Kibocha v Republic (Criminal Appeal 22 of 2024)
[2024] KEHC 10733 (KLR) (13 September 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 22 OF 2024

RC RUTTO, J

SEPTEMBER 13, 2024

BETWEEN

ROBERT MURIUKI KIBOCHA .... 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. E051 of 2021 delivered on 6th June, 2023)

JUDGMENT

A. Introduction

1. The appellant being aggrieved by the decision of the trial court 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 sentence set aside.

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

    a. The judgment of the trial court is against the weight of evidence.

    b. The trial court failed to consider the Appellant's defence.

    c. The trial court ignored facts that cast a doubtful light on the prosecution's case.

    d. The trial court ignored material discrepancy between the description of the accused given to the police by the complainant when first seen by her and the accused's actual appearance.

    e. The trial court ignored material discrepancies in the medical evidence adduced by the prosecution in court.

f. The prosecution evidence has fundamental variations and inconsistencies regarding the alleged defilement.

g. The trial court erred by relying on prosecution's evidence that was riddled with contradictions and discrepancies leading to selective judgment.

h. The charges against the Appellant were not proved beyond reasonable doubt.

i. The sentence of the trial court was harsh, oppressive and manifestly 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* Cap 63A laws of Kenya. The particulars of the offence were that on 8th September, 2021 in Ruiru Sub-county within Kiambu County intentionally and unlawfully caused his penis to penetrate the vagina of HNG, a child aged 8 years. 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 on the 8th day of September 2021 in Ruiru Sub- County, within Kiambu county intentionally and unlawfully touched the vagina of HNG, a child aged 8 years with his penis.

4. The appellant pleaded not guilty to all the charges and to prove its case, the prosecution called 6 witnesses while the defence gave sworn evidence and called five witnesses.

C. Prosecution case

5. The victim, PW1 gave unsworn evidence. She testified that while going to her school one day, a man that he had passed while walking took her to the grass and removed her uniform, a dress, stocking and panty and did "tabia mbaya" to her. While testifying, she pointed her genital area and told the trial court that it was the place she urinates from and immediately began crying. She further testified that the man made her lie down while facing upwards and that the man who was wearing a trouser and sweater removed them while standing up and covered her mouth so that she could not scream. She stated that she felt pain and that the man did not talk to her. She described the man having a dent on the forehead, beards and that he was not wearing a face mask. She stated that at the time, people were required to wear masks but the man was not wearing his and that after the incident, she went to school.

6. PW1 informed the trial court that she is used to going to school alone but at times she would meet her friends along the way and they would walk together to school. She further told the court that when she went to school, she did not inform her teacher what had happened to her because the man told her that if she tells anyone, he will kill her. She further testified that after school, she walked home with her friends whom she didn't tell anything and when she got home also, she did not tell her mother because the man had threatened to kill her if she did. She told the court that the next morning when she woke up to go to the toilet, the mother noticed her different walking style and asked her about what had happened. That her father was at work and so her mother took her to the police station then to the hospital. She further told the court that the man who did this to her was found when her dad took her on a motor cycle and told her that when they reach the car wash, she should check whether the man was there. She stated that when she reached the car wash, she saw the man and showed her dad and he was then arrested. She identified the accused as the person who did tabia mbaya to her.

7. During cross-examination, she stated that she attended [Particulars Withheld] Primary School before they moved to Eldoret, which was far from home, and she used to walk to school but would get very tired. She stated that she used to see the accused at a car wash while walking to school and that he

attacked her near the car wash. She stated that she did not tell her teacher about the incident because the accused had told her that if she did, he would do it to her again and kill her.

8. The child's mother, PW2, MWW testified that the complainant was born on 16/6/2013 as shown in her birth certificate which was produced as PExh 1. She further testified that the victim was 9 years old. She testified that on 9/09/2021 at 3a.m while in the house, she woke the victim up as she usually does to take a short call. That when she woke her up, she noticed that she was in pain and that when she was urinating, she stopped suddenly and on asking the victim, she indicated to her that she was feeling pain. She testified that the victim then told her that as she was going to school on 8/09/2021, she met a man she sees at the car wash who did tabia mbaya to her. She added that the victim told her that the man was seated at a bench on the car wash and after she passed him, he held her from behind and took her to the grass and removed her clothes and defiled her. That the victim told her that she did not scream because the person covered her mouth with a piece of cloth and no other person passed by as it was raining. She further testified that in the morning, she called the victim's father and he told her to report to the police station. That she checked the victim's genitalia which smelled badly and her panty had a foul smell. She stated that the victim told her that she sees the man around the car wash but does not know his name but he has a dent on the forehead and did not have a mask. PW2 stated that the car wash was about 1km from home. She further testified that she reported the matter at Ruiru Police Station together with the victim. Thereafter, that they went to Ruiru Sub-county Hospital with 2 police officers and the victim was examined at her genital area then given drugs. She identified the treatment card in yellow, lab request form and report, post rape care form and P3 form which were marked as PMF1 2, 3, 4 and 5.

9. Upon cross-examination, PW2 testified that there are many businesses along the road where their house is located, and there are street lights, but they do not work. She further stated that she does not know the accused and does not know whether her husband does, but the victim used to see him at the car wash. She testified that the victim used to leave home at 6:30 a.m., and on the day of the incident, she did not take her to school because she had been called to wash clothes for a lady who said she was leaving early. She left the house with the victim and went in the opposite direction of the car wash. She further stated that when the victim came back home at 4 p.m., she did not find her but went to a neighbor's house with whom she had agreed that if the victim did not find her at home, she would stay there until she returned. She also testified that while they were at the police station, the victim saw the accused and hid behind her. They went to the hospital with the accused on the second day.

10. The victim's father, PW3, A.G.M. told the court that while returning from Mombasa for work, he saw that his wife had called him several times on the night of 10/9/21. When he called her back, she told him that the victim had an issue as she had noticed she was in pain and that the victim had told her that a man she normally sees at the car wash defiled her and threatened to kill her. His wife stated that the victim could identify the man. He testified that he immediately told his wife to take the victim to the police station and hospital. When he arrived home, he went with the victim to the shop to buy a soda and told her that when she sees the man, she should inform him. The victim identified the accused, who was sitting on a bench near Bernard Apartments. He testified that with the help of other motorcycle riders, they arrested the accused.

11. The police officer, PW4, Emmy Omoke from Ruiru Police Station received the victim's case on 10/09/2021. She reiterated what PW1 and PW2 testified. She then testified that she escorted the girl to Ruiru Sub County Hospital, where she was treated and given medication. She stated that on the evening of 12/09/2021, the victim, while accompanied by her father on his motorcycle, spotted the accused and informed her father, who stopped and sought assistance from bystanders to arrest the accused. They then escorted him to Ruiru Police Station, where he was booked in the cells. On

13/09/21, she escorted the accused to the hospital, where he was examined for the alleged offence. She testified that samples from the complainant and the accused were forwarded to the Government Chemist by another corporal for analysis after she prepared an exhibit memo (MFI18). The results from the government chemist were not yet ready as at the time of her testimony. She produced the victim's birth certificate.

12. PW4 stated that she visited the scene where the incident occurred, noting that the distance from where the accused was seated to the scene was about 50-100 meters, and confirmed that the victim frequently used that road to school. From the victim's home to the scene was approximately 800 meters to 1 kilometer. She described the scene of the crime as being next to a dam with long grass, where the accused took the victim. She further testified that since the victim did not tell anyone at school, she did not visit the school. PW4 also testified that upon taking the victim to the hospital, the victim was issued a treatment card (MFI1), a lab request form (MFI3), and a PRC form (MFI4), which was filled out on 10/09/2021 but stamped on 14/09/21 when the P3 form (MFI5) was completed. When she took the accused to the hospital on 13/09/21, he was issued a treatment card (MFI6) and a lab request form (MFI7).

13. Upon cross-examination, PW4 testified that the report was completed on 10/09/21 by the victim, who was escorted by her mother. She stated that she visited the scene but did not take pictures or inquire about potential witnesses. She further mentioned that the victim's panty, which could have been used as evidence, was washed. She noted that the laboratory analysis results were not yet ready when she inquired on 2/08/22. Additionally, she stated that she did not conduct an identification parade because the victim had already positively identified the accused.

14. The medical officer, PW5, Dr. Dennis Odhiambo Omondi testified that he examined PW1 and completed the P3 form on 15/09/21, following her treatment on 10/09/21. He noted that her labia was swollen, indicating an injury to the vaginal wall, and that there was a missing hymen, bleeding, and discharge from her vagina. He explained that the lab results revealed high vaginal swabs with pus cells and epithelial cells, suggesting friction on the vaginal wall. The PRC Form, filled on 10/09/21, also indicated swelling of the labia, a tear in the vagina, and bleeding. Dr. Omondi confirmed the tear and discharge during his examination and stated that for a girl of 8 years, it would be impossible to have menstrual periods, thereby ruling out menstrual flow as the source of the blood. He produced the P3 form (PExh 5), treatment card (PExh 2), PRC Form (PExh 4), and lab request form (PExh 3). Additionally, PW5 produced the treatment notes for Robert Muriuki (PExh 6) and the lab request form (PExh 7).

15. The government analyst, PW6, confirmed that she prepared the analysis report on 12/09/22. She testified that on 13/09/21, at the laboratory in Nairobi, they received items under reference V233/21 at the request of Corporal Ruth Mutua of Ruiru Police Station. The examination was intended to determine the origin of evidentiary material from the vaginal swab of the victim, an 8-year-old, and the blood sample of Robert Muriuki. She stated that no spermatozoa, semen, or pubic hair were found in the vaginal swab sample. She produced the report as PExh 9. PW6 further testified that the offence occurred on 08/09/21, and the samples were collected on 10/09/21, which is three days after the alleged incident. She explained that if samples are not collected immediately or if the victim bathes and changes clothes, it is possible that evidence may be washed away. She noted that within 48 hours, there could be degradation of the evidentiary material.

16. With these six witnesses, the prosecution rested its case. Upon the closure of the prosecution case, the court found that the prosecution had established a prima facie case, and the appellant was placed on his defense. He chose to give a sworn statement and called five witnesses.

D. Defence case

17. DW1, the appellant stated that he is a boda boda rider and has a daughter aged 18 years. On 8/09/21, he was at home because his motorcycle had a problem and did not go to work. He left his compound around 9:15 a.m. to look for a mechanic. On 12/09/21, he did not go to work and stayed indoors until 3 p.m., when he went to sit outside the gate at a bench next to a car wash. He saw two men approaching him with a girl child. He testified that he knew one of them, Nganga, an official of the bodaboda sacco, who called him over and informed him that the other man wanted him to go to Ruiru Police Station, which they did using Nganga's motorcycle. He testified that the other man told him that if he did not want to be taken to the police station, he should give him Kshs 50,000/=.

18. DW1 testified that when he arrived at the police station, he was not told why he was there but was only instructed to remove his shoes and enter the cell. After two days, around 3 p.m., he was taken to Ruiru Sub-County Hospital for a DNA test and then returned to the police station. He testified that the caretaker of the plot where he was staying came and informed him that a report had been made that he had defiled a child. DW1 stated that he was arraigned in court on 14/9/21. He admitted that he has a dent in his face, which he sustained in a road traffic accident in 2017. He testified that the dent makes him easily identifiable even in his home area. He stated that he sits at the car wash when he does not go to work and further denied committing the offense.

19. On cross examination, he reiterated that he was arrested on 12/09/21 in the presence of Ng'ang'a. That the victim's father asked him for money as he was seated behind him on the motor cycle which he refused to give. He stated that he did not ask the victim's father about the Kshs 50, 000/= when he was giving his testimony.

20. DW2, Kelvin Mungura Kibocha, testified that he is the brother to Robert Muriuki and caretaker of his late mother's plot. He stated that he works for Brookside as a packer, and on 7/9/21, he worked the night shift until 8/09/21 at 5 a.m. when he arrived home. Around 5:20 a.m., he started cleaning and finished around 8 a.m., and by that time, the accused had not yet left and his motorcycle was still there. He stated that the accused's door had been locked from the inside. At 8 a.m., the accused told him that he wanted to leave the house and take the motorcycle to the garage. On cross-examination, he testified that the appellant is his older brother, he loves him and can do anything for him and if he commits a crime, he will let him go to jail. He also stated that the plot is L-shaped and cannot see the appellant when he is at his house. Also, that there were three tenants on the plot and therefore he does not know whether the accused could have borrowed a key from a tenant in the compound. He stated that there is indeed a car wash near their house but no dam; however, there is a place with tall grass.

21. DW3, Anselian Nganga Waruru, a boda boda rider in Gatongora, testified that on 12/09/21, he met PW3, who told him that he was looking for a man who had raped someone. Upon meeting the accused, he stated that he advised DW1 to comply and go to the police station. Along the way, PW3 repeatedly asked for money from the accused, specifically Kshs 50,000, if he wanted the case to end. At the police station, PW3 asked him if the plot was owned by the accused person's family and if they had money. He also told him to tell the accused to give him money for the case to be terminated. He testified that he had never seen PW3 until that day when he stopped him. He stated that, apart from the appellant's drunkenness, which he had stopped, he believed the appellant could not commit such a crime.

22. DW4, Elizabeth Wambui, the sister of the accused person, testified that this is the first time the accused has been arrested and that he has been living with his daughter ever since he separated from his wife.

23. From the record CKK has been referred to as DW4 but he is indeed DW5 and this court proceeds to correct the error by referring to him as DW5. He stated that he was a neighbor of the victim and her

family and that he used to see the complainant going to school. He stated that he heard from other neighbors that the victim had been defiled, yet he used to talk to the victim's father regularly, but the father never told him about the incident.

24. DW6, Emily Adhiambo Odinga, stated that she had no relationship with the victim's mother apart from the fact that she used to buy from her hotel. She produced her identity card and birth certificate as DExh 1 and DExh 2, respectively, and stated that when she asked why the victim and her family were moving away from the plot, she was told by another neighbor that they were moving out because they had lied against a man that their child had been defiled. She told the court that the victim never came to their house and that her mother was always in her house since she was a housewife.

25. After hearing of the parties, trial court considered all evidence on record to determine if prosecution evidence proved all the ingredients of the charge. The trial court delineated the following issues for determination: was the victim a child, was there penetration, was the penetration by the accused?

26. On the issue of age the trial court held that the certificate of birth produced as PExhibit No. 1 indicated that the victim was born on 16/6/2013 and was therefore 8 years at the time of the alleged offence. On penetration, the court stated that it was satisfied that the victim was telling the truth and her evidence was corroborated by the medical evidence and therefore, this test passed. On the third ingredient of identity of the perpetrator, the trial court found the prosecution's evidence watertight and dismissed the defence case.

27. Ultimately, the appellant was convicted under section 215 of the Criminal Procedure Code of defilement. On sentencing the trial court noted the mandatory nature of sentencing under the *Sexual Offences Act* and proceeded to sentence the appellant to life imprisonment.

E. The Appeal

28. 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 April 2024, while the respondent sought to rely on its submissions dated 18th April 2024. The parties' submissions are as follows:

a. Appellant's Submissions

29. The Appellant submits that the impugned judgment was not founded on proper legal principles and that the trial court failed to accord the Appellant a fair trial and erred by shifting the burden of proof.

30. Firstly, as to whether he was accorded a fair trial, the Appellant submitted that the trial court failed to analyse and consider his defence which occasioned him a miscarriage of justice. Secondly, the Appellant submitted that the trial court erred in stating that, "… I find that the defence by the accused to be mere denial and an afterthought and has not created doubt in the prosecution's case." According to the Appellant, the court unjustifiably shifted the burden of proof hence violating his constitutional right under Article 50 (2) as read with Article 50 (2) (a) on presumption of innocence. Thirdly, that the trial court failed to consider the defence case by failing to analyse the same. The Appellant submits that the defence evidence was lumped up and the court found the same as untenable which to the Appellant is casual as the court failed to give it the import that it deserved to his prejudice and detriment. On this, he relied on the case of *Thuranira v Republic CR Appeal 127 of 2009*.

31. Fourth, the Appellant submits that the court failed to properly consider the alibi defence despite the Appellant giving a sworn statement and calling five witnesses. The Appellant relies on *Mwita v*

Republic (Criminal Case 10 of 2020) [2022] KEHC 3265 (KLR) and *Joseph Ngugi v Republic, Cr. Appeal No. 76 of 2002*.

32. Fifth, the Appellant submits that the evidence relied upon by the court to support the decision fell far too short of proving the case beyond a reasonable doubt. The main evidence of PW1 lacked credibility and was not of a truthful witness. She was a single witness to the allegations, and the court failed to consider the evidence with caution. The Appellant submits that PW1 changed her testimony, which the court ought to have been wary of. He relies on the case of Chila v Republic [1967] EA 722 and Nairobi CA CRA No. 11 of 2016, John Mutua Munyoki v Republic, among others.

33. He further submits that the court failed to record the proceedings accurately, as there were some omissions that were crucial in identification, and the fact that the court left them out amounted to gross violations of the Appellant's constitutional rights under Article 50 (5). Additionally, the Appellant submits that the inconsistencies in the prosecution's case created reasonable doubt, indicating that the evidence was not true, and therefore, the court erred in its holding.

34. The Appellant lastly submits that the sentence imposed by the trial court was manifestly excessive and repugnant to human decency and human rights. He relies on the cases of Criminal Appeal No. 22 of 2018, Evans Nyamari Ayako v Republic, and Justus Ndung'u Ndung'u v Republic, Murang'a High Court Criminal Appeal E052 of 2022. He concludes by submitting that the conviction was wrongful for the many reasons mentioned and urges this court to correct the injustice suffered by quashing the conviction and allowing the appeal.

b) Respondent's Submissions

35. The respondent opposed the appeal in its entirety and proceeded to submit on the ingredients of defilement namely; age, penetration and identification of the appellant. Further, they submitted on whether the accused defence was considered by the trial court, whether prosecution case was marred with contradictions, inconsistencies and fabricated evidence that resulted to selective justice and whether the sentence was harsh and excessive.

36. On 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 certificate was produced as PExh1 which confirmed the complainant's age and what had been stated by PW1 and PW2.

37. It was the respondent's submissions that PW1 testified that the Appellant did tabia mbaya to her. PW5 produced P3 form that indicated that the complainant was defiled. That the trial court in analyzing the evidence concluded that the evidence on record evidently proves an act of penetration. Reliance was placed on the case of Mark Oiruri Mose v Republic [2013] eKLR.

38. On the identity of the perpetrator, the respondent submits that DW1 was known to the Appellant and that there was no possibility of mistaken identity. The respondent submits that the trial court came to the correct conclusion that it was the Appellant who defiled PW1.

39. The Respondent submits that the appellant's defence was analysed and considered by the trial court but prosecution case was overwhelming against him. That the trial court held, "that the defence is a mere denial and an afterthought and has not created doubt in the prosecution's case. I have also considered the defence and it is also my considered view that the defence of the appellant did not absolve him from the offence for which he was charged. I find his defence to comprise mere and general denials which did not dislodge the prosecution evidence against him." The Respondent further submits that all prosecution witnesses were consistent and corroborated each other.

40. 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, that the aggravating circumstances outweighed the mitigating circumstances hence the sentence of life imprisonment was legal and proper to act as a deterrent. The Respondent relied on the case of Abdalla v Republic KECA 1054 (KLR).

41. The Respondent urged this court to disregard the ground raised by the Appellant that the defence of alibi was not considered because the said ground was not raised in the petition of appeal dated 13th June, 2023 and a supplementary record was not served upon it (if any).

F. Analysis and determination

42. 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."

43. Having considered the petition of appeal as well as the submissions by parties, I discern the following issues for determination:

    a. Whether the prosecution proved its case beyond reasonable doubt;

    b. Whether the court considered the Appellants Defence;

    c. Whether there were contradictions and inconsistencies; and

    d. Whether the sentence was manifestly excessive and repugnant to human decency and human rights

a. Whether the prosecution proved its case beyond reasonable doubt.

44. 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 Section 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.

45. 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.

46. Turning onto the complaints' age, the complainant testified that she was 8 years old. Her mother also confirmed and produced a birth Certificate as Pexh 1 indicating that the victim was born on 16th June, 2013, which confirmed that she was 8 years of age when the offence was committed. To support this finding this court relies on the case of Francis Omuromi v Uganda, Court of Appeal criminal Appeal No. 2 of 2000 in which it was held that "… age may also be proved by birth certificate, the victims parents or guardian and by observation and common sense…."

47. Accordingly, I agree with the trial court's finding that the victim's age was properly established.

48. On penetration, PW1 testified that as she was going to school, a man whom she had passed took her to the grass, removed her uniform, a dress, stocking and panty and did tabia mbaya to her at the place that she uses to urinate. According to the trial court records, when PW1 was testifying, she pointed the said area and started crying. PW2 stated that she realized that PW1 was not walking well and upon asking her, she stated what happened and that she felt pain when urinating.

49. PW5, the senior medical doctor stated that the victim had a torn vagina when she examined her and that further, high vaginal swabs showed pus cells and epithelial cells which means that there had been friction on vaginal walls. He further confirmed that the victim's genitalia was interfered with by blunt trauma into the vagina which was evidence of penetration. PW5 produced the P3 form, treatment card, PRC form and lab request form. This evidence confirmed that the victim was penetrated which corroborated the evidence of PW1.

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

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

51. I have looked at the record of the proceedings in the trial court , I find that the totality of the evidence proved beyond doubt that there was penetration.

52. I also note that the Appellant did not submit or object to this element of penetration as the victim's testimony is corroborated by the medical report presented by the medical evidence.

53. Turning to identification of the perpetrator, the Appellant's submit that PW1's testimony was not truthful given that she gave unsworn evidence and that it was not corroborated by material evidence. Further, besides it being untruthful, the court plainly recorded the victim's description of the perpetrator as having a plain beard. The Appellant further testified that this crucial characterization of his beard was not recorded by the court, yet it is a crucial aspect of the description. Notably, the Respondent did not submit on this.

54. In determining this ground, the trial court stated that, "I have analysed the evidence and looking at the case in totality, I am persuaded that the complainant had sufficient opportunity to clearly see and identify the perpetrator. This offence occurred in the morning and therefore there was enough light for her to see him. It is my finding that the accused in the instant case was properly and positively identified by recognition based on the testimony of PW1. There was also sufficient lighting for SIM to be able to identify and recognize the appellant…The accused through his counsel extensively cross-examined the minor complainant in court. She did not falter and was clear that it was the accused who defiled her. She stated how she used to see the accused at the car wash when she was going to school. She was a persuasive witness. I am satisfied that she was telling the truth. ……..I find no reasons why she would

lie against the accused person yet before this incident her family and herself had never had encounters with the accused person and his family…

> From the record also, it is him who sexually assaulted the complainant. Even though the evidence of the complainant has not been corroborated in regards to the identity of the perpetrator herein, I find that she gave a clear account as she was positive the person who penetrated her genitalia was the accused …"

55. The appellant assertions call for the perusal of the record of appeal. This being the first appellate court as guided by the case of Okeno v Republic [1972] E.A. 32) I have reviewed the record of appeal, specifically, the evidence of the victim with regard to identification of the appellant. This is what PW1 stated: "I saw his face. He had a dent on the forehead, had beards and did not have a mask". This court finds that the evidence PW1 is further corroborated by the appellant evidence to the effect that he had a dent on his head which made him easily identifiable in his home area.

56. Further, PW1 stated that she had seen the appellant near the car wash, which has no name but is near her home. She also mentioned that she used to see him sitting there in the morning. She was the one who identified the appellant when she saw him at the car wash on the day of his arrest. It is therefore my considered view that, having analyzed the prosecution's evidence, as against that of the appellant PW1 positively identify the perpetrator by way of recognition.

57. DW1 on the other hand stated that at the estimated time that PW1 goes to school and particularly on the day of the incident, he was still at home and had not left for his boda boda work as his Motor cycle had a problem. DW1's testimony was supported by DW2's testimony that he was still sleeping at the alleged time of the incident. Moreover, DW2 stated that the plot was L-shaped and he could not see the appellant when he is at his house, he could also not confirm whether DW1 was in the house or not or whether he requested for a key from another tenant and opened the gate and left without DW2's knowledge. I find DW2's evidence not convincing in the circumstance.

58. As for DW3, Mr. Ng'ang'a, he testified that he was the one who accompanied the victim's father, along with DW1 and the victim, to the police station. There was nothing substantial from him in terms of the positive identification of the perpetrator, but he testified that as they were headed to the police station, the victim's father kept asking DW1 to give him money. I note that the issue of money was never raised by the appellant when PW3 was testifying.

59. DW4's, DW5's and DW6's testimony confirms that they all know the appellant. However, their evidence does not confirm or corroborate his whereabouts on the day of the incident. From the analysis of the Defence witnesses, I confirm that none of them confirms seeing or even knowing the whereabouts of the appellant on the morning of the incident.

60. This then leaves this court with the testimony of the appellant and that of PW1 only. It is important to also consider the evidence of the investigating officer (PW4). He testified that the victim informed her that the perpetrator had a dent on the forehead and a thick beard. That the child termed it as "ndevu mingi". PW4 further testified and stated that, "I did not do an identification parade because the child identified the perpetrator and told his father so there was no need for an ID parade."

61. I note that from the day of the incident when the victim identified the appellant as the perpetrator, she never changed her mind about the person who committed the offence against her. The P3 form filled out even confirms that the victim stated she was defiled by someone known to her. I have carefully re-evaluated the time when the alleged offence occurred, that is, around 6:30 a.m. At this time, there was broad daylight, and an 8-year-old child could identify someone, especially someone known to her. Recognition is more reliable than identification, as was held in the case of George Kamau Muhia v

Republic [2014] eKLR. In the instant case, the victim was clear about the person who did tabia mbaya to her and was telling the truth, as found by the trial court which was satisfied as to her intelligence, credibility and truthfulness. I therefore do not agree with the submission by the Appellant's counsel that unsworn testimony of minors which in the instant case was subjected to serious cross examination was of no evidential value simply because the witness was a minor.

62. In the case of Peterson Kinyua Muriuki v Republic [2017] eKLR, the court stated:

> "From the evidence of the complainant she met the appellant in broad daylight. Circumstances favoured a positive recognition of a person she knew by name and had seen him before. The trial court could only caution herself on relying on the evidence of the complainant if the circumstances did not favour a positive identification on recognition. The circumstances of this case favoured a positive identification on recognition.

63. Guided by the above authority, I am persuaded particularly on the clear identification of the appellant through recognition. I find that there was no need for an identification parade. PW1 first informed the mother that she was defiled by a known person, that is what she repeated to the father, medical officers and police officer without contradicting herself at any point. Being that the trial court also took the precautionary measure when solely relying on the victim's testimony, this court finds no reason to interfere with the trial court's finding that the appellant engaged in an act that caused penetration; and is satisfied that the prosecution proved this key ingredient to the required threshold.

64. Flowing from 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.

b. Whether the court considered the Appellants defence.

65. The appellant stated on appeal that his defence of alibi was not considered by the trial court. I have perused the judgment and, in my view, the learned magistrate considered both the prosecution and the defence case and came to the conclusion that the version of the defence was not believable. The trial court stated as follows: -

> "I find that the defence is a mere denial and an afterthought and has not created doubt in the prosecution's case. I have also considered the defence and it is also my considered view that the defence of the Appellant did not absolve him from the offence for which he was charged. I find his defence to comprise mere and general denials which did not dislodge the prosecution evidence against him."

66. I have already evaluated the appellant's defence above as adduced by himself and his witnesses. I have found that while the appellant alleged that he never left his house, the witnesses he called could not support his allegations. I find that his alleged defence of alibi could not dislodged the strong prosecution evidence of identification by recognition that placed him at the scene of crime. From the foregoing, I find that the Appellant's defence was considered by the trial court and therefore, this ground of appeal fails.

c. Whether there were contradictions and inconsistencies in the prosecution case

67. 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. The Court of Appeal of Kenya

addressed itself on the issues of contradictions in the case of Richard Munene v Republic [2018] eKLR where it stated:

> "It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

68. Consequently, the issue is whether there were indeed contradictions and inconsistencies and whether the said inconsistencies and contradictions were of such a degree that they prejudice the appellant.

69. The appellant alleges that the contradictions arise from the testimonies of PW1 and PW2 as compared to the testimony of DW5 on the timing that the victim left school and where she went thereafter. I find this allegation an afterthought and of no substantial importance to the matter, particularly the ingredients of the offence have been proved. The Appellant has submitted that the trial court ought to have noticed that contradiction and make a finding that PW1 is not truthful. It is worth emphasising that in considering a contradiction or inconsistency in the prosecution case, what is evaluated is the evidence of the prosecution only. One moves to show that the evidence of the prosecution as bored out by its witnesses, contradicts itself. One cannot use the evidence of the defence to say that prosecution evidence is contradictory. In any event, the defence evidence is meant to contradict the prosecution's case so as to prove the accused's innocence. Consequently, the assertion in this case that the evidence of PW1 and PW2 contradicted that of DW5 is with no basis. This ground of appeal is dismissed.

d. Whether the sentence was manifestly excessive and repugnant to human decency and human rights

70. The appellant was sentenced to life imprisonment on 6/06/2023. In passing sentence, the trial court considered the accused mitigation and noted that the offences under *Sexual Offences Act* carry mandatory sentences.

71. The Appellant submits that the sentence is cruel, inhumane, and constitutes degrading punishment. The appellant further argues that Kenyan courts have shown an aversion to life sentences, finding them antithetical to the constitutional value of human dignity, and inhumane and degrading due to their indefiniteness and the impossibility of defining when, if ever, the inmate might be released.

72. The Respondent, however, diverges from the Appellant's position, submitting that the court lacks the discretion to issue a finding outside of what is stipulated by law.

73. I have perused the authorities relied upon by the parties herein. I am also alive to the what the provision of the Sexual Offence Act provide in section 8(2) thus: "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."

74. Outrightly, this court notes the recent decision of the Supreme Court decision in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023*) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) where the apex Court affirmed the mandatory sentences in the *Sexual Offences Act*. It therefore follows that the mandatory life sentence in section 8(2) of the *Sexual Offences Act* that the appellant was sentenced to is for upholding.

75. The above notwithstanding, the Court of Appeal in the case of Evans Nyamari Ayako v Republic Kisumu Court of Appeal Criminal Appeal, No 22 Of 2018, held as follows regarding what amounts to life sentence in Kenya:

> " On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment."

76. This decision was the followed 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. In so doing, the Appellate 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*.
>
> 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.
>
> 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.
>
> 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."

77. I have considered the above superior court decisions, by which I am duly bound. I find the holding in Akhonya v Republic particularly applicable in this case. Consequently, the life sentence imposed by the trial court is affirmed with a rider that it amounts to 30 years imprisonment.

78. Ultimately, this court makes the following orders;

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

    ii. The Appeal on sentence succeeds, to the extent that I substitute the indeterminate life imprisonment sentence with a life sentence of thirty years imprisonment.

Orders accordingly.

RHODA RUTTO

JUDGE

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

For Appellant:

For Respondent:

Court Assistant: