina was pink, no discharge and injuries seen, the hymen was pink with smooth regular margin and was intact. However, the anus had fresh lacerations at 6 and 7 o'clock positions, reddening of anal oriphis which was tender on touch.

46. Further PW4 produced the P3 form as Pexh.5. According to the senior medical officer, there was fresh lacerations at 6 and 7 o'clock and reddening around the anus. PW4 stated that as per the findings, there was evidence of anal penetration and it is possible to have lacerations one week after the incident and based on the findings, something hard went in and came out. PW4 agreed that hard stool could cause lacerations but an anal tear is caused by a foreign object or hard stool while an anal feasure is caused by chronic constipation. That in this case, PW4 confirmed that the anal tear was caused by something bigger however, he could not tell what penetrated.

47. The Appellant in his defence did not testify on the issue of penetration but has however substantively submitted on it by stating that to prove penetration, the victim's testimony is usually corroborated by the medical report presented by the medical officer hence the trial court erred in relying upon hear say.

48. I have avidly looked at the proceedings of the trial court which I drawn inference from since it is the court that had the opportunity to hear and note the demeanor of the witnesses. The record shows that on 6th June, 2022 this matter came up for hearing and the trial court upon examining the victim and noted as follows; "Upon examining the child herein, I find that she is unable to speak properly because her mother is the one that can tell the court what the child answered as per the questions put to her by the court. Her speech has not formed well and therefore, I find that we cannot get any clear evidence from her." I note that the defense did not object to the victim testifying through an intermediary, and therefore the appellant's action of raising this issue at this stage is clearly an afterthought.

49. However, be it as it may be Section 31 of the *Sexual Offences Act* provides for vulnerable witnesses and when an intermediary can testify on behalf of such a witness. In this instance the court found that the victim was a vulnerable witness on account of age given that she could not communicate effectively.

50. The court in the case of *Kennedy Chimwani Mulokoto v Republic Eldoret High Court Criminal Appeal No. 51 of 2011* stated that;

> " When the mother of the little girl gave her evidence, she was deemed to be giving evidence on behalf of that little girl... Therefore, for all intents and purposes, when the mother of the little girl gave evidence, she did so as a legally recognized intermediary, for and on behalf of the little girl. Such evidence was admissible."

51. Also, in the case M.M v Republic [2014] eKLR it was held that:-

> " Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim aged six (6) months, like that in the case of *Robinson Tole Mwakuyanda V. R. H. C. Cr. Appeal No. 227 of 2007*, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak."

52. Drawing from the above authorities I find that the adoption of the evidence of the mother of the child as an intermediary was proper in the circumstances. In holding as such, this court takes full congisance of section 31(10) of the *Sexual Offences Act* which provides that a court shall not convict an accused person solely on the uncorroborated evidence of an intermediary. Hence this court needs to focus on whether the evidence of the mother PW1 was collaborated.

53. In this regard, I find that the evidence of PW1 was collaborated by PW2 who also stated that upon being called by PW1 to check on the victim, she saw blood come out of the anus of the victim and the child told her "S hapa". The foregoing testimony was further corroborated by PW3 through the production of the medical certificate produced as Pexh 3 and a Post Rape Care Form produced as Pexh 6. Further PW4 produced the P3 form as Pexh 5. According to the report, there was fresh lacerations at 6 and 7 o'clock and reddening around the anus, there was evidence of anal penetration. He confirmed that the anal tear was caused by something bigger however, he could not tell what penetrated it.

54. Further, the appellant has claimed that the medical evidence from PW3 indicated that the lacerations could have been caused by diarrhoea, which PW1 stated the victim had. While this was mentioned by PW3, it is important to note that PW3 confirmed, despite reviewing the medical report from Kiambu Hospital, that she conducted her own swab test and found no foreign or fecal matter in the anus. This confirms that, although lacerations can be caused by frequent diarrhoea, PW3's examination did not support that finding. Consequently, it confirms penetration by something bigger.

55. In the case of Bassita Hussein v Uganda, Supreme Court Criminal Appeal No 35 of 1995, the court stated as follows;

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims oral evidence and corroborated by medical evidence or other evidence."

56. Consequently, guided by the above, I find that the evidence of PW1 as well as PW3, PW4 and PW6 (the clinical officer and doctors), was sufficient to proof the ingredient of penetration, and there is no reason to disturb the finding of the trial court.

57. The appellant in his submissions raised issue that the medical officers who came to testify were not the ones recorded as having attended to the victim. That PW4 and PW6 testified on behalf of Dr. Koome and Dr. Dorcas respectively.

58. From the record, it is clear that PW4 testified that his colleague, Dr. Koome was transferred to Lari Level 4 Hospital and he confirmed knowing both his hand writing and signature. PW6 also explained why she testified on behalf of Dr. Dorcas. I therefore find that PW4 and PW6 correctly testified and produced the medical evidence in accordance with sections 33 and 77 of the *Evidence Act*.

59. Based on the above finding I find that there was no miscarriage of justice or an error in Dr. Dennis Omondi Odhiambo and Dr. Wangechi Irungu testifying and producing medical reports on behalf of their colleagues. The appellant's contention before this Court is thus without merit.

60. Turning to identification of the perpetrator, PW1 testified that the Appellant is one known to him and the victim as she had moved to the plot and stayed there for a month. This was further supported by PW2 who confirmed that he knows S and that they lived in the same plot but she moved out. DW1 further confirmed that he is well known to the victim and PW1 when he stated that, "...I used to go to the shop with P. It was not the first time I was carrying her. My Uncle used to send me with her to Githurai to buy items....."

61. All the above goes to address the issue of identification. The confirmation by DW1 to be well known to PW1 and the victim goes to address the issue of identification. As to whether it is the Appellant that was the perpetrator of the offence, DW1 did not oppose the fact that he was with the victim on 13th September 2021. In fact, he confirmed that he took the child to the mother, PW1 at 11.20am.

62. I have taken into account the fact that the offence was stated to have happened during the day. PW1 states that the victim got lost at 3p.m and at around 5.30pm the Appellant brought back the child carrying her as she was sleeping. On the other hand, DW1 states that he got to the plot at around 11.20am, he found the complainant, her mother and her mother's friend. He opened the taps and went upstairs. On coming back, he found the victim alone and asked a tenant who was washing utensils where the complainant's mother was. She said she had left P and the containers there. That since he knew the victim, he could not leave her there and took her to the mother.

63. Notably the appellant does not give a proper account of his time. It is also not in dispute that it is the appellant that took the victim to her mother while she was sleeping. It is also note in dispute that there was a tenant who saw the Appellant together with the victim. This is confirmed by the Appellant statement that she asked a tenant who was washing utensils where the victim's mother was and again by the PW1 who stated that she asked P who told her that S is the one who had taken the child. I find that this version of evidence confirms the facts as stated by PW1 that the Appellant delivered the victim to her while the victim was asleep, and this incident was witnessed by a third party.

64. The trial court weighed the evidence of DW1 and that of the prosecution and found that the prosecution's evidence was overwhelming because there was no doubt in the identification of the subject since, he used to go to PW1's plot and was last seen with the victim.

65. In arriving at its decision, the trial court appreciated the fact that the prosecution's evidence was all circumstantial. The court based its determination on circumstantial evidence having compared evidence of the prosecution and the defence. I have also re-looked at the evidence before court and the one thing that comes out clearly is that the victim was indeed defiled on 13th September 2021. That is the same day that the appellant was seen with the victim and he carried the victim back to the mother when the victim was sleeping. The appellant's defence does not give an account of his whereabouts at

the time of the alleged incidence when the child went missing, between 3pm and 5pm. It thus does not exonerate him from the alleged offence at the alleged time of the offence.

66. When dealing with circumstantial evidence the court of Appeal in the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, had this to say:

> " Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence."

67. I therefore agree with the trial court's findings that the prosecution's evidence despite being all circumstantial, met the requirements established standards.

68. From all the foregoing, I find that the prosecution proved all the ingredients of defilement. I find no reason to disturb the finding of the trial court. This ground must fail as it surely does.

Whether there were contradictions and inconsistencies in the prosecution case

69. It is trite law that not all discrepancies and inconsistencies are fatal to the prosecution case. The discrepancies must be of such gravity that they prejudice the accused. In Mwangi v Republic [2021] KECA 345 (KLR) it was held:

> "
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> " 34. On the alleged failure of the first appellate court to address inconsistencies, glaring gaps and extenuating gaps, the position in law and which we fully adopt is as was stated, inter alia by the court in Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993,that:
> "In any trial, there are bound to be discrepancies and any appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences..."

70. Consequently, the issue is whether in this matter, there were indeed contradictions and inconsistencies and whether the said inconsistencies and contradictions were of such a degree that they prejudiced the appellant.

71. The appellant alleges that the contradictions arise in that PW1 stated that the incident occurred on 14th September 2021 yet the charge sheet states 13th September 2021. Further, that PW1 testified that she woke the victim up at 11:30 p.m after she has been sleeping from 5:30 p.m yet PW2 testified that PW1 informed her that the child did not sleep the whole night. The appellant also alleges that it is contradictory and inconsistent for a mother to check the victim's vagina and anus for one and half hours. Lastly, the appellant states that it is impossible for the victim to have known the Appellant as she had hardly formed her speech.

72. In a decision of the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR where the appellate court cited with approval the Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6, it was held that:

> " With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor

contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

73. Guided by the above, this court has noted the above allegations of inconsistencies and contradictions are minor. On the issue of conflicting dates, from the record, I have observed that at the start of her testimony, PW1 indicated that the incident occurred on 14/9/21, however at page 14 of the Record of Appeal she went further to state that the incident occurred on 13/9/21 because they went to hospital on 14/9/21.

74. I have also observed that the Appellant in his defence stated how he came to be in contact with the victim on the 13/9/21 and so outrightly he knew he was being accused of an offence that occurred on the 13/9/21 and not on the 14/9/21. I therefore find that this contradiction did not affect the substance of the prosecution case. It is imperative that in scrutinizing a witness's testimony for alleged contradictions and inconsistencies, the evidence should be evaluated holistically and not cherry-pick specific portions. In this case, PW1's testimony ought to be evaluated in its entirety including the cross-examination and re-examination. If this is done, one will not harbor any allegation of contradictions.

75. Similarly, as regards allegations as to the timings on the fact that the victim did not sleep after being woken up at 11:30p.m till morning amounts to a better part of the night which the victim did not sleep anyway. I also note that it is the Appellant who is contradicting himself on the issue that the victim would have hardly known his name yet he testified and stated that he was well known to the victim and even used to go to the market with her and would take sweets to her.

76. It is my finding therefore that the said inconsistencies and contradictions submitted by the Appellant were very remote and in any event, occassioned no prejudicial in any way. Consequently, this ground also fails.

Whether the sentence was harsh and excessive

77. The appellant was sentenced to life imprisonment on 6th October 2023. In passing the sentence, the trial court considered the accused mitigation and noted that the offences under *Sexual Offences Act* are mandatory.

78. The appellant's submission is two-fold: first, that the trial court sentenced him to life imprisonment without considering the fact that he was a minor at the time of the offence and that the best interest of the child was not considered, which ought to have been the case. Therefore, he submits that the sentence was in breach of Section 8(7), of the *Sexual Offences Act* given that the court recognized in the judgment that "Accordingly, I hereby make a finding of guilt against the subject in the main count and I hereby find him in conflict with the law for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 in accordance with Section 215 of the CPC."

79. Secondly, that the sentence is harsh, excessive, and unconstitutional. The trial court was wrong in concluding that the offence had a mandatory sentence since jurisprudence gives the courts discretion.

80. On the first fold, the appellant requests that this court consider he was a minor at the time of the offence and therefore any sentence should take that into account. I have reviewed the court record and note that on 16/09/2021, the appellant informed the trial court that he was 17 years old. However, on 23/09/2021, the court confirmed that he was actually 18 years old, as the Birth Certificate indicated he was born on 04/05/2003. The Birth Certificate, marked as "MFI7," also confirms the aforementioned birth date. Therefore, the appellant's submission on this issue fails.

81. On the second fold, the Appellant submits that the sentence is harsh, excessive and unconstitutional. This sentence was made by the trial court on 6/10/2023 where the court stated, "Having considered

accused's mitigation. I note that the offences under *Sexual Offences Act* are mandatory. I proceed to sentence accused to life imprisonment."

82. Section 8(2) of the SOA. Provides that:

> " 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"

83. In a 3-judge bench of the Court of Appeal in the case of *Akhonya v Republic (Criminal Appeal 269 of 2019*) (2024) KECA 327 (KLR) (15 March 2024) at Kisumu (Unreported) allowed the appellant's appeal by reducing the sentence of life imprisonment to a term of 30 years imprisonment for an offence of defilement. The court had this to say: -

> " 8. Our most recent jurisprudence has similarly declared life imprisonment as unconstitutional due to the indeterminate nature of the sentence. See Frank *Turo v Republic- Kisumu Criminal Appeal No. 157 of 2017* and Evans Nyamari *Ayako v Republic- Kisumu Criminal Appeal No. 22 of 2018*.
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> 9. In the Evan Nyamari Ayako case, this court in applying Articles 27 and 28 of *the Constitution* to sentencing, declared that life imprisonment means a determinate sentence of thirty (30) years imprisonment.
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> 10. Consequently, we must allow the Appellant's appeal herein to the extent that we declare that the mandatory nature of the sentence of life imprisonment which was imposed on him by dint of Section 8 (2) of the *Sexual Offences Act*, is unconstitutional. So is the indeterminate term of the life imprisonment actually imposed on him.
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> 11. In the specific circumstances of this case, however, we would agree with the Respondent that the objective seriousness of the case and the aggravating circumstances make the life sentence a commensurate sentence: the survivor of the ordeal was a girl of extreme tender years at 8 years old; and the atrocity committed on her resulted in extensive damage and impact to her. The offence called for a stiffly deterrent sentence; one that signals the society's opprobrium to the conduct of the appellant as it reflects the inherent seriousness of the offence."

84. I have considered the above superior court decisions, which I am duly bound by. I do set aside the indeterminate life imprisonment sentence herein and replace it with a life sentence of 30 years in prison.

85. Consequently, this court makes the following orders;

i. The Appeal on conviction is dismissed and the trial court decision on the same upheld.

ii. The Appeal on sentence partly succeeds to the extent that the indeterminate life imprisonment sentence is set aside and substituted with a sentence of thirty years.

86. Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 13TH DAY OF SEPTEMBER 2024.

For Appellants:

For Respondent:

Court Assistant: